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How Was *That* Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers

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HOW WAS *THAT* REASONABLE? THE MISGUIDED DEVELOPMENT OF QUALIFIED IMMUNITY AND EXCESSIVE FORCE BY LAW ENFORCEMENT OFFICERS

Abstract: Under the qualified immunity doctrine, current policy shields law enforcement officers who utilize excessive force against ordinary American citizens. As a result, police departments and enforcement officers lack incentives to change their behavior, leaving victims and grieving families powerless in the face of an unforgiving legal doctrine that provides little to no justice. This Note explores the creation and development of the qualified immunity doctrine within the policing context and argues that its near-impossible and unjust standards have been problematically overextended and drastically need reform by the Supreme Court. The countless lives lost at the hands of those who are meant to serve and protect are not in vain—they serve as the clarion call for legal change.

INTRODUCTION

Recent killings of unarmed black men by white police officers has received renewed media attention, highlighting the need to change current laws to implement better policing practices and policies that promote accountability and racial equality.[1] 2018 proved there is no relent in this trend—the Sacramento County District Attorney recently declined to charge two police officers who fatally shot a twenty-two year-old unarmed black male, Stephon Clark, in his grandmother's backyard.[2] Increasingly frequent videos of police brutality

[1] *See* Jasmine C. Lee et al., *At Least 88 Cities Have Had Protests in the Past 13 Days Over Police Killings of Blacks*, N.Y. TIMES (July 16, 2016), https://www.nytimes.com/interactive/2016/07/16/us/protesting-police-shootings-of-blacks.html [https://perma.cc/ES6C-XMWS] (showing public reactions to police violence against black citizens through protests in various cities across the nation); Haeyoun Park & Jasmine C. Lee, *Looking for Accountability in Police-Involved Deaths of Blacks*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/interactive/2016/07/12/us/looking-for-accountability-in-police-involved-deaths-of-blacks.html [https://perma.cc/KP4U-56DE] (showing raw footage and analyzing thirteen recent high-profile police excessive force cases that were caught on video); *see also* THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 4 (2015), https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf [https://perma.cc/684X-2RJR] (noting how minorities are the target of harsher treatment by police, prosecutors, and judges); Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), https://www.propublica.org/article/deadly-force-in-black-and-white [https://perma.cc/49L6-UB2A] (explaining that young black males are much more at risk of being killed by police than white males).

[2] *See* Christina Caron, *East Pittsburgh Police Kill Antwon Rose, Unarmed 17-Year-Old, as He Flees*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/pittsburgh-police-shooting.html [https://perma.cc/Y4UK-PW6H] (showing how police killed unarmed teenager Antwon

against black men have captivated audiences across America and shed light on the injustices faced by minorities.[3] Unfortunately, despite seemingly conclusive video evidence, officers are rarely charged or indicted in these types of cases, and conviction rates against police are even more bleak.[4] In fifteen separate high-profile police killings of unarmed black men from 2014 to 2016, only three officers were criminally convicted and seven officers were never even charged.[5] Data analysis regarding excessive force of police officers is vastly

Rose); Jose A. Del Real, *No Charges for Police in Fatal Shooting*, N.Y. TIMES, Mar. 3, 2019, at A15 (detailing the case of Stephon Clark who was killed by two police officers in March 2018); John Sullivan et al., *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html?utm_term=.3a6c6cfc4e14 [https://perma.cc/N77Z-5BRC] (proving that around one thousand people die annually from police shootings); Julie Tate et al., *998 People Have Been Shot And Killed by Police in 2018*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.f62945024587 [https://perma.cc/SAF4-PDWR] (showing each instance of deadly police shootings in 2018); *see also* Matthew Haag, *Dallas Police Officer Kills Her Neighbor in His Apartment, Saying She Mistook It for Her Own*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/us/dallas-police-shooting-botham-shem-jean.html [https://perma.cc/RF76-97X9] (detailing how a Dallas police officer entered an unarmed black neighbor's apartment, fatally shooting him because she mistook the apartment for her own).

[3] *See* PEW RESEARCH CTR., SHARP RACIAL DIVISIONS IN REACTIONS TO BROWN, GARNER DECISIONS 2 (2014), http://www.pewresearch.org/wp-content/uploads/sites/4/2014/12/12-8-14-Police-Race-release.pdf [https://perma.cc/4ZCC-59NE] (showing that, in response to the Daniel Pantaleo grand jury hearing in the Eric Garner case, only forty-seven percent of white people polled thought the wrong decision was reached by the grand jury, while ninety percent of black people polled thought the wrong decision was reached by the grand jury); Glenn Bain, *Nearly Two-Thirds of New Yorkers Believe Officer Daniel Pantaleo Should be Charged in the Death of Eric Garner: Poll*, N.Y. DAILY NEWS (Dec. 13, 2014), http://www.nydailynews.com/new-york/two-thirds-new-yorkers-wanted-charges-eric-garner-case-article-1.2043869 [https://perma.cc/PQM4-RMDQ] (showing that a majority of New Yorkers thought the grand jury reached the wrong decision in the case against Daniel Pantaleo); Mercy Benzaquen et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (April 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html [https://perma.cc/KE3Z-TLEF] (highlighting the video footage of recent mistreatment of black men by police).

[4] *See* Taylor Kate Brown, *The Cases Where US Police Have Faced Killing Charges*, BBC NEWS (Apr. 8, 2015), http://www.bbc.com/news/world-us-canada-30339943 [https://perma.cc/XU6V-8F2R] (showing that police are rarely arrested or charged for their violent crimes); James C. McKinley Jr. & Al Baker, *A System, with Exceptions, That Favors the Police in Fatalities*, N.Y. TIMES, Dec. 8, 2014, at A1 (arguing that police officers benefit from favorable treatment under the justice system); Madison Park, *Police Shootings: Trails, Convictions Are Rare for Officers*, CNN (Mar. 27, 2018), https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html [https://perma.cc/6RZQ-4GB2] (providing statistics on the low conviction rates for police officers involved in killings). *But see* Richard Pérez-Peña, *Officer Indicted in Shooting Death of Unarmed Man*, N.Y. TIMES, July 30, 2015, at A1 (showing an officer was indicted for shooting and killing an unarmed black motorist).

[5] *See* Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations with Police. 3 Officers Convicted.*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html [https://perma.cc/VAE9-DQXR] (showing the outcomes of fifteen different cases of police violence and excessive force claims from 2014 to 2016). During the fall of 2014 alone, four separate, highly publicized cases arose involving unarmed black males killed by police. *See, e.g.*, David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES,

insufficient, but the available information does not bode well for minorities.[6] Such disconcerting information may lead one to wonder what the current state of the law is governing a police officer's use of deadly force and how so many seemingly unjustified civilian killings of unarmed black men occur by those tasked with serving and protecting those same civilians.[7] The answer is found amongst a long line of confusing and oftentimes contradictory cases wrought with misunderstandings and misconceptions.[8]

Because criminal prosecutions of police for excessive force are scarce, a plaintiff's most plausible avenue for redress is often a civil suit for monetary

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Dec. 4, 2014, at A1 (detailing protests that took place in response to officer Daniel Pantaleo, the man responsible for the death of Eric Garner, not being indicted by a grand jury); Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii [https://perma.cc/UC6E-5QBA] (discussing the video of the police shooting of John Crawford III in Wal-Mart); Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy [https://perma.cc/EDJ7-BVLL] (discussing the video of the moments leading up to the fatal shooting of a twelve-year-old black child, Tamir Rice, in Cleveland, Ohio); Eliott C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014), https://www.cnn.com/2014/08/11/us/missouri-ferguson-michael-brown-what-we-know/index.html [https://perma.cc/CL4Y-E5M7] (detailing the facts known about the police shooting of African American unarmed teenager Michael Brown).

[6] *See* BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS, 2003–2009—STATISTICAL TABLES 6 (2011), http://www.bjs.gov/content/pub/pdf/ard0309st.pdf [https://perma.cc/P3HN-ZYN3] (showing half the people killed by police in recent years were either black or Hispanic); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 252 (2010) (showing that unrestricted police authority is frequently exercised in low income minority areas); Rob Barry & Coulter Jones, *Hundreds of Police Killings Are Uncounted in Federal Stats*, WALL STREET J. (Dec. 3, 2014), https://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504 [https://perma.cc/KK99-QJVA] (showing deficiencies in the way police killings are counted); Reuben Fischer-Baum, *Nobody Knows How Many Americans the Police Kill Each Year*, FIVETHIRTYEIGHT (Aug. 19, 2014), https://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year/ [https://perma.cc/XQZ9-8737] (illustrating problems in the way the FBI keeps track of police killings).

[7] *See* Rob Arthur et al., *Shot by Cops and Forgotten*, VICE NEWS (Dec. 11, 2017), https://news.vice.com/en_ca/article/xwvv3a/shot-by-cops [https://perma.cc/4PEW-8V7V] (showing that police shootings of Americans are twice as frequent as actually reported); Carl Bialik, *Why Are So Many Black Americans Killed by Police?*, FIVETHIRTYEIGHT (July 28, 2016), https://fivethirtyeight.com/features/why-are-so-many-black-americans-killed-by-police/ [https://perma.cc/S2XL-6KM6] (discussing different rationales and theories on why police kill so many black people); *Why Do US Police Keep Killing Unarmed Black Men?*, BBC NEWS (May 26, 2015), http://www.bbc.com/news/world-us-canada-32740523 [https://perma.cc/677E-J5LK] (reporting expert opinions on the recent uptick in shootings by police officers of unarmed civilians).

[8] *See* Graham v. Connor (*Graham III*), 490 U.S. 386, 388 (1989) (holding that an objective reasonableness test under the Fourth Amendment is the proper analysis for investigatory police stops); Tennessee v. Garner, 471 U.S. 1, 3 (1985) (discussing the constitutionality of excessive force in a policing context for the first time); Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982) (expanding the doctrine of qualified immunity); Pierson v. Ray, 386 U.S. 547, 553 (1967) (creating the doctrine of qualified immunity); *see also infra* notes 53–95 and accompanying text.

damages.[9] Civil actions are frequently brought against police officers and police departments for use of excessive force under 42 U.S.C. § 1983 ("§ 1983").[10] To successfully bring § 1983 claims, plaintiffs must precisely state the constitutional right that was violated by the police officer's use of force against them.[11] Commonly, the infringed constitutional right identified by plaintiffs is found in the Fourth Amendment's protection against unreasonable searches and seizures.[12] Sadly, this method of action has proved futile for all but a few plaintiffs, largely due to the doctrine of qualified immunity.[13]

Qualified immunity protects police officers from any and all liability in civil suits if their actions do not violate known and "clearly established" laws.[14] The divergent rationales for qualified immunity are holding police accountable when they abuse their power, and shielding police officers and their

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[9] *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1798 n.145 (2016) (suggesting the lack of criminal prosecutions for police may be due to mutual relationships between prosecutors and police or impossibly high standards of proof for plaintiffs); Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN (Mar. 27, 2018), https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html [https://perma.cc/JGC5-JDVJ] (providing statistics on the low conviction rate for police officers when they are involved in killings).

[10] 42 U.S.C. § 1983 (2012); *see* 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, 152 (2005) ("Section 1983 . . . is the workhorse of modern civil rights litigation."). Section 1983 states, in relevant part:

> 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.

42 U.S.C. § 1983.

[11] *See* Saucier v. Katz, 553 U.S. 194, 201 (2001) (stating the first question for a qualified immunity analysis is what constitutional right was infringed, if any at all); Baker v. McCollan, 443 U.S. 137, 140 (1979) (stating plaintiffs must identify the precise constitutional violation with which the police officer is charged).

[12] *See* U.S. CONST. amend. IV; Mullenix v. Luna (*Mullenix IV*), 136 S. Ct. 305, 312 (2015) (making a determination of qualified immunity under the Fourth Amendment); *Saucier*, 553 U.S. at 194 (utilizing the Fourth Amendment analysis); *Graham III*, 490 U.S. at 388 (using an objective reasonableness test based off the Fourth Amendment); Terry v. Ohio, 392 U.S. 1, 16 (1968) (holding that the Fourth Amendment clearly governs arrests or seizures, which is categorized by stopping someone and prohibiting them from freely walking away).

[13] *See* Cover, *supra* note 9, at 1799 (arguing that a revived excessive force standard is needed because the Fourth Amendment places few restraints on an officer's decision to use force on citizens).

[14] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (stating qualified immunity protects police from civil suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

employers from unnecessary distractions.[15] Qualified immunity is applied to protect police officers in instances where their use of force may be questionable, but if the officer's actions were unreasonable, then qualified immunity is not available as a defense.[16] So long as the officer's actions were based upon a reasonable misunderstanding, even the loss of an innocent life cannot stop that officer from raising a successful qualified immunity defense.[17]

If a plaintiff can clear the first major hurdle of § 1983 by proving that an officer is not entitled to qualified immunity, the next hurdle is proving that the officer's use of force was objectively unreasonable.[18] There is a lack of clarity, however, in considering what constitutes a reasonable or unreasonable use of force.[19] The test for reasonableness in § 1983 claims concerning Fourth Amendment violations requires consideration of all the facts from the viewpoint of a reasonable officer at the time the force was exerted.[20] The test for reasonableness, however, does not consider an officer's ill intentions or bad motivations underlying their use of force.[21] If an officer is found to have acted

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[15] *See Pearson*, 555 U.S. at 231; *Saucier*, 533 U.S. at 206. The distractions alluded to by the Court include harassment due to insubstantial claims against government officials, and having to focus on defending a lawsuit instead of the assumed duties of a police officer. *Pearson*, 555 U.S. at 231.

