



LAWYERS' COMMITTEE FOR  
**CIVIL RIGHTS**  
U N D E R L A W

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**TESTIMONY OF ARTHUR AGO  
DIRECTOR, CRIMINAL JUSTICE PROJECT  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

**U.S. HOUSE JUDICIARY COMMITTEE  
Subcommittee on the Constitution, Civil Rights and Civil Liberties**

**HEARING ON  
"Examining Civil Rights Litigation Reform, Part One:  
Qualified Immunity"**

**March 31, 2022**

Good Morning, Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and members of this Subcommittee. My name is Arthur Ago, and I am the Director of the Criminal Justice Project at the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today about qualified immunity and how it both undermines civil rights and is a barrier to police accountability. Congress must abolish the doctrine of qualified immunity if victims of police misconduct are to have a meaningful opportunity to pursue justice under the law, particularly Black people and other people of color, who disproportionately bear the brunt of this misconduct.

The Lawyers' Committee has long been on the front lines in the battle for equal rights. We are a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real.

I have been the Director of the Criminal Justice Project at the Lawyers' Committee for nearly three years, after working for close to two decades at the Public Defender Service for the District of Columbia representing indigent children and adults facing serious delinquency and felony criminal charges in Washington, D.C., ultimately serving as its Trial Chief. The Lawyers' Committee combats mass incarceration and strives for equal justice by confronting the ways in which racism infects every stage of the criminal justice system. We challenge laws and policies that criminalize poverty, promote access to justice and representation of indigent people charged with crimes, and advance police accountability and structural reform of police departments. As part of this work, we help educate the public, as well as Congress, about various aspects of policing reform, including the abolishment of the doctrine of qualified immunity.

Police accountability is essential to meaningful police reform. Without accountability, policing culture will not change. And it must change. For many years, police officers have operated within a system that discriminates against Black people and other people of color, over-criminalizes low-level property and drug crimes, and fails to protect communities of color. Police encounters with Black people disproportionately result in civil rights violations, including far too many tragic encounters that end in the

killings of men, women, and children of color. Indeed, Black Americans are three times more likely than white Americans to be killed by the police.<sup>1</sup>

In the wake of the killings of George Floyd, Breonna Taylor, and far too many other people of color, Americans demanded change to this flawed system of police accountability. Congress can, and must, play a central role in promoting this kind of transformative change by abolishing the doctrine of qualified immunity. We commend the U.S. House of Representatives for twice passing the George Floyd Justice in Policing Act, which would abolish qualified immunity for police officers, among other common-sense reforms.<sup>2</sup>

But since the George Floyd Justice in Policing Act has yet to be enacted, the judicially-created doctrine of qualified immunity continues to shield police officers who violate the law from facing legal accountability. The lack of any such accountability not only amounts to an impenetrable structural barrier for victims of police brutality seeking justice, but it also sends a resounding message to police officers that they are empowered to act without consequence. The system cannot continue to function under these principles.

Today, I would like to provide you with a short history of the judge-made doctrine of qualified immunity, explain how the doctrine prevents victims of police misconduct from obtaining justice, underscore the devastating impact of police misconduct on people of color, describe real-life examples of how qualified immunity operates to prevent victims of police misconduct from seeking justice, and explain why it is imperative that Congress abolish qualified immunity in order to better serve victims of police misconduct, their broader communities, and the police themselves. Though qualified immunity applies to a variety of public officials, my focus today will be on the applicability of qualified immunity to law enforcement.

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<sup>1</sup> Gabriel L. Schwartz & Jaquelyn L. Jahn, *Mapping fatal police violence across U.S. metropolitan areas: Overall rates and racial/ethnic inequities, 2013-2017*, PLoS ONE 15(6) (2020) (finding, based on an analysis of 5,494 police-related deaths between 2013 and 2017, that Black Americans were on average 3.23 times as likely as white Americans to be killed during a police encounter), available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686>.

<sup>2</sup> George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congr. (2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congr. (2021).

## I. QUALIFIED IMMUNITY UNDERMINES CIVIL RIGHTS

Qualified immunity, as applied to police officers, is a fundamentally flawed doctrine because it operates as an ironclad shield to accountability for those officers who commit acts of misconduct, brutality, and even murder. What's more, qualified immunity is not, and has never been, enshrined in statute. It is a judge-made doctrine that does not operate with the imprimatur of a democratically enacted law and that, in practice, endangers the very communities America's police forces are sworn to protect.