[16] *See, e.g.*, Headwaters Forest Def. v. Humbold, 276 F.3d 1125, 1127 (9th Cir. 2002) (illustrating a case where police applied pepper spray in nonviolent protestors' eyes with cotton swabs); Deorle v. Rutherford, 272 F.3d 1272, 1275–76 (9th Cir. 2001) (illustrating a case where a police officer, without warning, shot an unarmed individual in the head with a beanbag gun resulting in the loss of the individual's eye).

[17] *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (stating the officer's mistake is protected from liability if it was reasonable); *see also Pearson*, 555 U.S. at 231 (holding that qualified immunity protects police if their mistake is one of law, fact, or "based on mixed questions of law and fact" (quoting Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting))).

[18] *See* Graham v. Connor (*Graham III*), 490 U.S. 386, 388 (1989) (holding that an "objective reasonableness" test is used to analyze a police officer's use of force). *See generally* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008) (arguing that current excessive force doctrine privileges police by incorporating and fostering racist biases, and prohibiting inquiry into the police officer's state of mind). The reasonableness test involves weighing the plaintiff's interest in not being unreasonably searched or stopped with the government's opposing interest. *Graham III*, 490 U.S. at 396.

[19] Harmon, *supra* note 18, at 1127. After *Tennessee v. Garner*, lower courts applied differing rules for excessive force. 471 U.S. 1 (1985); *see, e.g.*, Kuha v. City of Minnetonka, 365 F.3d 590, 598 n.2 (8th Cir. 2004); Martin v. Dishong, 57 F. App'x 153, 155 (4th Cir. 2003); Abraham v. Raso, 183 F.3d 279, 288 (3rd Cir. 1999).

[20] *See* Tennessee v. Garner, 471 U.S. 1, 8–9 (1985). Factors to be considered with the totality of circumstances are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham III*, 490 U.S. at 396. Triers of fact are encouraged to recognize that police are forced to make difficult decisions about what level of force is necessary during tense, fast-moving, and risky situations. *See id.* at 396–97.

[21] Scott v. United States, 436 U.S. 128, 138 (1978); *see Graham III*, 490 U.S. at 396–97 (giving no weight to the officer's intentions, good or bad).

unreasonably, then they are liable for monetary damages.[22] When considering the gaps provided by the reasonableness test in judicial decisions, the attempt to shield officers with qualified immunity results in a betrayal of the purposes underlying § 1983 legislation.[23] The intersection of qualified immunity and excessive force doctrine has rendered § 1983 plaintiffs highly vulnerable and unlikely to succeed on the merits.[24]

This Note explores the case law and policy that created the doctrines of qualified immunity and excessive force, which are increasingly used as a shield for police officers who forcibly violate constitutional rights.[25] Part I of this Note provides the historical background and context of § 1983 claims as well as the gradual doctrinal developments of excessive force and liability in the policing context.[26] Part II discusses the judicially created standards and tests applied in determining qualified immunity and excessive force, and shows how the doctrines have evolved over the years to increase protections for the police.[27] Part III then argues that the U.S. Supreme Court has gone astray from the original intent of the legislation and has rendered victims of excessive police force helpless.[28] Part III also advocates for the application of a new method in deciding § 1983 litigation and suggests ways in which the Court should proceed in its application.[29]

I. HISTORICAL CONTEXT OF 42 U.S.C. § 1983

The language in § 1983, which codifies many provisions of the Civil Rights Act of 1871 ("Act"), states that any person acting under the apparent authority of law is liable when they deprive another person of a constitutional right, privi-

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[22] *See* 42 U.S.C. § 1983; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 135–36 (suggesting the award of money damages is the best award an excessive-force victim can expect).

[23] *See* Allen H. Denson, *Neither Clear Nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 750 (2008) (stating that inconsistent applications of qualified immunity have resulted from trying to shield police from the burden of litigation).

[24] *See* Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 657–58 (2013) (suggesting that qualified immunity is a confusing doctrine, and a significant threat to plaintiffs). Some scholars argue that police are twice as protected because of the two reasonableness tests—clearly established law and excessive force—that shield police. *See* John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 165 (2016) (same). *See generally* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) (arguing police in a Fourth Amendment excessive force case are protected from liability by two layers of reasonableness).

[25] *See infra* notes 30–218 and accompanying text.

[26] *See infra* notes 30–95 and accompanying text.

[27] *See infra* notes 96–160 and accompanying text.

[28] *See infra* notes 161–218 and accompanying text.

[29] *See infra* notes 161–218 and accompanying text.

lege, or immunity.[30] The Act was enacted in response to diminishing law and order in the South, largely due to Ku Klux Klan ("KKK") violence against black people and those who sympathized with them.[31] Section 1 of the Act dealt with enforcing the Fourteenth Amendment and was later codified at § 1983.[32] The intention of the Act was plainly stated in the legislation's title, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes" and its application was eventually expanded to include the Fourth Amendment's protection against unreasonable searches and seizures.[33] Following its enactment and the Civil War, though, few claims were brought in the late 1800s due to restrictive United States Supreme Court interpretations of congressional power under the Fourteenth Amendment and "under the color of state law" limitations.[34] It wasn't until 1961, during the

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[30] 42 U.S.C. § 1983 (2012). The Civil Rights Act of 1871 ("the Act") is also commonly referred to as the Ku Klux Klan Act. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 164 (1970) (quoting congressional debates of the forty-second Congress and stating that Section 1 of the Ku Klux Klan Act was limited to depravation of rights committed under the color or law); Martin J. Jaron, Jr., *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URB. LAW. 1, 1 n.1 (1981).

[31] *See* Briscoe v. LaHue, 460 U.S. 325, 337 (1983). The Ku Klux Klan ("KKK") used deceptive appearances as state officers, frequently collaborating with state or local governments, to frighten and murder countless freed slaves and anyone who opposed the KKK's racist agenda. *See* Clarke, *supra* note 10, at 154–55 (2005) (explaining how KKK members used their position to commit injustices against blacks and anyone who sympathized with them); *see also* Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 119–21, 342–43, 425–28 (1988) (detailing atrocities done by Southerners to newly-freed slaves and their supporters in the late nineteenth century). Merely a month after President Ulysses S. Grant called upon Congress to address the frequent violent, lawless, and unpunished acts of the KKK, Congress quickly passed the Act. *See Briscoe*, 460 U.S. at 337. During legislative debates, descriptions of the terrors inflicted by the KKK on black people and white supporters went on for hours: "arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation." *Id.* Legislators reasoned that KKK members and their supporters controlled or influenced state law enforcement to the extent that their crimes went unpunished. *See id.* Similar to the "blue wall of silence," KKK members were bound to protect other members by perjuring themselves or violating their oaths as jurors. *See id.* State law enforcement's inability to punish KKK members caused legislators to provide a federal remedy that protected the right to equal protection of the laws. *See id.* at 338.

[32] *See* 42 U.S.C. § 1983; Howlett v. Rose, 496 U.S. 356, 358 (1990) (describing the history of the Civil Rights Act of 1871); Monroe v. Pape, 365 U.S. 167, 171 (1961) (same). The Act provided for the invalidation of state laws that infringed constitutional rights, offered a solution when state law was insufficient, and provided a federal cause of action because state actions were not practically available as an option. *See Monroe* 365 U.S. at 173–74. The Act was revised and reorganized within revised statutes. Jaron, *supra* note 30, at 1 n.1. Section 1 of the Act became 42 U.S.C. § 1983. Eric P. Gifford, Comment, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 TEX. TECH L. REV. 1013, 1015 (1995).

[33] Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983); *Monroe*, 365 U.S. at 171. The Act was a federal remedy that did not preclude any state remedies, and state remedies need not be pursued to render the Act available for plaintiffs. *Monroe*, 365 U.S. at 183.

[34] *See* Michael S. DiBattista, Note, *A Force to Be Reckoned With: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After* Kingsley, 48 COLUM. HUM. RTS. L. REV. 203, 208 (2017) (stating that the post-Civil War United States Supreme Court "narrowly interpreted

civil rights movement, that the Court revived this statute.[35] Section A of this Part describes the history and context of various types of immunity, and how the Supreme Court applied it to law enforcement and municipalities.[36] Section B shows how the doctrine of qualified immunity was created, and tracks its early developments.[37] Section C explains how the doctrine of excessive force became a factor at common law for police use of force against civilians.[38]

A. Law Enforcement & Municipal Liability

In 1961, in *Monroe v. Pape*, the United States Supreme Court considered municipal liability for § 1983 violations.[39] Prior to this decision, state and local law enforcement officers often were not subjected to § 1983 claims unless they acted within their employment capacity.[40] The plaintiff in this case, Mr. Monroe, brought a § 1983 claim against the police and the city stating that both entities acted under the color of the law and effectively denied Mr. Monroe his

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Congress's power under the Enforcement Clause of the Fourth Amendment"); *see, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1876) (showing that a private conspiracy to violate constitutional rights of another individual lacks the requisite component of state action); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (holding that the Privileges and Immunities Clause only applies to the rights of United States citizens).

[35] Clarke, *supra* note 10, at 156.

[36] *See infra* notes 39–52 and accompanying text.

[37] *See infra* notes 53–74 and accompanying text.

[38] *See infra* notes 75–95 and accompanying text.

[39] 365 U.S. at 191–92 (1961). In *Monroe*, thirteen Chicago police officers broke into a home without a search warrant or arrest warrant early in the morning, forced a family from their beds, and made the parents stand naked in their living room in front of their children. *Id.* at 169. The police then scoured every room, damaging furniture and emptying all containers. *Id.* The father, James Monroe, was detained for over ten hours and was questioned about a recent murder. *Id.* He was never brought before a judge, although some were available, and was not allowed to contact his family or an attorney. *Id.* He was later released without any criminal charges filed against him. *Id.*

[40] Clarke, *supra* note 10, at 163. The Act was narrowly interpreted to only allow claims against officers or officials when state law expressly enumerated their actions. *See* Eric H. Zagrans, *'Under Color of' What Law?: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 524–25 (1985) (suggesting the Court misinterpreted legislative intent for the "under the color of law" requirement under the Civil Rights Act of 1871). An action taken "under the color of state law" is a misuse of power, "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326 (1941). The Court thoroughly discussed the "color of law" distinction in its 1913 decision *Home Tel. & Tel. Co. v. City of Los Angeles*. 227 U.S. 278, 287 (1913). There, the Court dealt with the argument that the Fourteenth Amendment only applied to acts done by state officers within the narrow confines of their prescribed job duties, and did not extend to abuses of power committed by state officers in excess of their prescribed duties. *Id.* The Court disagreed with that interpretation, and instead held that when a state officer, acting under an assertion of state power, commits a wrong that would violate the Fourteenth Amendment, the officer is presumed to possess the authority of the state. *See id.* at 288–89 (stating an officer cannot violate someone's constitutional rights by acting under an assumption of state power while simultaneously denying that power for the purpose of committing the wrong).

constitutional rights, privileges, and immunities.[41] After an exhaustive discussion on the legislative intent of the forty-second Congress, which passed the Civil Rights Act of 1871, the United States Supreme Court held that state law enforcement officials could be held liable in federal court for violations of someone's constitutional rights, regardless of whether those actions may also be brought in state court for violations of state law.[42]

Because *Monroe* concerned only state law enforcement officials, the Supreme Court felt the need to revisit similar liability issues concerning federal law enforcement agents in 1971 with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[43] In *Bivens*, the plaintiff, brought a damage claim against federal narcotics agents alleging that both their arrest and search were conducted without a warrant and the officers used unreasonable force.[44] Creating what are referred to now as *Bivens* claims or *Bivens* actions, the majority held that federal remedies are available to citizens when federal agents violate their constitutional rights, but the Court limited the decision to Fourth Amendment violations.[45] Since its decision in *Bivens*, however, the Supreme Court has expanded *Bivens* to include Fifth Amendment and Eighth Amendment violations, making it a "functional equivalent of § 1983" claims.[46]

The Supreme Court then dealt with the liabilities of municipalities in 1978, in *Monell v. Department of Social Services of City of New York*.[47] After re-examining the legislative intent of the forty-second Congress, the Court

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[41] *Monroe*, 365 U.S. at 170. The police argued § 1983 did not apply because state law already prohibited the conduct and provided plaintiffs an avenue for remedy. *Id.* at 172. The police further reasoned one could not act under the color of the law while simultaneously violating the law. *Id.*

[42] *See id.* at 172, 183. *See generally* Cong. Globe, 42d Cong., 1st Sess., 244–820 (1871) (detailing congressional debates over the Civil Rights Act of 1871).

[43] *See* 403 U.S. 388, 389 (1971). The facts in *Bivens* were similar to the facts of *Monroe*—Federal Bureau of Narcotics agents entered an apartment in New York without an arrest warrant, search warrant, or probable cause, handcuffed Mr. Bivens in front of his wife and children, and then proceeded to hastily search the apartment. *Id.* at 389. *Compare id.*, *with Monroe*, 365 U.S. at 169. The federal agents then booked Mr. Bivens at the courthouse where he was interrogated and strip-searched. *Bivens*, 403 U.S. at 389.