In the simplest of terms, qualified immunity undermines civil rights in the United States. In the wake of emancipation and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, Congress enacted the Civil Rights Act of 1871. The Act, which includes the well-known Section 1983,<sup>3</sup> was the direct result of a congressional desire to "secure to all citizens the rights so guaranteed [sic] to them" by the U.S. Constitution.<sup>4</sup> It was a direct response to a persistent refusal by large numbers of Americans, under color of law, to recognize, respect, and protect the constitutional rights of formerly enslaved people.<sup>5</sup> What the Act emphatically did not contain—and what Congress has never legislated—is a way to immunize those who violate others' civil rights under color of law.

Qualified immunity is exactly that: a litigation defense that enables police officers to have an otherwise meritorious civil rights case dismissed even when no one disputes the officers' conduct. It was the Supreme Court of the United States and not Congress, a century after 1871, that ruled that victims of civil rights abuses by police officers may only seek redress in court when a particular right in question was "clearly established" at the time of the violation.<sup>6</sup>

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<sup>3</sup> 42 U.S.C. § 1983 provides, 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 ..."

<sup>4</sup> *Cong. Globe App'x*, 42nd Cong., 1st Sess., at 210 (Apr. 11, 1871) (statement of Sen. John Sherman).

<sup>5</sup> See *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) ("Restoration of civil authority ... was a major concern," particularly after "increasing numbers of attacks, often fatal, against blacks and Union sympathizers ..."); *Stern v. U.S. Gypsum*, 547 F.2d 1329, 1334 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (Civil Rights Act of 1871 "was enacted by a Congress acutely aware of the massive and frequently violent resistance in the southern states to federal Reconstruction after the Civil War").

<sup>6</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted).

In other words, under federal law, qualified immunity requires plaintiffs seeking to hold police officers accountable for misconduct to overcome a daunting hurdle. They must not only show that the officer accused of misconduct violated a constitutional right, but also that the right had been “clearly established” in a previous ruling.<sup>7</sup> The doctrine was created in 1967<sup>8</sup> and refined to its current form in 1982<sup>9</sup> by judges, not Congress, in an attempt by the Supreme Court to balance “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>10</sup>

Over time, however, the Supreme Court has increasingly struck that balance in favor of shielding officers, so much so that now, the doctrine is not just a shield against “harassment, distraction, and liability” for reasonable conduct, but a protection against almost any accountability whatsoever. If a police officer is sued for damages by a victim of police misconduct, the police officer can move to dismiss the case solely on qualified immunity grounds, and does not have to respond to any of the victim’s substantive allegations. Such ironclad protections for police officers mean that officers rarely face legal repercussions for their misconduct, and are empowered to continue acting with impunity. This, of course, sends a message to other officers that they, too, can engage in similar misconduct without the threat of any legal liability. As Justice Sotomayor eloquently wrote in her dissenting opinion in *Kisela v. Hughes*, the application of qualified immunity in cases where there is clear evidence of the use of excessive force by police officers “sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished .... [T]here is nothing right or just under the law about this.”<sup>11</sup>

As the history of qualified immunity has shown us, it is up to Congress to abolish this inherently unjust judge-made doctrine as it applies to law enforcement officers. Though many states have attempted to abolish the doctrine, the outsized influence of

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<sup>7</sup> See, e.g., *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011).

<sup>8</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>9</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>10</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted).

<sup>11</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

police officers and police unions have thwarted nearly every attempt.<sup>12</sup> Between mid-2019 and late 2021, at least 35 state bills attempting to abolish qualified immunity for police officers failed.<sup>13</sup> Even though a handful of states have reformed qualified immunity, those changes are clearly limited to those states, and limited to claims brought only under state law.<sup>14</sup> And ultimately any reliance on the states to abolish and abrogate qualified immunity thwarts the intent of Civil Rights Act of 1871, which was to vindicate the rights of all Americans in all states, equally: a victim of police abuse in Greenwich, CT, where qualified immunity has been reformed, should have no more of an ability to prosecute a civil rights lawsuit than a person 15 minutes away in White Plains, NY, a state that has not abolished qualified immunity. In many cases, the failures to abolish qualified immunity can be attributed to focused lobbying efforts by police officers and unions, who argue that eliminating qualified immunity will make it difficult for police departments to recruit, hire, and retain qualified officers. As I will explain in a moment, these kinds of arguments are unfounded and ignore the benefits to police officers of abolishing qualified immunity.