[44] *Bivens*, 403 U.S. at 389. The Court implied that Mr. Bivens complaint also stated that the federal agents had no probable cause, although his complaint did not expressly state that. *Id.* at 389 n.1.

[45] *Id.* at 392, 394. The Court stated the Fourth Amendment limited federal power irrespective of the state punishing the same act, if done by a private citizen. *Id.* at 392. The Fourth Amendment secures an unqualified right not to be unreasonably searched and seized by federal agents. *Id.* A *Bivens* action is the federal equivalent to a § 1983 claim, but is not applicable to state officers or local municipalities. *See* Denson, *supra* note 23, at 750 n.23. The distinguishing factor between a *Bivens* claim and a § 1983 claim is that federal statute violations or other constitutional violations besides the Fourth Amendment were not available in a *Bivens* claim. Clark, *supra* note 10, at 171.

[46] Clark, *supra* note 10, at 171; *see, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (concerning an Eighth Amendment violation); Davis v. Passman, 442 U.S. 228 (1979) (concerning a Fifth Amendment violation). The Court's rationale has developed such that the relevant question for § 1983 claims, applicable to state officers and municipalities, and a *Bivens* action, only applicable federal officers, are the same. Denson, *supra* note 23, at 750 n.23.

[47] *See generally* 436 U.S. 658 (1978).

concluded that legislators intended the term "person" in the Act to include local governments and municipalities.[48] The Court, however, somewhat limited its holding by adding a causation requirement for municipalities.[49] A municipality can only be liable for a § 1983 claim if one of its policies or customs caused the harm.[50] The Court refused to apply vicarious liability, stating that municipalities will not be held liable under § 1983 for a wrong done exclusively by one of its personnel.[51] Nonetheless, the Court's decision in *Monell* opened access to federal courts for all citizens to bring § 1983 claims against both law enforcement officers and municipalities.[52]

B. The Creation of Qualified Immunity

The United States Supreme Court has regularly granted government officials some type of immunity from lawsuits to defend them from unnecessary obstructions in their job duties and from "potentially disabling threats of liability."[53] This immunity typically comes in the form of qualified immunity, which is defined as "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clear-

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[48] *See Monell*, 436 U.S. at 683, 690. The Court in *Monroe* reasoned that the forty-second Congress did not intend municipal corporations to be included as a "person" in the Act, and therefore held that the City of Chicago was not liable for any 42 U.S.C. § 1983 claims. *See Monroe*, 365 U.S. at 187, 191, 204. Nonetheless, that portion of the *Monroe* decision was later overturned in *Monell*. *See Monell*, 436 U.S. at 665, 690. The Court in *Monroe* refrained from discussing policy questions and considerations around municipal liability in § 1983 claims. *Monroe*, 365 U.S. at 191.

[49] *See Monell*, 436 U.S. at 691. In *Monell*, female employees at the Department of Social Services and the Board of Education of the City of New York brought a § 1983 claim alleging that the Department enforced an official policy of involuntary unpaid maternity leave after five months of pregnancy. *Id.* at 660–61.

[50] *Id.* at 690–91.

[51] *See id.* at 691.

[52] *Id.* at 694–95. The Eleventh Amendment creates an immunity that bar suits in federal court against a nonconsenting state or one of its departments. U.S. CONST. amend. XI; *see* Alabama v. Pugh, 438 U.S. 781, 782 (1978) (holding that the Eleventh Amendment prohibits a suit against a nonconsenting state and its board of corrections).

[53] *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (discussing immunity precedents against executive officials). The Supreme Court has granted absolute immunity to some government officials because their "special functions or constitutional status" necessitate a total defense from liability. *Id.* at 807; *see, e.g.*, Stump v. Sparkman, 435 U.S. 349, 363–64 (1978) (showing that judges, in their official capacity, are entitled to absolute immunity); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501–03 (1975) (showing that legislators, in their official capacity, are entitled to absolute immunity). Absolute immunity shields certain officials even when their actions violate clearly established law, whereas qualified immunity is more limited in application and only applies if the official did not violate clearly established law. *See Harlow*, 457 U.S. at 818 (holding that government officials are afforded qualified immunity if their actions do not violate "clearly established clearly established statutory or constitutional rights of which a reasonable person would have known"); Pierson v. Ray, 386 U.S. 547, 554 (1967) (discussing absolute immunity afforded to judges).

ly established constitutional or statutory rights."[54]The origin of qualified immunity lies with the Court's 1967 holding in *Pierson v. Ray*.[55] In *Pierson*, the Court shielded police officers from liability when they made a false arrest because they acted in good faith and with probable cause.[56] Since *Pierson*, the Supreme Court expanded the qualified immunity doctrine with subsequent decisions in 1975, 1982, and 1987, all affording government officials more protections.[57]

In 1975, in *Wood v. Strickland*, the Court created a two-part test to determine qualified immunity for public officials, which included both an objective reasonableness factor and a subjective factor that took an official's malice into account.[58] In 1982 though, the Court in *Harlow v. Fitzgerald* eliminated the

[54] *Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014). Qualified immunity is a judicial doctrine that protects government officials from civil liability when their alleged conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Qualified immunity is founded on the principle that officers should not be liable for their unconstitutional acts unless they were provided fair notice that their actions were unlawful at the time of the incident. *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004). Qualified immunity is aimed at balancing the related interests of holding public officials responsible when they abuse their authority, and protecting public officials from harassment and interference with work duties and liability when they act reasonably in their official capacity. *See Pearson*, 555 U.S. at 231 (discussing the intended aims of qualified immunity). Irrespective of an official's mistake being one of law, fact, or a combination of the two, the protections of qualified immunity apply. Groh v. Ramirez, 540 U.S. 551, 567 (2004); *Butz*, 438 U.S. at 507. Qualified immunity is not simply a defense to liability, but immunity from a suit in its entirety. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[55] *See Pierson*, 386 U.S. at 557; *see also* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that the "President of the United States, is entitled to absolute immunity"); Butz v. Economou, 438 U.S. 478, 515–17 (1978) (holding that prosecutors and other executive officials engaged in adjudicative functions are entitled to absolute immunity); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (reasoning that because executive officials have greater responsibilities and duties than other government officials, their protections should be greater and more comprehensive). *Pierson* involved a racially mixed group of church ministers that attempted to use segregated facilities at a bus terminal in Jackson, Mississippi, in 1961. 386 U.S. at 548–49. The ministers were arrested by the police, charged, and sentenced to a maximum sentence of four months in prison and a two-hundred dollar fine. *Id.* at 548–50.

[56] 386 U.S. at 547–57. In *Pierson*, the ministers claimed that the police arrested them solely for trying to use the "White Only" waiting room since "no crowd was present," and "no one threatened violence or seemed [likely] to cause a disturbance." *Id.* at 557. The officers contended that they did not arrest the ministers to preserve segregation in the South, but instead were trying to prevent violence. *Id.* The Supreme Court said the jury, though ruling in favor of the officers, had been "influenced by irrelevant and prejudicial evidence" and thus the Court remanded the case to the trial court for a new trial. *Id.* at 557–58. The Court in *Monroe* said that § 1983 should be "read against the backdrop of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. Subsequently, the Court in *Pierson* said the backdrop referenced in *Monroe* includes the defense of good faith and probable cause for police officers. *Pierson*, 386 U.S. at 556–57.

[57] *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (concerning a warrantless search of a home by FBI agents and other law enforcement officials); *Harlow*, 457 U.S. at 800 (concerning an alleged unlawful discharge from the Air Force); Wood v. Strickland, 420 U.S. 308, 322 (1975) (concerning school officials expelling of students).

[58] *Wood*, 420 U.S. at 321–22. Although *Wood* involved school officials, the Court held those officials could be held liable if they "knew or reasonably should have known" that they would violate

subjective element.[59] After *Harlow*, the Court continued granting government officials qualified immunity, dismissing citizen's civil rights claims.[60] Due to a lack of specificity and summary judgment decisions that did not allow plaintiffs the ability to reach the discovery stage of trial, problems alleging § 1983 claims quickly arose after *Harlow*.[61]

In 1987, in *Anderson v. Creighton*, the Supreme Court held that a Federal Bureau of Investigation agent's search of an individual's home without a warrant was constitutional because the agent suspected a fleeing robbery felon was in the home.[62] Fearing an abandonment of the objective reasonableness test, the Court noted that violated rights need to be clearly established in a "more particularized, and hence more relevant sense."[63] The Court's aim was to find the middle ground between downright eliminating qualified immunity when malice is alleged, and allowing qualified immunity to shun all § 1983 claims.[64]

Following these seminal decisions, the issue of qualified immunity for officers so deeply divided federal circuit courts that the Supreme Court revisited the topic with its 2001 decision in *Saucier v. Katz*.[65] In *Saucier*, a man brought

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a student's constitutional rights or if the school official deliberately meant to deny the student such a right. *Id.* at 322. The two-part test was intended to balance the legitimate needs of a responsible public official with that of an individual's civil rights. *Id.* at 321.

[59] 457 U.S. at 815–18.

[60] *See id.* at 817–18; Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf [https://perma.cc/VV38-F69P] (discussing a recent decade-and-a-half-long trend of Supreme Court decisions that grant qualified immunity to government defendants over § 1983 claimants). The Court has not favored a plaintiff in a § 1983 qualified immunity case since 2004. *See* Kinports, *supra*, at 63 n.7; *see also Groh*, 540 U.S. at 565 (showing the last time the Court has favored a § 1983 plaintiff).

[61] *See* Denson, *supra* note 23, at 756 (stating that "to achieve the socially desirable goal of deterring future violations by providing guidance to public officials, while at the same time not holding officials liable for violating constitutional rights in novel situations, constitutional rights must be recognizable in a more useful sense").

[62] 483 U.S. 635, 637. The fleeing felon was not found in the home. *Id.*

[63] *See id.* at 640 (saying the right must be sufficiently stated so a "reasonable official would understand that what he is doing violates that right"). The Court said that to hold police officers liable, their actions do not need to be exact replicas of previous cases, but that under current law at the time of the incident, the unlawfulness of the action needs to be apparent. *Id.*; *see Mitchell*, 472 U.S. at 534–35 n.12 (stating officials aren't immune to suit just because an action hasn't occurred under the exact same circumstance, but that when legitimate instances requiring an exception exist, those exceptions do not violate clearly established law); *see also* Malley v. Briggs, 475 U.S. 335, 344–45 (1986) ("Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost.").

[64] *See* Denson, *supra* note 23, at 757 (arguing that the Court failed at striking this balance due to the Court's bewildering explanation that an officer can act reasonably unreasonable and be granted qualified immunity).

[65] 533 U.S. 194 (2001); *see* Tahir Duckett, Note, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 419 n.93 (2016) (comparing circuit cases on qualified immunity); *see also* Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999) (reasoning that qualified immunity and excessive force require the same analyses);

a *Bivens* action against military officers alleging Fourth Amendment violations for use of excessive force to arrest him.[66] The Court stated that the inquiries into excessive force and qualified immunity were distinct from one another, with the latter acknowledging that officers can make reasonable mistakes about the legality of their conduct.[67] The Court then set out a sequential two-step test to decide qualified immunity claims for officers.[68] First, a court must decide if a constitutional right was infringed upon by the most favorable interpretation of the facts to the plaintiff.[69] Then, supposing such an infringement occurred, a court must determine if that right was "clearly established" law.[70] Deciding if the facts alleged demonstrate if the officer's acts violated a constitutional right was thus mandated as the threshold inquiry in all qualified immunity cases.[71] Eight years later, however, in *Pearson v. Callahan*, the Supreme Court rolled back the strict sequential order stating that although *Saucier*'s procedures were sometimes appropriate, it should not be mandatory in all instances.[72] The Supreme Court continued to build upon its newly forged doctrine of qualified immunity by adding another component to the analysis of police use of force through prominent decisions in the late 1980s.[73]

C. Police Use of Excessive Force

Excessive force is "[u]nreasonable or unnecessary force under the circumstances."[74] The first time the Supreme Court addressed the constitutionali-

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Bass v. Robinson, 167 F.3d 1041, 1051 (6th Cir. 1999) (reasoning that qualified immunity and excessive force require the same analyses); Snyder v. Trepangnie, 142 F.3d 791, 800 (5th. Cir. 1998) (stating there is not conflict between finding qualified immunity and finding excessive force).

[66] *Saucier*, 533 U.S. at 198–99; *see supra* notes 44–46 and accompanying text (explaining the difference between a *Bivens* claim and a § 1983 claim). In *Saucier*, the plaintiff was an injured sixty-year-old with a leg brace, who was forcibly removed from an Al Gore event after trying to protest with a sign that read "Please Keep Animal Torture Out of Our National Parks." *See* 533 U.S. at 197–98; s*ee also Harlow*, 457 U.S. at 818 n.30 (noting qualified immunity of state officials sued under § 1983 is commensurate with the immunity of federal officers sued directly under the Constitution).

[67] *Saucier*, 533 U.S. at 204–05.

[68] *Id.* at 201.

[69] *Id.* at 200.

[70] *Id.* The Court noted the inquiry into qualified immunity must consider the specific context of the situation, but did not mention the subjective mind of the officer. *Id.* at 202.