Recent history also shows that qualified immunity reform is exceedingly unlikely to occur in the federal courts. The Supreme Court has shown over the years an increasing unwillingness to review cases in which qualified immunity was successfully invoked by police defendants, including cases decided as recently as this term. Two unanimous Supreme Court decisions on October 18, 2021, illustrate how the Court continues to broadly interpret qualified immunity in a manner that limits suits against police officers.

In *Rivas-Villegas v. Cortesluna*, police in Union City, California, responded to a domestic violence call.<sup>15</sup> The person suspected of domestic violence came out of the house and was shot twice with beanbag rounds by the police when he put his hands down after being told not to do so. During the course of his arrest, a police officer placed and held his knee on the man's back while the man was lying on the ground. The Supreme Court

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<sup>12</sup> Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill*, THE WASHINGTON POST (Oct. 7, 2021), available at [https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a\\_story.html](https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html).

<sup>13</sup> *Id.*

<sup>14</sup> Emma Tucker, "States tackling 'qualified immunity' for police as Congress squabbles over the issue," CNN (Apr. 23, 2021), available at <https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html>

<sup>15</sup> 142 S. Ct. 4 (2021).

unanimously held that the officer was protected from liability by qualified immunity, stressing the absence of a case with sufficiently similar facts to establish that a “clearly established” right had been violated.

On the same day, the Court reached a similar conclusion in *City of Tahlequah v. Bond*.<sup>16</sup> That case arose in a domestic violence situation where police in Tahlequah, Oklahoma, were called by a woman to remove her ex-husband from her home. The police confronted the ex-husband in a garage. While talking to the police, the ex-husband picked up a hammer and held it in a threatening manner. When the ex-husband disobeyed the police order to drop the hammer, police shot and killed him. Like in *Rivas-Villegas*, the Supreme Court ruled that qualified immunity applied due to the absence of a case with sufficiently similar facts.

It is impossible to ascertain whether the police violated civil rights in these two cases because of the fundamental flaw of qualified immunity. In both cases, the U.S. Supreme Court, based on its own judge-made doctrine, prevented the plaintiffs from even having their day in court, thereby preventing a jury from determining whether the plaintiffs’ civil rights were violated.

In light of the disheartening pattern of the U.S. Supreme Court ruling against civil rights plaintiffs under the shield of qualified immunity—a shield that the Court itself created—it is clear that the task of abolishing the doctrine must be addressed by Congress. The Lawyers’ Committee urges Congress to act expeditiously and decisively to abolish qualified immunity protections for law enforcement officers and to take an important step towards meaningful police reform.

## **II. QUALIFIED IMMUNITY PREVENTS VICTIMS OF POLICE MISCONDUCT FROM OBTAINING JUSTICE**

The fundamental reason that qualified immunity must be abolished is that the doctrine prevents victims of civil rights abuses from being made whole. As a preliminary matter, victims of police misconduct are unable to pursue accountability through internal police disciplinary systems or through the criminal justice system. Chicago is a prime example of the failure of police systems to achieve accountability. The U.S. Department

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<sup>16</sup> 142 S. Ct. 9 (2021).

of Justice found that between 2004 and 2017, the Chicago Police Department’s internal disciplinary system was “broken” and “seldom h[eld] officers accountable for misconduct.”<sup>17</sup> During that period, DOJ further found that “without even conducting a disciplinary investigation in over half of those cases, [Chicago] recommended discipline in fewer than 4% of those cases it did examine.”<sup>18</sup> Over a five-year period, the Chicago Police Department investigated 409 police shootings and concluded that just two of the shootings were unjustified.<sup>19</sup> Additionally, criminal prosecution of police officers who violate the law is exceedingly rare. Since 2005, the police across the country have fatally shot approximately 15,000 people, but only 110—0.73%—resulted in homicide charges against the police officers responsible. Of those 110, only 42, comprising 0.28%, resulted in convictions.<sup>20</sup> This leaves victims of police misconduct with only one avenue for accountability: civil court, where they encounter the exceedingly high hurdle of qualified immunity.