[71] *Id.* at 201.

[72] *See Pearson*, 555 U.S. at 236, 242 (claiming *Saucier*'s procedures unnecessarily expanded litigation resources, increased the potential for confusion and bad decisions, and resulted in too much inflexibility). *See id.* at 237–42.

[73] *See generally* Graham v. Connor (*Graham III*), 490 U.S. 386, 388 (1989) (holding that the objective reasonableness standard should be used for Fourth Amendment claims), *rev'g* Graham v. City of Charlotte (*Graham II*), 827 F.2d 945, 946 (4th Cir. 1987), *aff'g* Graham v. City of Charlotte (*Graham I*), 644 F. Supp. 246, 248 (W.D.N.C. 1986); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (creating the objective reasonableness test for Fourth Amendment seizures).

[74] *Excessive Force*, BLACK'S LAW DICTIONARY (10th ed. 2014). Reasonable force is defined as "[f]orce that is not excessive and that is appropriate for protecting oneself or one's property. The use

ty of police use of excessive force was in its 1985 decision in *Tennessee v. Garner*.[75] In *Garner*, the Court held a Tennessee statute unconstitutional because it granted police the right to use any and all necessary means to complete an arrest.[76] The Court created a reasonableness test to analyze the police officer's use of force, which balances the governmental interest in effecting law enforcement with the individual interest of freedom from unreasonable search and seizure.[77] The Court reasoned that the government's interest in fatally shooting a nondangerous fleeing suspect is heavily outweighed by an individual's interest in their own life.[78] The Court did note that although this instance was determined to be an unconstitutional use of police force, if the suspect threatened the officer with a weapon or if there was probable cause that the suspect "committed a crime involving the infliction or threatened infliction of serious physical harm," deadly force preventing the suspect from fleeing could be constitutional.[79]

After the Court's decision in *Garner*, it revisited the issue of excessive force under the Fourth Amendment with its decision in *Graham v. Connor* in 1989.[80] *Graham III* involved a police officer's use of force that did not culminate in an arrest, but did subsequently injure the suspect.[81] The injured citizen,

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of reasonable force will not render a person criminally or tortuously liable." *Reasonable Force*, BLACK'S LAW DICTIONARY (10th ed. 2014). Generally, whether a police officer used excessive force in a given situation is a factual determination for the trier of fact. Legal Info. Inst., *Excessive Force*, https://www.law.cornell.edu/wex/excessive_force [https://perma.cc/64PM-G45G]. Although police use of force is allowed in certain circumstances, like self-defense or defense of another individual, there is no universal set of rules that govern when an officer should use force, and if so, to what amount. *See* NAT'L INST. OF JUSTICE, *Police Use of Force*, https://www.nij.gov/topics/law-enforcement/officer-safety/use-of-force/pages/welcome.aspx#noteReferrer2 [https://perma.cc/2T5X-TM8V] (describing various aspects of use of force with police officers).

[75] 471 U.S. 1 (1985); *see* Stacey Barchenger, *How a Tennessee Case Forever Changed Police Shootings*, THE TENNESSEAN (Aug. 23, 2015), https://www.tennessean.com/story/news/2015/08/21/how-tennessee-case-forever-changed-police-shootings/31848333/ [https://perma.cc/77FC-VN2T].

[76] *Garner*, 471 U.S. at 11. *Garner* involved a nighttime burglary that resulted in an African American teenage boy, Edward Garner, being fatally shot in the back of the head by a Memphis Police Officer. *See id.* at 3–4. Although the officer admitted to seeing no sign of a weapon, clearly saw the suspects face and hands, and was "reasonably sure" that the suspect was unarmed and nonthreatening in size, the officer nonetheless shot him in the back of the head to prevent his escape. *Id.* Only ten dollars and a purse were found on Garner's deceased body. *Id.* at 4.

[77] *Id.* at 8–9.

[78] *See id.* at 11.

[79] *Id.* at 11–12.

[80] *Graham III*, 490 U.S. at 386.

[81] *Id.* at 388–89. *Graham III* involved a diabetic man, Dethorne Graham, who was facing the beginning of insulin shock. *Id.* at 388. Mr. Graham asked a friend to drive him to a nearby convenience store so he could buy orange juice to stop the approaching reaction, but after seeing a long line ahead of him, he put the juice down, hurried out of the convenience store, and asked to be taken to a nearby friend's house instead. *Id.* at 388–89. A police officer saw Mr. Graham enter the store and leave in a hurry, became suspicious, and made an investigatory stop about half a mile from the convenience store. *Id.* at 389. Despite the men's explanation of Mr. Graham's diabetic condition and ensuing reaction, the officer made them wait while he found out what happened at the convenience

Dethorne Graham, filed a § 1983 suit in federal court against the officers involved, claiming they violated the Fourteenth Amendment by using excessive force in their investigatory stop.[82] The United States District Court for the Western District of North Carolina granted a motion for a directed verdict in favor of the officers, using a four-factor test to ultimately determine the officers did not use excessive force.[83] The court held the amount of force used was "appropriate under the circumstances," because "there was no discernable injury inflicted," and the force used "was not applied maliciously or sadistically for the very purpose of causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation."[84] On appeal, a divided United States Court of Appeals for the Fourth Circuit affirmed the district court's decision, endorsing the four-factor test and agreeing that the officers' use of force was not excessive.[85] The United States Supreme Court granted certiorari and reversed the decisions of the lower courts, reasoning that excessive force claims arising from investigatory stops are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than the Fourteenth Amendment's substantive due process standard.[86] This decision did

store. *Id.* Next the officer returned to his car to call for backup, Mr. Graham began entering diabetic shock, got out of the car, ran around it twice, and then passed out on the curb after collapsing. *Id.* More police officers soon arrived in response to the initial officer's call for backup, then one officer turned Mr. Graham over on his stomach and tightly cuffed him behind his back, ignoring the friend's requests to get Mr. Graham orange juice. *Id.* Another officer said, "Ain't nothing wrong with the M.F. but drunk. Lock the S.B. up." *Id.* Several officers then picked Mr. Graham from his back, carried him to his friend's car, and forced his face down on the hood. *Id.* Mr. Graham started to regain consciousness and asked the officers to check his wallet for a diabetic decal that he carried, but the officers told him to "shut up" and thrust his face back onto the hood of the car. *Id.* Four officers then grabbed Graham by each of his limbs and threw him head first into the back of a police car. *Id.* The officers then would not allow the friend to bring Mr. Graham some orange juice. *Id.* Shortly thereafter, the officers were informed that Mr. Graham did nothing illegal at the convenience store, so they drove him home and released him. *Id.* During their investigatory stop, though, Mr. Graham sustained a broken foot, lacerations on his wrists, a bruised forehead, an injured shoulder, and developed a loud ringing in his ear. *Id.* at 390.

[82] *Id.* at 390.

[83] *Id.* at 390–91. The four factors the district court used were: "(1) The need for the application for the force. (2) The relationship between the need and the amount of the force that was used. (3) The extent of the injury inflicted. (4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Graham I*, 644 F. Supp. at 248.

[84] *Graham I*, 644 F. Supp. at 248–49.

[85] *Graham II*, 827 F.2d at 946. The court reasoned that the four-factor test was available for all excessive force claims sought against government agents. *Id.* at 948; *see Graham III*, 490 U.S. at 391. The dissenting judge argued that Supreme Court precedent required excessive force claims resulting from investigatory stops to be analyzed under the "objective reasonableness" standard set forth in the Fourth Amendment. *Graham II*, 827 F.3d at 950–52 (Butzner, J., dissenting).

[86] *Graham III*, 490 U.S. at 392, 394.

not end the matter, however, because the Court revisited the issue again eighteen years later.[87]

The Supreme Court took up the question of what constitutes excessive force under the Fourth Amendment again in 2007 with *Scott v. Harris*.[88] In *Scott*, a deputy sheriff pursued a car that was traveling on a highway at speeds nearly twenty miles per hour over the speed limit.[89] After a high-speed chase developed, another officer joined the pursuit without knowing the underlying nature of the offense and rammed the suspect's vehicle, causing the suspect to lose control and sustain severe injuries.[90] The driver, Victor Harris, sued the officers under § 1983, claiming the officers abused Harris's Fourth Amendment protection against unreasonable seizure.[91] After the United States District Court for the Northern District of Georgia ruled in favor of the driver and the United States Court of Appeals for the Eleventh Circuit affirmed, the Supreme Court reversed the decision in an eight Justice majority.[92] In ruling in favor of the police, the Court stated that Harris's reckless actions placed officers, other drivers, and pedestrians at risk of serious injury or death.[93] The Court reasoned this risk was enough to determine the officer's actions were reasonable and not excessive.[94] *Scott* was the latest in a long line of foundational cases concerning the doctrines of qualified immunity and excessive force, which are still being developed by the Court.[95]

II. The Doctrines of Qualified Immunity & Excessive Force: A Discussion of Current Tests & Standards

Although recent § 1983 claims have provided the Supreme Court an opportunity to change the direction in which qualified immunity and excessive force jurisprudence is headed, the Court largely continues to build upon past

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[87] *See* Scott v. Harris, 550 U.S. 372, 374–76 (2007) (involving a high-speed car chase where police officers bumped the fleeing car, critically injuring the driver).

[88] *Id.*

[89] *Id.* at 374.

[90] *Id.* at 374–75.

[91] *Id.* at 375–76.

[92] *Id.* at 376, 379–80.

[93] *Id*. The video evidence of the police pursuit introduced to the Supreme Court, which was not used in trial before either the district court or court of appeals, was found to contradict the account of events told by Harris and the court of appeals. *Id.* at 378. The Court supported its position by giving the public access to the video, stating, "[w]e are happy to allow the videotape to speak for itself." *See id.* at 378 n.5; *see also* Record at 36, Exh. A, *Scott*, 550 U.S. 372 (No. 05-1631), https://www.supremecourt.gov/media/video/mp4files/scott_v_harris.mp4 [https://perma.cc/6W98-P3PE] (showing the referred incident through one of the police officer's dashcam video).

[94] *Scott*, 550 U.S. at 386. The Court reasoned that the government's interest in protecting officers, innocent drivers, and pedestrians heavily outweighed the risk of injury to a reckless driver by ramming their car. *Id.* at 384.

[95] *See generally Scott*, 550 U.S. 372; *Graham III*, 490 U.S. 386; *Garner*, 471 U.S. 1.

precedents by increasing protections for police officers.[96] In the most recent cases regarding § 1983 claims, the Supreme Court ruled in favor of the defendant police officers.[97] The first of those cases set the stage for continued litigation surrounding the tests for reasonableness and clearly established law.[98] Section A of this Part discusses qualified immunity and the development of "clearly established law" in a recent Supreme Court decision.[99] Section B discusses the legitimate interests of qualified immunity for police and government actors.[100] Section C discusses the standards the Court created for excessive force and how it recently changed.[101]

A. Clearly Established Means Unconditionally Immune in Mullenix v. Luna

In 2015, in *Mullenix v. Luna*, the United States Supreme Court set the stage for continued litigation over qualified immunity and what is "clearly established" law.[102] In *Mullenix IV*, the estate of a deceased motorist brought a § 1983 claim against a state trooper for using excessive force to shoot and kill the fleeing motorist suspect during a high-speed pursuit.[103] After presentation

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[96] *See* Kinports, *supra* note 60, at 64 (explaining the Court has expanded qualified immunity doctrine by continuously adding elements); Marshall Heins II, Note, *Absolutely Qualified: Supreme Court Transforms the Doctrine of Qualified Immunity into Absolute Immunity for Police Officers*, 8 HOUS. L. REV.: OFF THE REC. 1, 2 (2017), https://houstonlawreview.org/article/4445 [https://perma.cc/A2GW-W2X8] (stating the Court decided to ignore victims and afford police officers strengthened protections that essentially amount to "absolute immunity"). Absolute immunity is defined as "[a] complete exemption from civil liability, usually afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit." *Absolute Immunity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[97] *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1150 (2018) (reversing the lower court's decision and ruling in favor of the defendant police officer); White v. Pauly, 137 S. Ct. 548 (2017) (reversing the lower courts denial of qualified immunity for defendant police officers); Mullenix v. Luna (*Mullenix IV*), 136 S. Ct. 305, 308 (2015) (reversing the lower court decision and ruling in favor of the defendant police officer, granting him qualified immunity).

[98] *See Mullenix IV*, 136 S. Ct. at 308.

[99] *See infra* notes 102–132 and accompanying text.

[100] *See infra* notes 133–150 and accompanying text.

[101] *See infra* notes 151–160 and accompanying text.

[102] *See Mullenix IV*, 136 S. Ct. at 308.

[103] *Id.* at 307. The United States District Court for the Northern District of Texas denied Defendant Officer Mullenix's, motion for summary judgment based on qualified immunity, then Mullenix appealed. *Id.*; *see also* Luna v. Mullenix (*Mullenix I*), No. 2:12-CV-152-J, 2013 WL 4017124, at *6 (N.D. Tex. Aug. 7, 2013). The Court of Appeals for the Fifth Circuit affirmed. *Mullenix IV*, 136 S. Ct. at 307; *see also* Luna v. Mullenix (*Mullenix II*), 765 F.3d 531, 533 (5th Cir. 2014). Mullenix then sought a rehearing en banc, but the Fifth Circuit denied his petition. *See Mullenix IV*, 136 S. Ct. at 308. The two judges who formed the panel's majority withdrew their original opinion and substituted a new one, which recognized that objective reasonableness is a question of law that can be decided at summary judgment, as the dissenting judge pointed out. *Id.*; *see also* Luna v. Mullenix (*Mullenix III*), 773 F.3d 712, 715 (5th Cir. 2014). Nonetheless, the court reaffirmed the denial of qualified immunity for officer Mullenix. *Mullenix IV*, 136 S. Ct. at 308; *see also Mullenix III*, 773 F.3d at 715. Officer

of a warrant for his arrest, the deceased motorist, Israel Leija Jr., sped away from an officer and entered an interstate highway in an effort to escape.[104] Mr. Leija led police on a high-speed chase at over one hundred miles per hour and called the police dispatcher threatening to shoot at police officers who did not stop their pursuit.[105] The dispatcher relayed the threats levied by Mr. Leija to police involved with the pursuit, and reported that Mr. Leija may have been drunk.[106] During the pursuit, other officers set up tire spikes on routes that Mr. Leija was expected to reach.[107] Officer Chadrin Mullenix arrived late to the area where the spike strips were deployed, but decided to formulate another tactic to single-handedly stop the chase.[108] Officer Mullenix sought to disable Mr. Leija's car by shooting it before it reached the tire spikes.[109] Officer Mullenix relayed his plan to his supervisor, who told Mullenix to "stand by" and wait to "see if the spikes work first."[110] While waiting for Mr. Leija's vehicle to appear, Officer Mullenix discussed his plan with a nearby officer who informed Mullenix that another officer was beneath the overpass.[111] Upon spotting Mr. Leija's vehicle, Officer Mullenix fired six shots at the vehicle, later admitting that it was difficult to see under the overpass at night, especially without any streetlights.[112] Mr. Leija's car continued forward and engaged the tire spikes, hit the median, then rolled over multiple times.[113] It was determined later that Mr. Leija was killed by Officer Mullenix's shots, potentially before he even made contact with the tire spikes.[114] Following the incident,

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Mullenix petitioned for a writ of certiorari, and the United States Supreme Court granted the petition, ultimately reversing the Fifth Circuit's decision. *Mullenix IV*, 136 S. Ct. at 308.

[104] *Mullenix IV*, 136 S. Ct. at 306. The warrant was for failing to complete community service hours while on probation, and a new domestic violence complaint. *See Mullenix III*, 773 F.3d at 716.

[105] *Mullenix IV*, 136 S. Ct. at 306. The chase occurred at night on a highway with light traffic, no pedestrians, and no stopped vehicles. *Mullenix III*, 773 F.3d at 716. The cross traffic was divided by a large center median, and Mr. Leija did not hit another vehicle or cause another vehicle to crash. *Id.*

[106] *Mullenix IV*, 136 S. Ct. at 306. Despite the threats from Mr. Leija, there was no weapon in the car. *Mullenix III*, 773 F.3d at 716.

[107] *Mullenix IV*, 136 S. Ct. at 306. The officers involved received training on how to properly deploy spike strips and how to take a defensive position that minimized any risks posed by the drivers. *Id.*

[108] *Id.*

[109] *Id.* Mullenix received no training on shooting to disable cars, and had never attempted such an act before. *Id.*

[110] *Id.* at 306–07. Mullenix claims not to have heard his supervisor's commands over the radio because he had already exited his vehicle with his rifle and positioned himself to shoot. *Mullenix III*, 773 F.3d at 717.

[111] *Mullenix III*, 773 F.3d at 717. Mullenix acknowledged the risk of harming another officer, but stated that he did not think he would hit the officer beneath the overpass. *Id.*

[112] *Mullenix IV*, 136 S. Ct. at 307; *Mullenix III*, 773 F.3d at 717. Mullenix also admitted that he could not discern how many people were in the vehicle, whether there were passengers, or what anyone was doing inside the vehicle. *Mullenix IV*, 136 S. Ct. at 307.

[113] *Mullenix IV*, 136 S. Ct. at 307.

[114] *Id.* Four shots struck Mr. Leija in his upper body, but no shots hit the vehicle's engine block, radiator, or even the hood. *Id.*

Officer Mullenix boasted to his supervisor saying, "[h]ow's that for proactive?"[115]

The Court only addressed the question of qualified immunity, and left unanswered the question of whether there was a Fourth Amendment violation.[116] Noting that a "clearly established right" must be so clear that "every reasonable official would have known" they were violating that right, the Court held that you cannot define the clearly established right at a high level of generality.[117] The Court went on to reason that existing precedent must place the question "beyond debate."[118] The relevant inquiry here for the Court was whether Officer Mullenix acted unreasonably "beyond debate."[119] In an attempt to show the "hazy legal backdrop against which [officer] Mullenix acted" the Court compared the facts in *Mullenix IV* to the facts in *Brosseau v. Haugen.*[120] The Court stated that the threat Mr. Leija posed to officers was comparable to the threat posed to officers in *Brosseau* by a fleeing suspect headed in the general area of other officers and onlookers.[121] The Court detailed some helpful facts from *Mullenix IV* to justify its earlier position and reasoning in *Brosseau*.[122] Ultimately, the majority in *Mullenix IV* held that no precedent

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[115] *Mullenix III*, 773 F.3d at 717. This was the same supervisor who told Mullenix to "stand by" and wait to "see if the spikes work first." *Id.* During a counseling session earlier that same day, officer Mullenix's supervisor told by him that he was not being proactive enough as a police officer. *Id.*

[116] *Mullenix IV*, 136 S. Ct. at 308. The facts of *Mullenix* presented the United States Supreme Court with a wide-ranging concoction of police use of force, Fourth Amendment violations, and qualified immunity, which was ultimately another chance to clarify these confusing doctrines. *Id.* at 306–08. The Court reversed the Fifth Circuit's ruling in the case. *Id.* at 308.

[117] *Id.* (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)); Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011).

[118] *Mullenix IV*, 136 S. Ct. at 308 (quoting *Al-Kidd*, 563 U.S. at 741–42). The Court does not demand a case that is directly on point, but the particular facts of past cases are nonetheless relevant to the Court's analysis. *Al-Kidd*, 563 U.S. at 741.

[119] *Mullenix IV*, 136 S. Ct. at 309. The Court in *Mullenix IV* points to the *Brosseau v. Haugen* case, saying it was almost an exact illustration for qualified immunity in the context of the Fourth Amendment. *Mullenix IV*, 136 S. Ct. at 309–10; *see* Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (stating the correct inquiry was whether it was clearly established in a "more 'particularized' sense" that the officer's actions were prohibited by the Fourth Amendment in the context they confronted). The Court in *Mullenix IV* also looks to *Anderson v. Creighton*, to show that when an analysis does not address the specific circumstances with which the specific officer was confronted, it falls short of the required specificity. *Mullenix IV*, 136 S. Ct. at 309; *see* Anderson v. Creighton, 483 U.S. 635, 640–41 (1987) (stating a conclusion that an officer's search was objectively unreasonable did not follow immediately from, and thus was not clearly established by, the principle of warrantless searches in the Fourth Amendment context).

[120] *Mullenix IV*, 136 S. Ct at 309–10. *Brosseau* involved an officer who shot a fleeing suspect out of fear that the suspect would endanger other nearby officers on foot, other motorists on the road, and any other citizen who may be in the area. *Brosseau*, 543 U.S. at 196–97. The fleeing suspect was shot in close proximity "shortly after [the car] began to move." *Id.*

[121] *Mullenix IV*, 136 S. Ct. at 310.

[122] *See id.* (reasoning that by time officer Mullenix fired his rifle, Mr. Leija led police on a twenty-five-mile chase reaching speeds of over one hundred miles per hour, was purportedly drunk, already threatened to shoot officers on two occasions, and was speeding towards officers). Notably, the

squarely governed the facts that officer Mullenix faced, and thus could not conclude that he acted unreasonably "beyond debate."[123]

As the lone dissenter in *Mullenix IV*, Justice Sotomayor believed it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired his rifle, and that officer Mullenix's "rogue conduct" killed Mr. Leija.[124] Justice Sotomayor stated that the Fourth Amendment is violated unless the governmental interests in carrying out a specific seizure outweighs the infringement on the individual's Fourth Amendment rights.[125] Inherent in that analysis is the fact that the government must have a legitimate interest in using deadly force over other kinds of force.[126] Thus, the proper focus in answering the "clearly established" legal question is whether, knowing what Officer Mullenix knew at the time, there was a governmental interest in shooting at the car rather than waiting for the tire spikes.[127] Justice Sotomayor thought it was important to note that Mr. Leija was going to, and indeed did, cross the tire spikes even though officer Mullenix claimed concern for his fellow officers below who set the tire spikes.[128] Although the majority suggests

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Court did not consider that officer Mullenix, unlike the officer in *Brosseau*, used improvisational deadly tactics for which he had no training, disobeyed orders from a supervisor, fired six rifle shots from a far distance into a car that admittedly was hard to see at night in the absence of ambient lighting, without knowing who or what was in the car, and disregarded the tire spikes already in place that would likely have been successful. *See Mullenix III*, 773 F.3d at 717.

[123] *Mullenix IV*, 136 S. Ct. at 310–12. In his concurrence, Justice Scalia went a step further, stating that the proper focus should have been on whether it was reasonable to shoot at the car's engine in light of the risk to the suspect. *Id.* at 313 (Scalia, J., concurring). Justice Scalia believed the majority unfairly portrayed Officer Mullenix's actions, and that although Mullenix used deadly force, he did not intend to harm Mr. Leija. *Id.* at 312–13.

[124] *Id.* at 313 (Sotomayor, J., dissenting). An officer's actual intentions are irrelevant to the Fourth Amendment's objective reasonableness standard. *See* Graham v. Connor (*Graham III*), 490 U.S. 386, 397 (1989) (stating that the objective reasonableness inquiry takes the circumstances facing the officer into account and disregards the officer's underlying motivations).

[125] *Mullenix IV*, 136 S. Ct. at 314 (Sotomayor, J., dissenting); *see Scott*, 550 U.S. at 383. There must be a "governmental interes[t]" in both effectuating a seizure and "how [the seizure] is carried out." *Mullenix IV*, 136 S. Ct. at 314 (Sotomayor, J., dissenting) (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)); *see id.* at 316 (stating that the majority ignored clearly established Fourth Amendment precedent that requires both a governmental interest in seizing a suspect as well as in the level of force used to seize that suspect).

[126] *See Mullenix IV*, 136 S. Ct. at 314 (Sotomayor, J., dissenting).

[127] *Id.* The majority, according to Justice Sotomayor, did not prove any such governmental interest, but claimed that Officer Mullenix planned to stop the car "in a manner that avoided the risks" of relying on tire spikes. *See id.* at 311 (majority opinion). Yet, there was no evidence in the record to even remotely suggest that shooting a vehicle in the manner contemplated by Officer Mullenix could stop the vehicle before engaging the tire spikes, or in a more effective manner than using the tire spikes alone. *Id.* at 314–15 (Sotomayor, J., dissenting).

[128] *Id.* at 314 (Sotomayor, J., dissenting). "Even if his shots hit Leija's engine block, the car would not have stopped instantly" and regardless, the officers were "trained to take defensive positions" when utilizing tire spikes. *Id.* The threats posed by Leija's speeding vehicle existed irrespective of whether the car was stopped by shooting the engine block, hitting the tire spikes, or a combination of the two. *Id.*

that tire spikes are fallible, two additional tire spikes were placed further along down the interstate in case the first set of spikes failed.[129] This led Justice Sotomayor to conclude that no reasonable officer could have believed that shooting at a speeding vehicle would stop the vehicle with less jeopardy or better conviction than waiting for the it to come into contact with tire spikes.[130] According to Justice Sotomayor, since it is clearly established that a governmental interest must necessitate deadly force, even if it is not always clearly established what specific level of governmental interest is sufficient, Officer Mullenix violated Mr. Leija's right to be free of intrusion.[131] Accordingly, Justice Sotomayor saw no reason overturn the Fifth Circuit's decision.[132]

B. Policy and Qualified Immunity Interests for Police Officers

The Supreme Court has essentially reversed almost all lower court cases where the court denied qualified immunity for police officers, stressing the importance of qualified immunity to all of society[133] Qualified immunity as a doctrine has been defended as a necessity to ensure that suitable officials are not dissuaded from public service due to fear of potential lawsuits.[134] Supporting this policy, the Court stated that a lawsuit could be a heavy burden for a public servant, and accordingly aims to dismiss frivolous lawsuits against offi-

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[129] *See id.* at 306, 310–11 (majority opinion) (suggesting that Officer Mullenix's fears about Leija's vehicle remaining a threat after engaging the tire spikes was valid); *see also Mullenix III*, 773 F.3d at 716 ("[P]olice units set up . . . a total of three spike locations ahead of the pursuit.").

[130] *Mullenix IV*, 136 S. Ct. at 315 (Sotomayor, J., dissenting). Justice Sotomayor also noted that Officer Mullenix's decision to shoot at the vehicle was even more unreasonable since he had three minutes to deliberate taking any action before Mr. Leija even came into his sights—something the majority did not address. *See id.* at 316; *Mullenix III*, 773 F.3d at 716.

[131] *Mullenix IV*, 136 S. Ct. at 316 (Sotomayor, J., dissenting). Focusing solely on the majority's version of the facts, there is still no governmental interest that justifies shooting the car before it hit the tire spikes. *See* Heins II, *supra* note 96, at 8 (explaining Justice Sotomayor's reasoning in her dissent).

[132] *Mullenix IV*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

[133] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (showing that out of over thirty decided cases on qualified immunity since 1982, the Supreme Court has found a violation of clearly established law only twice); *see, e.g.*, White v. Pauly, 137 S. Ct. 548, 551 (2017) (stating that qualified immunity is "important to society as a whole"); City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (stating that the Supreme Court often reverses lower court decisions because of how "important to society as a whole" qualified immunity is). The Court's recent decisions in *District of Columbia v. Wesby*, and *Kisela v. Hughes*, bring the total qualified immunity decisions to thirty-two. *See Kisela*, 138 S. Ct. at 1150 (involving a woman who was shot by a police officer after they received a 911 call about a woman acting erratically with a knife); District of Columbia v. Websy, 138 S. Ct. 577, 582 (2018) (involving excessive force by police when they entered an abandon building and arrested partygoers inside).

[134] *See* Wood v. Strickland, 420 U.S. 308, 319–20 (1975) (claiming that the denial of immunity for public officials and the imposition of damages for reasonable mistakes would intimidate and deter the most capable of candidates from seeking office); Pierson v. Ray, 386 U.S. 547, 554 (1967) (stating that such an imposition would "contribute not to principled and fearless decision making but to intimidation").

cials at the earliest possible stage.[135] Yet, very few of these cases are dismissed before trial, and even fewer cases are dismissed on qualified immunity grounds.[136] Additionally, qualified immunity has been used as a safeguard for public officials because they are only held accountable for their behavior if they are on notice that such behavior is an unconstitutional infringement on an individual's rights.[137]

Prior to the Supreme Court decision in *Saucier v. Katz*, the Fourth Amendment objective reasonableness standard protected officials who acted reasonably in constitutionally murky waters, even if their actions violated the Constitution, showing that qualified immunity is gratuitous.[138] Yet in 2001, in *Saucier*, the Court proposed a test for when an officer is eligible for qualified immunity.[139] Since then, the Court has stated inconsistent policy motivations for the creation of qualified immunity, not adhering closely to its own precedent.[140] Combine these inconsistencies with a steep objective reasonableness test, and qualified immunity is essentially giving police officers "two bites at the apple."[141] The clearly established law portion of the objective reasonableness test laid out in *Harlow* is founded in qualified immunity principles, yet courts disconcertingly appear to be using the Fourth Amendment to utilize the

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[135] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). The doctrine of qualified immunity is intended to allow officials to make informed decisions without the fear of a lawsuit, and thus has protected public officials who make reasonable mistakes in good faith. *See Wood*, 420 U.S. at 319, 321.

[136] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1809 (2018) (concluding, after a two-year study of 1,183 § 1983 cases against police officers or police departments, that only seven cases were dismissed based upon qualified immunity, while thirty-eight were dismissed before trial).

[137] *See Anderson*, 483 U.S. at 638–39. The Court in *Anderson* held that officials could not be held liable for an infringement on an individual's rights unless a clearly established right exists. *Id.* at 641. Consequently, when qualified immunity applies to a public official, claims against them do not go to trial. *See Harlow*, 457 U.S. at 814–15.

[138] *See* Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 97, 99 (1989) (stating that qualified immunity is superfluous if courts properly interpret *Garner* when deciding if the force used was objectively unreasonable, because the standards for finding a fourth Amendment violation and deciding immunity are the same). The *Garner* decision asks if unnecessary force was used to effectuate an arrest, and if a reasonable officer in the same position would think that the amount of force used was necessary. *Id.* at 99.

[139] 503 U.S. at 201–02. The court's chronological test is to first decide if the facts alleged show that an officer violated a constitutional right, and if so, decide if that right has been clearly established. *Id.*

[140] *Compare* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (holding that the goal of qualified immunity is to "free officials from the concerns of . . . 'avoidance of disruptive discovery'"), *and Harlow*, 457 U.S. at 818 (stating that constitutional claims involve intrusive discovery procedures that can disrupt the effectiveness of government), *with Pearson*, 555 U.S. at 231–32 (reasoning that the motivation behind the creation of qualified immunity was to "ensure that 'insubstantial claims' against government officials [would] be resolved prior to discovery").

[141] *See Anderson*, 483 U.S. at 664 n.20 (Stevens, J., dissenting).

test.[142] Accordingly, such overlapping standards pose a problem because they afford police officers too much protection and further confuse courts about when and how to apply each standard.[143]

Subsequently, courts have been granting qualified immunity to police if a mere possibility exists that the officer did not know they were infringing upon a constitutional right.[144] The Court in *Anderson*, however, did not require in the moment that officers know they are violating someone's rights, but rather said that the right in contention should be sufficiently clear.[145] In 2011, in *Ashcroft v. al-Kidd*, the Supreme Court attempted to further clarify the "clearly established" standard by holding that existing precedent must put the question of constitutionality "beyond debate."[146] This added element has further limited the ability of civilians to bring successful excessive force claims because the fact-specific nature of § 1983 cases makes the development of "clearly established" law extremely difficult.[147] It has been proven that large police departments and their officers change their actions and behaviors in response to court decisions.[148] Nevertheless, understanding if someone is an immediate threat or not is integral to an officer's duties.[149] Critics argue that analyzing threats are so integral to police duties that it is hard to understand why a trained officer needs clarity for every potential situation.[150]

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[142] *See* Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 427 (2016) (discussing how different courts are applying inconsistent standards of qualified immunity and Fourth Amendment reasonableness).

[143] *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118, 139–40 (2009) (noting that the rule for reasonableness has become a complete defense for everything but the most heinous behavior); *see also* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 945 (2015) (reasoning that the "clearly established" standard is "riddled with contradictions and complexities"); Blum et al., *supra* note 24, at 654–55 (showing the increasing difficulty for plaintiffs in proving "clearly established" violations with 42 U.S.C. § 1983 claims).

[144] *See Anderson*, 483 U.S. at 640.

[145] *See id.*

[146] *Al-Kidd*, 563 U.S. at 741; *see* Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) (stating that to violate a clearly established law, the law must be "beyond debate").

[147] *See* Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1034–36 (2005) (suggesting that the misunderstanding of the clearly established standard arises from the lack of clarity around what sources of common law are proper for courts to analyze whether the law is clearly established and how much deviation is allowed).

[148] *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844–45 (2012) (showing results from a study in which various police departments used data from lawsuits to identify problems and improve their practices).

[149] *Id.*

[150] *See Graham III*, 490 U.S. at 396. *Graham* was the starting point for over a quarter century of developing the concept of imminent threats to police. *See id.*; Duckett, *supra* note 142, at 431 (stating "it is difficult to imagine the police officers . . . had inadequate direction from the courts").

C. Excessive Force & the Reasonableness Standard Revisited

In *Graham v. Connor*, the Supreme Court advanced an objective reasonableness test based on the Fourth Amendment's protection against unreasonable search and seizure to evaluate excessive force during an arrest or an investigatory stop.[151] There, the Court relied on *Tennessee v. Garner* to "make explicit what was implicit in *Garner*'s analysis" and hold that any excessive force claims stemming from "an arrest, investigatory stop, or other 'seizure'" is properly scrutinized under a Fourth Amendment "reasonableness" standard in place of a Fourteenth Amendment "substantive due process" standard.[152] The Court stated that determining reasonableness under the Fourth Amendment required one to weigh the violation of someone's constitutional right with the opposing governmental interest.[153] The majority in *Graham* stated that although the definition and application of "reasonableness" under the Fourth Amendment is not precise, it must be considered from the viewpoint of a "reasonable officer on the scene" instead of considering the "20/20 vision of hindsight."[154] The Court further contended that reasonableness calculations should allow for an officer's forced "split-second judgments" about the amount of force that is necessary in "tense, uncertain, and rapidly evolving" circumstances.[155] Further still, the Court held that the determination of reasonableness in excessive force claims was an objective standard that did not take an officer's subjective mindset and intent into account, irrespective of the presence of malice.[156]

Continuing development on the tests for reasonableness in excessive force claims, the Supreme Court revisited the topic of excessive force recently in 2014 with its decision in *Plumhoff v. Rickard*.[157] *Plumhoff* involved a high-speed car chase that ended with both the driver and passenger of the fleeing

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[151] 490 U.S. at 395. This decision provided that every § 1983 excessive force claim should not be analyzed under the same general standard. *Id.* at 393; *see Baker*, 443 U.S. at 144 n.3 (1979) (stating § 1983 provides a way to justify federal rights, but is not a "source of substantive rights" by itself).

[152] *Garner*, 471 U.S. at 1; *see Graham III*, 490 U.S. at 395. *Garner* involved a claim of deadly force used to stop a fleeing suspect who did not appear armed or dangerous. *See* 471 U.S. at 3–4. The complaint alleged Fourth and Fourteenth Amendment violations, but the Court used a Fourth Amendment substantive due process standard that determined reasonableness based off how and when a particular seizure is carried out. *Id.* at 7–8.

[153] *Graham III*, 490 U.S. at 396.

[154] *Id.*; *see Garner*, 471 U.S. at 7–8.

[155] *Graham III*, 490 U.S. at 396–97.

[156] *Id.* at 397. An officer's intent, whether good or bad, is not dispositive of whether a constitutionally permissive amount of force was used. *Id.* Justice Blackmun wrote the concurrence with Justice Brennan and Justice Marshall joining, stating there is no reason to hold pre-arrest excessive force claims to only a Fourth Amendment objective reasonableness standard instead of allowing a Fourteenth Amendment substantive due process standard. *Id.* at 399–400 (Blackmun, J., concurring). Whereas substantive due process concerns resulting from a use of force may only appear in rare instances that are not blatantly unreasonable, Justice Blackmun opined that a substantive due process analysis should not be applied until such a case arose. *See id.* at 400.

[157] *See* 572 U.S. at 765.

vehicle being shot to death by police.[158] There, the Court held it was "beyond serious dispute" that the fleeing car posed such "grave public safety risk[s]" that the officer's use of "deadly force to end that risk" was reasonable.[159] The Court further reasoned that if police are justified in using deadly force, then they are justified in using that force until the "threat has ended."[160]

III. BETTER APPROACHES TO POLICE USE OF FORCE & QUALIFIED IMMUNITY

After decades of common law alterations, the doctrines of excessive force and qualified immunity currently betray the original intent of the forty-second Congress, and should be revisited to more properly reflect their original purpose of providing justice for otherwise helpless victims of police violence.[161] Section A of this Part argues that the Supreme Court should begin using different methods to determine reasonableness.[162] Section B discusses the confusing and sometimes contradictory directions from the Court in reference to jurors and police officers.[163] Section C argues that the dangers of being a police officer have largely been exaggerated.[164] Section D suggests a different direction the Court can go to improve the doctrine of qualified immunity.[165]

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[158] *See id*. at 770.

[159] *Id.* at 777.

[160] *Id.* The Court briefly mentioned the presence of an innocent passenger, but insisted that their presence did not alter the calculations of reasonableness. *See id.* at 777–78 (stating that Fourth Amendment rights cannot be asserted by anyone except the injured person, and the presence of a passenger in a fleeing car does not enhance the rights of the driver). The Court noted further that if the passenger would have brought his own claim against the police, the risk he faced would have been a central concern, but not all lower courts allow a passenger to recover under the Fourth Amendment. *See id.* at 778 n.4. *Compare* Vaughan v. Cox, 343 F.3d 1323, 1329 (11th Cir. 2003) (stating that a passenger who was shot by police may recover under the Fourth Amendment), *and* Fisher v. Memphis, 234 F.3d 312 (6th Cir. 2000) (holding that the plaintiff may sue under the Fourth Amendment because the defendant police officer shot at plaintiff's vehicle), *with* Milstead v. Kibler, 243 F.3d 157, 163–64 (4th Cir. 2001) (suggesting a passenger cannot recover under the Fourth Amendment), *and* Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 (1st Cir. 1990) (suggesting a passenger cannot recover under the Fourth Amendment). The Court also pointed out that it was the driver who put the passenger in danger by fleeing, so it would be irrational if the driver's disregard for safety helped the passenger win a claim. *Plumhoff*, 572 U.S. at 778.

[161] *See* Bums v. Reed, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part) (suggesting the Court has refused to certain types of immunity in a § 1983 context if it was not intended by the forty-second Congress in 1871); Baude, *supra* note 133, at 55 (suggesting the Court has strayed away from congressional intent with its creation of qualified immunity for police officers); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 774, 794 (1987) (suggesting that the Court misinterpreted congressional intent to hide the justices personal policy agendas).

[162] *See infra* notes 166–173 and accompanying text.

[163] *See infra* notes 174–189 and accompanying text.

[164] *See infra* notes 190–209 and accompanying text.

[165] *See infra* notes 210–218 and accompanying text.

A. The Court Should Use Hard Data, Science, & Internal Policies to Determine Reasonableness

The U.S. Supreme Court has consistently held that officers need to be confident "beyond debate" that their actions violate an individual's constitutional rights to be held liable for such violations.[166] The Court struggles to define reasonableness, and settles with formulating precedent based on inconsistent opinions about reasonable behavior.[167] The Court proceeds to weigh risks to society against risks to individuals, yet has incongruously claimed it is near impossible to quantify such risks.[168] As is evident in its holding in 2015, in *Mullenix v. Luna*, the Court nonetheless weighs the reasonableness of an officer's actions without considering hard scientific or statistical data, or internal police policies.[169] Without considering these sources of data, the Court nonetheless evaluates police use of force, but spends very little time actually evaluating police officers' use of deadly force.[170]

Although police departments across the nation quantify the risks associated with the use of deadly force and adopt evidence-based policies to guide their officers, the Court treats the topic of policing "as more of an art than a science."[171] In 1986, in *Malley v. Briggs*, the Court said that the *Harlow* standard sufficiently meets the goals of "avoid[ing] excessive disruption of government" and resolving frivolous claims at summary judgment stage, but the Court failed to provide any data justifying those purposes and goals.[172] The Court decided to "slosh . . . through the factbound morass of 'reasonableness'" when specialists in better positions to evaluate law enforcement already maintain and implement policies that the Court could, and should, adopt.[173]

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[166] *See, e.g.*, Plumhoff v. Rickard, 572 U.S. 765, 779 (2014); Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011); Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[167] *See* John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Police Officers from Shooting at Moving Vehicles*, 164 U. PA. L. REV. ONLINE 135, 137, 141 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1163&context=penn_law_review_online [https://perma.cc/6BY8-LQV6] (highlighting confusion and inconsistencies in the Court's approach to reasonableness in the context of excessive force in vehicular pursuits).

[168] *See* Scott v. Harris, 550 U.S. 372, 383–84 (2007).

[169] *See* Mullenix v. Luna (*Mullenix IV*), 136 S. Ct. 305, 310 (2015).

[170] *See id.*; Gross, *supra* note 167, at 142; Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 849 (2014).

[171] *See* Gross, *supra* note 167, at 142.

[172] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that the goal of the standard laid out in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), was to allow the government to work uninterrupted and remove frivolous or weak claims at summary judgment). Without any data to support justifying the doctrine of qualified immunity, it is hard to imagine how the Court can accurately determine the success of qualified immunity. *See id.*

[173] *Id.*; *see* Gross, *supra* note 167, at 142; *see also* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008) (showing that instead of using relevant data and statistics to evaluate their reasoning, the Court uses of meaningless and ineffective considerations to evaluate police actions).

B. Reasonableness Confusion Trickles Down to Jurors

The only constitutional threshold limiting the use of force by police officers is that their use of force must be reasonable.[174] Yet, the Supreme Court's development of decisions regarding excessive force and qualified immunity does not properly guide police officers or triers of fact as to what is reasonable and under what conditions.[175] Rather, as the doctrine of qualified immunity and use of force stands today, the Court has offered opposing standards and decided cases that seemingly conflict with one another.[176] In *Scott v. Harris*, the Court even acknowledged that the lack of easy to follow standards means they have to persevere without any guidelines concerning what excessive force actually is, or how to determine reasonableness in most situations.[177] The confusion and misdirection applied by the Court has been highlighted in recent decisions like *Plumhoff* and *Mullenix IV*.[178] Such confusion and misdirection results in a broader scope of protection for police officer's than what § 1983 intended, effectively giving police officers greater deference.[179] At its current point, excessive force analyses favor police and allow for racist biases and dangerous stereotypes.[180] This proves troublesome because, amongst other considerations, implicit bias studies show that violence and criminality are associated with black people more than any other ethnic or racial group.[181] Com-

[174] John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 67 (2017).

[175] *See* Harmon, *supra* note 173, at 1127 (showing that the Supreme Court has not adequately determined or defined what constitutes an inappropriate use of force by police).

[176] *Compare Scott*, 550 U.S. 372, 385–86 (declining to hold an officer liable for using deadly force on a fleeing suspect), *with* Tennessee v. Garner, 471 U.S. 1, 22 (1985) (holding an officer liable for shooting at a fleeing suspect), *and* Gross, *supra* note 24, at 181 (stating the Supreme Court condemned deadly force against a fleeing suspect in *Garner* but approved of it in *Scott*).

[177] *Scott*, 550 U.S. at 383; *see* Gross, *supra* note 24, at 170 (noting the lack of defined standards in *Scott*); *see also* Harmon, *supra* note 173, at 1144 (discussing how the lack of precise framework affects police officers and jurors).

[178] *See generally Mullenix IV*, 136 S. Ct. at 306 (holding that shooting into a car to stop a fleeing suspect is a reasonable use of deadly force); *Plumhoff*, 572 U.S. at 777 (reasoning that shooting fifteen shots into a fleeing car, killing both the driver and passenger, is reasonable).

[179] *See* Gross, *supra* note 24, at 161; Harmon, *supra* note 173, at 1123 (acknowledging that the Court has encouraged the use of meaningless and ineffective considerations when evaluating an officer's actions in court).

[180] *See* Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Petitioner at 19, 24–25, Tolan v. Cotton, 572 U.S. 650 (2014) (No. 13-551), 2013 WL 6843336 (suggesting that the Court's analysis of reasonableness for police use of force risks legitimizing racist or biased stereotypes); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 643 (2003) (showing that people associate danger more frequently with African-American faces than Caucasian faces).

[181] *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (showing that many people associate negative stereotypes with black people); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 183–86 (2001) (showing that people often incorrectly perceive weapons in the hands of African-Americans

bine this fact with an excessive force doctrine and qualified immunity doctrine that increasingly afford police the benefit of the doubt, and systemic injustices will flow, as recently shown.[182] Furthermore, the Court has provided a way for police to make rash decisions and simultaneously hide behind the shield of qualified immunity in almost all deadly force occurrences.[183]

Through combining an excessive force standard that benefits police, with a qualified immunity standard that requires extremely specific precedent, the Supreme Court has effectively biased lower courts against ever holding police officers liable.[184] A plaintiff claiming a violation of § 1983 must prove their rights were violated and that every reasonable officer would have understood the officer's actions in question to be a violation of those rights.[185] Supposing a plaintiff can overcome such strong impediments and make it to the jury, the judge will instruct the jury to view the reasonableness of an officer's acts through the eyes of a reasonable officer on the scene—another barrier to plaintiffs.[186] While legitimate interests to justify the use of force do exist, the dangers associated with being a police officer have been extremely exaggerated at the expense of individual's rights and livelihoods.[187] Nevertheless, qualified immunity has moved away from the idea of what *one* reasonable officer should have known to an almost impossible bar of what *every* reasonable officer should have known.[188] Following changes in how these standards are applied,

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when in actuality there is a phone or a tool); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 12 (1989) (showing that people often associate ambiguous behavior of African-Americans as aggressive, but do not perceive the same behavior in Caucasians as aggressive).

[182] *See supra* notes 1–7 and accompanying text.

[183] *See Mullenix IV*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

[184] Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1812 (2016).

[185] *See* Blum et al., *supra* note 24, at 656; *see also Al-Kidd*, 563 U.S. at 741 (requiring "that every reasonable official" know they were infringing upon someone's rights).

[186] *See* Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 486 (1994) (noting that juries are expected to decide if an officer's actions were reasonable based on "subjective objectivity," which has invariably led to confusion between what is reasonable or necessary); Blum, *supra* note 143, at 941 n.190 (2015) (suggesting that the jury is given "unintelligible instructions" when determining an officer's reasonableness and if they should be afforded qualified immunity); Harmon, *supra* note 173, at 1144–45 (suggesting that jury instructions are not helpful to jurors in making reasonableness clearer).

[187] *See* Gross, *supra* note 24, at 168 (showing that being a police officer is not as dangerous as commonly believed).

[188] *See* Blum, *supra* note 185, at 655 (using the Supreme Court's language in *Harlow* and *Ashcroft* to show it may not have meant to change the language from *a* reasonable officer to *every* reasonable official); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124 (2009) (stating qualified immunity for officers is more like absolute immunity, and effectively allows such immunity barring the most heinous and outrageous police conduct); *see, e.g.*, *Al-Kidd*, 563 U.S. at 741 (using "every reasonable" officer); *Harlow*, 457 U.S. at 818 (using "a reasonable" person).

the Court has been extremely hesitant to regulate any use of force by police officers largely due to distorted beliefs about policing dangers.[189]

C. Embellishments and Overstatements of Policing Dangers

It is undeniable that police officers need to use force to serve the legitimate needs of law enforcement.[190] Although some uses of force seem obvious, others are not as intuitive.[191] Because the police are the practical means by which the government advances its own interests, the police are justified in using defensive force.[192] Conversely, because police are fallible human agents, their justifications for use of force often exceed the government's interests in allowing the use of such force.[193] Injuries to police officers are extremely rare, yet the Court is fixated on protecting them.[194] Although governments have substantial interests in maintaining safety for their officers and officials, they also have commensurate interests, if not stronger interests, in protecting the general public when their officials and officers abuse their power and violate the rights of citizens.[195] In fact, police officers often use force offensively instead of in self-defense, and do so with fluctuating levels of premeditation.[196] Allowing such abuses to persist unpunished leads to an erosion of public trust and confidence in the police, subsequently undermining the goals of criminal

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[189] *See* Gross, *supra* note 24, at 161–62 (suggesting the Court has not altered its reasonableness doctrine due to "inaccurate assumptions regarding the nature of policing").

[190] *See* NAT'L INST. OF JUSTICE, *supra* note 74 (stating that police need to use force to defend themselves and defend other citizens).

[191] *See* Harmon, *supra* note 173, at 1150 ("[P]olice must be able to arrest individuals for serious crimes, even if they resist, and they must defend themselves from serious assault."). Police obviously must defend themselves from physical attack, but pointing out an agreeable limit on the interest of using force is a murkier undertaking. *Id.*

[192] *See id.* at 1155 (suggesting that if an officer did not concurrently serve the states interests by defending themselves, the state could contract away the right to self-defense on the job so that citizens could benefit from greater freedoms).

[193] See *id.* at 1156 n.173 (citing numerous state statutes and cases that exempt police officers from a duty to retreat).

[194] *See* Stoughton, *supra* note 170, at 849. A considerable amount of assaults on police officers result in either minor injuries, or no injuries at all. *See Table 70: Law Enforcement Officers Assaulted*, FBI, http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/tables/table70-leo-assaulted-type-weapon-percent-injured-01-10.xls [https://perma.cc/8VQC-ABEK] (showing that in the last fifteen years, 71.7% to 74.1% of assaults on police resulted in no injuries or minor injuries).

[195] *See* Harmon, *supra* note 173, at 1157 (suggesting that a breakdown in trust between law enforcement and the communities they patrol can result in a loss of police legitimacy and increased violence).

[196] *See* Stoughton, *supra* note 170, at 868 (suggesting police are more often the aggressive party when use of force is involved). The Court's reasoning in *Graham v. Connor* that police often face situations that are "tense, uncertain, and rapidly evolving," is so overbroad and ambiguous that it is applicable to any stressful situation like a law school exam, or even a poker game. Graham v. Connor (*Graham III*), 490 U.S. 386, 397 (1989); *see* Stoughton, *supra* note 170, at 868 n.143.

law and reducing community cooperation with the law.[197] Even the "President's Task Force on 21st Century Policing" acknowledged that the current culture of policing needs to be changed from a militaristic approach to a protective approach so that trust in the community can be restored.[198]

A common perception exists that being a police officer is a highly dangerous job.[199] Although police officers can face dangerous situations, the dangers commonly associated with their jobs, specifically self-defense responses to dangerous criminals, are highly exaggerated.[200] According to a 2016 study conducted by the Federal Bureau of Investigation, more officers die on the job accidently than due to felonious activity.[201] As a matter of fact, truck drivers,

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[197] *See* Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469, 490–92 (2005) (finding that police misconduct and increased policing in disadvantaged communities is directly correlated with violent crime, and suggests that police departments focus on accountability instead of over-policing disadvantaged communities); Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 312–13, 315 (2009) (discussing the need for, and benefits of, cooperation between law enforcement and the communities they serve, and the importance of legitimacy in a policing context); Melissa Hung, *Low-Income PoCs Still Don't Trust the Police, but Would Work with Them*, NPR (Feb. 22, 2017), https://www.npr.org/sections/codeswitch/2017/02/22/515820280/low-income-pocs-still-don-t-trust-the-police-but-would-work-with-them [https://perma.cc/WE5V-6YX3] (discussing a recent study's findings that although citizens in high-crime, high-poverty areas are skeptical of police, they are not reluctant to cooperate with police for increased community safety); Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP (July 10, 2017), http://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx [https://perma.cc/HM2B-72AU] (noting that although confidence in police has risen to the twenty-five year average of fifty-seven percent from a record-tying low of fifty-two percent in 2015, a strong lack of confidence exists among African Americans, Hispanics, liberals, and people younger than thirty-five).

[198] PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 11 (2015), https://riczai-inc.com/Publications/cops-p311-pub.pdf [https://perma.cc/LV4G-HYH8].

[199] *See, e.g.*, Matt Apuzzo, *Shoot First, and He'll Answer Questions*, N.Y. TIMES, Aug. 2, 2015, at A1 (discussing how a popular police-aligned expert witness consistently testifies that police face a high level threat, irrespective of other experts and scholars calling his research "pseudoscience" and "lacking in both foundation and reliability"); Dean Scoville, *The Hazards of Traffic Stops: Pulling Over a Motorist Can Result in a Citation or a Raging Gun Battle. You Have to Be Prepared for Either One.*, POLICE MAG. (Oct. 19, 2010), http://www.policemag.com/channel/patrol/articles/2010/10/duty-dangers-traffic-stops.aspx [https://perma.cc/GWS2-P9KA] (describing the traffic stop as "one of the most dangerous aspects of police work").

[200] *See* Radley Balko, *Once Again: Police Work Is NOT Getting More Dangerous*, WASH. POST (Oct. 2, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/10/02/once-again-police-work-is-not-getting-more-dangerous/?utm_term=.c64913465a58 [https://perma.cc/M58F-RMZB] (showing that being a police officer is an increasingly safe profession, especially in recent years); *see also* David Feige, *The Myth of the Hero Cop*, SLATE (May 25, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/05/the_myth_of_the_hero_cop_police_unions_have_spread_a_dangerous_message_about.html [https://perma.cc/NSF9-AFU3] ("Police officers earn more than you think for a job that's less dangerous than you imagine.").

[201] *Compare* FBI, *Law Enforcement Officers Feloniously Killed: Type of Weapon, 2007–2016* (2017), https://ucr.fbi.gov/leoka/2016/officers-feloniously-killed/tables/table-1.xls [https://perma.cc/QUZ9-6LXB] (showing that from 2007 through 2016, 470 law enforcement officers were killed with firearms, 166 of which involved an incident where officers had prior knowledge that a firearm was involved), *with* FBI, *Law Enforcement Officers Accidentally Killed: Circumstance at Scene of Inci-*

farmers, construction workers, and even grounds maintenance workers all individually accounted for more on the job deaths than total police officer deaths in 2016.[202] Still, many people cling to the belief that routine traffic stops are the most dangerous aspect of a police officer's job, demanding the greatest degree of precaution and protection.[203] Notwithstanding, recent statistics and studies seem to tell a different, less perilous story.[204] In 2011, police officers were eighteen times more likely to die during an arrest than during a traffic stop.[205] Even then, it is extremely unlikely for an officer to be killed on the job.[206] In fact, data suggests that being a police officer has gotten increasingly safer over time, with 2015 being one of the safest years ever for police offic-

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dent, 2007–2016 (2017), https://ucr.fbi.gov/leoka/2016/officers-accidentally-killed/tables/table-64.xls [https://perma.cc/6AF4-E5YJ] (showing that from 2007 through 2016, 563 law enforcement officers were accidently killed on the job).

[202] *Compare* BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2016, at 3 chart 3 (2017), https://www.bls.gov/news.release/pdf/cfoi.pdf [https://perma.cc/8X5C-QEF8] (showing fatal work injuries by profession for 2016), *with* FBI, *Law Enforcement Officers Feloniously Killed: Region, Geographic Division, and State, 2007–2016* (2017), https://ucr.fbi.gov/leoka/2016/officers-feloniously-killed/tables/table-1.xls [https://perma.cc/4EUM-BSCQ] (showing that sixty-six officers died from felonious activity in 2016), *and* FBI, *Law Enforcement Officers Accidentally Killed: Region, Geographic Division, and State, 2007–2016* (2017), https://ucr.fbi.gov/leoka/2016/officers-accidentally-killed/tables/table-47.xls [https://perma.cc/RA32-XDBZ] (showing that fifty-two officers died accidently in 2016).

[203] *See, e.g.*, Scoville, *supra* note 199. In 1977, the Supreme Court agreed with this line of reasoning in *Pennsylvania v. Mimms*, when it discussed the "inordinate risk" officers face when approaching a car during a traffic stop, suggesting that traffic stops are more dangerous than other types of confrontations. 434 U.S. 106, 110 (1977). Although the Court cited a study suggesting that thirty percent of police shootings occur when an officer is approaching a vehicle, the Court did not discuss how often those officers spend their time conducting traffic stops in comparison to other policing duties. *See id.*; Gross, *supra* note 176, at 169. When you factor in that police spend a large proportion of their time conducting traffic stops, thirty percent is much less perilous in actuality. *See* Gross, *supra* note 176, at 169.

[204] *See* FBI, *Law Enforcement Officers Feloniously Killed: Circumstance at Scene of Incident, 2007–2016* (2017), https://ucr.fbi.gov/leoka/2016/officers-feloniously-killed/tables/table-23.xls [https://perma.cc/FTR3-63GX] (showing that four police officers were feloniously killed during traffic stops in 2016). *Compare* Lynn Langton & Matthew Durose, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 10 (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf [https://perma.cc/CN3N-LGRP] (showing that police were involved in over 26,000,000 traffic stops, and of those stops, 75% of drivers who were subjected to police use of force thought the force was unnecessary, and 33% thought the force was excessive), *with* FBI, *Law Enforcement Officers Feloniously Killed: Circumstance at Scene of Incident, 2002–2011* (2012), https://www.fbi.gov/about-us/cjis/ucr/leoka/2011/tables/table-19 [https://perma.cc/346L-B7AE] (showing that eleven police officers were feloniously killed during traffic stops in 2011).

[205] Gross, *supra* note 176, at 169; *see* Langton, *supra* note 204, at 2 (showing that police conducted over 3,000,000 arrests in 2011); FBI, *Law Enforcement Officers Feloniously Killed: Circumstance at Scene of Incident, 2002–2011*, *supra* note 204 (showing that twenty-three officers were feloniously killed during arrests).

[206] *See* Gross, *supra* note 176, at 169. (showing that officers have a 0.00077% chance of being killed while making an arrest, and 0.00004% chance of being killed during a traffic stop).

ers.[207] Nonetheless, the perceived dangers of policing remain central to law enforcement training, with officers taught to shoot before a threat is fully realized, because hesitations supposedly can be fatal.[208] These practices and misconceptions led to what Justice Sotomayor labeled a "shoot first, think later approach" adopted by police officers, which has abolished Fourth Amendment rights for anyone harmed by police officers.[209]

D. Amended Qualified Immunity and Excessive Force Standards Are Not Out of Reach

The Supreme Court conceded that it entirely reframed the doctrine of qualified immunity, abandoning common law principles along the way.[210] Even Justice Thomas, someone not often considered a champion of civil rights, suggested that qualified immunity should more closely align with common law principles that were in effect when the forty-second Congress enacted the Civil Rights Act of 1871.[211] Other sitting justices expressed concern by either con-

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[207] Gross, *supra* note 176, at 169; *see* Daniel Bier, *It Has Never Been Safer to Be a Cop*, NEWSWEEK (Sept. 14, 2015), http://www.newsweek.com/it-has-never-been-safer-be-cop-372025 [https://perma.cc/3THB-98PQ]. In the last decade, police fatalities decreased when measured per resident, per police officer, and in totality. *See* Bier, *supra*; Christopher Ingraham, *It's Official: There Never Was a 'War on Cops,'* WASH. POST (Dec. 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/12/30/its-official-there-never-was-a-war-on-cops/?utm_term=.1115d262f0d1 [https://perma.cc/6KW4-4VDB] (stating that aside from an aberration in 2013, 2015 was the safest year for police officers since 1887).

[208] *See* Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATLANTIC (Dec. 12, 2014), http://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/ [https://perma.cc/JH7J-W6A3] (suggesting that police training is a big part of the problem). "[O]fficers are taught that the risks of mistake are less—far less—than the risks of hesitation." *Id.* There is a common saying among police officers that it's "[b]etter to be judged by twelve than carried by six." *Id.*

[209] *Mullenix IV*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

[210] *See Anderson*, 483 U.S. at 645 (stating that the Court in *Harlow* substituted subjective malice considerations that were required at common law with an objective legal reasonableness test, which "completely reformulated qualified immunity along principles not at all embodied in the common law").

[211] *See* Ziglar v. Abassi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (stating that the Court's current qualified immunity jurisprudence embodies "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make" (quoting Rehberg v. Paulk, 566 U.S. 356, 366 (2012))); Perry Grossman, *Clarence Thomas to the Rescue?*, SLATE (June 21, 2017), https://slate.com/news-and-politics/2017/06/in-ziglar-v-abbasi-clarence-thomas-signals-his-support-for-civil-rights-plaintiffs.html [https://perma.cc/8JDL-W2JF] (suggesting that Justice Thomas is not typically the champion for civil rights, and saying his concurrence is the most radical call to change qualified immunity doctrine to date). *But see generally* District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (illustrating that Justice Thomas applied the doctrine of qualified immunity while writing for the majority, less than one year after his strong concurrence in *Ziglar*). Justices Ginsburg and Sotomayor wrote concurrences in *Wesby*, providing ample opportunity for Justice Thomas to join concurrences. *See generally* 138 S. Ct. at 593 (Sotomayor, J., concurring); *id.* at 593–94 (Ginsburg, J., concurring). In *Ziglar*, Justice Thomas stated that the balancing test between constitutional rights and

curring or dissenting on issues of qualified immunity, so altering the doctrine of qualified immunity is possible.[212]

Allowing § 1983 plaintiffs the ability to use an officer's malice to defeat qualified immunity claims is not an unreasonable retraction, and something the Court can amend.[213] After all, it was the Supreme Court that granted an ability to use an officer's malice in § 1983 claims, and the Supreme Court that subsequently took that possibility away.[214] Further, allowing lower courts the ability to clearly establish laws and recognize constitutional violations irrespective of equivalent cases on point is attainable with at least one recently appointed justice.[215] When courts decide cases that involve constitutional rights in the policing context, police departments change their internal policies to correspond with the rulings.[216] This is a powerful tool for progressive change, but the Supreme Court has been reluctant to use internal policies in their own calculations of reasonableness.[217] Qualified immunity is a common law doctrine, so the Court is in the best position to amend it—especially since other branches of government have proved unreliable at effecting positive change.[218]

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effective performance of governmental duties is one that the Constitution assigns to Congress, not the judiciary. 137 S. Ct. at 1849.

[212] *See, e.g.*, *Wesby*, 138 S. Ct. at 593 (Ginsburg, J., concurring); *Ziglar*, 137 S. Ct. 1843 (Thomas, J., concurring); *Mullenix IV*, 136 S. Ct. 305, 315 (Sotomayor, J., dissenting); Wyatt v. Cole, 504 U.S. 158, 169–75 (1992) (Kennedy, J., concurring); A.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016) (Gorsuch, J., dissenting).

[213] *See* Saucier v. Katz, 533 U.S. 194, 210 (2001) (illustrating the Court has included the subjective intent of an officer in previous decisions); *see also infra* note 214 and accompanying text.

[214] *See* Wood v. Strickland, 420 U.S. 308, 321 (1975) (including a subjective element and objective element); *Graham III*, 490 U.S. at 397 (stating that an officer's malice may not be taken into consideration).

[215] *See, e.g.*, *Holmes*, 830 F.3d at 1169 (Gorsuch, J., dissenting) (saying it was clearly established that a cop could not arrest a student for burping in class because precedent did not allow for arresting students for other minor classroom distractions, and ultimately concluding that any reasonable officer would have known that this was a step too far).

[216] *See* POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (2016) (showing that after the Fourth Circuit deemed tasing people on "drive-stun mode" unconstitutional, agencies within the Fourth Circuit amended their use of force and taser policies).

[217] *See* City and Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1777 (2015) (reasoning that "[e]ven if an officer acts contrary to her training[,] . . . that does not itself negate qualified immunity where it would otherwise be warranted"); Groh v. Ramirez, 540 U.S. 551, 564 n.7 (2004) (stating that an officer's training may put him on notice, but then explaining that the Court "do[es] not suggest that an official is deprived of qualified immunity whenever he violates an internal guideline").

[218] *See* Christian Sheckler & Ken Armstrong, *Who Will Now Police the Police?*, N.Y. TIMES, Dec. 2, 2018, at SR3 (showing how attorney general Jeff Sessions heavily restricted the Justice Department's power to address police abuses); Gross, *supra* note 176, at 163–64 (suggesting that legislators are too deferential to police officers, and that police departments are ill suited to address police misconduct). Legislators have gone in the wrong direction, taking steps to increase protections for police officers. *See id.* at 164.

CONCLUSION

Congress once passed legislation aimed at protecting citizens from police violence, especially black citizens who faced repeated and continuous injustices by the very police officers charged with protecting them. The true benefits of this legislation were short lived however, and victims of police abuse are subsequently left helpless. News outlets and social media platforms have helped shed light on these once unbelievable injustices, yet the Supreme Court relies on the same antiquated excuses, allowing these crimes to persist with impunity. Police departments and their advocates focus on the legitimate need for officers to use force in defending the government's interests, which undeniably exist. But when the legislation became effective, the Court was already supposed to balance legitimate government interests with individual citizens' interest in their own constitutional rights.

Even so, the Supreme Court's stated policy goals for qualified immunity in the policing context have largely gone unmet. Considering these repeated failures, the fact that being a police officer is not as dangerous as commonly believed, and that unarmed civilians continue being killed by police in unreasonable circumstances, it is past time for the Court to amend its jurisprudence of qualified immunity and police use of force. In its current form, an irrational fear of a black man can be weaponized into an excuse for murdering an innocent citizen. It was the Court that created this confusing and messy line of case law, and it is the Court's responsibility to finally clean up after itself.

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