Under the judge-made doctrine of qualified immunity, federal courts apply a two-part test: first, whether the police officer violated a federal statutory or constitutional right, and second, whether the unlawfulness of their conduct was “clearly established at the time.”<sup>21</sup> When analyzing these two prongs, judges are tasked with balancing “the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>22</sup> Over time, however, federal courts—including and especially the Supreme Court—have watered down this balancing test in a way that better protects officers from liability and redefines the limits of the doctrine in a manner that runs counter to the underlying purpose of civil rights laws. Today, qualified immunity protects officers from almost any accountability whatsoever. In the words of the Supreme

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<sup>17</sup> U.S. Dep’t of Justice, Investigation of the Chicago Police Department (Jan. 13, 2017), *available at* <https://www.justice.gov/opa/file/925846/download>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Amelia Thomson-DeVeaux, Nathaniel Rakich, and Likhitha Butchireddygar, *Why It’s So Rare For Police Officers To Face Legal Consequences*, FiveThirtyEight (June 2, 2020), *available at* <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

<sup>21</sup> *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

<sup>22</sup> *Pearson*, 555 U.S. at 231.



Court, qualified immunity protects “all [police officers] but the plainly incompetent or those who knowingly violate the law.”<sup>23</sup>

As an initial observation, the ability of a police misconduct victim to sue only officers who are plainly incompetent or knowingly violate the law contradicts both the spirit and letter of civil rights laws. Take for example a person’s civil rights claim that a police officer falsely arrested her without probable cause, seemingly exposing that officer to liability for violating her civil rights.<sup>24</sup> To be clear, that officer retains the defense at trial that the arrest was, in fact, reasonable because the officer had probable cause. The essential problem is that courts have interjected themselves into the calculus before there even is a trial—before the evidence can be evaluated by a jury, including whether the parties are credible in their claims—and ask whether the officer was plainly incompetent or knowingly violated the law. In the end, the question of whether the officer’s arrest was reasonable and based on probable cause, which is what the law requires, is never even considered let alone answered, thanks to the doctrine of qualified immunity. The final result is that police officers are never forced to face their accusers in court and thus never held accountable for civil rights violations such as this one.

This lack of accountability is rooted in two fundamental problems that are baked into the qualified immunity test itself. First, there is a fatal flaw in the second prong of the qualified immunity test, which requires that a right be “clearly established” in order for a law enforcement officer to be subject to liability for violating it. And second, there is a fatal flaw in how the current two-prong qualified immunity test is applied.

**A. Plaintiffs Are Unable to Pass the “Clearly Established” Second Prong of the Qualified Immunity Test Because It Requires Too Much Specificity.**

The second prong of the Supreme Court’s qualified immunity test requires a court to determine whether a right “was clearly established at the time an action occurred” before permitting a lawsuit to proceed.<sup>25</sup> Although the Supreme Court held that the

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<sup>23</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>24</sup> *See, e.g., Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) (“[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.”).

<sup>25</sup> *Harlow*, 457 U.S. at 818.

second prong “does not require a case directly on point for a right to be clearly established,”<sup>26</sup> it has also directed “clearly established law must be ‘particularized’ to the facts of the case.”<sup>27</sup> Despite repeated court precedent that cases with *similar* facts should define what is “clearly established” law, courts, including the Supreme Court, have demanded much more *specificity*. One context in which this has become increasingly clear is in cases related to a police officer’s use of excessive force. The Supreme Court has repeatedly recognized that “specificity is especially important in the Fourth Amendment context, where ... it is sometimes difficult for an officer to determine how the relevant legal doctrine, here, excessive force, will apply to the factual situation the officer confronts.”<sup>28</sup> This trend toward specificity has transformed qualified immunity into a doctrine of protection against almost any accountability whatsoever.

Thus, to avoid dismissal, a civil rights plaintiff is left to identify a precedent—published by the Supreme Court or a federal Circuit Court of Appeals governing the jurisdiction—which includes facts or circumstances that are very close to, if not virtually identical with, those in the plaintiff’s case. In practice, a court in almost any case will be able to distinguish the facts in a manner that creates a difference between the case before the court and the precedent put forth by a civil rights plaintiff. Therefore, courts too often rule that plaintiffs have not demonstrated that their rights were “clearly established.” This has led to absurd results.

For example, in 2018 in *Baxter v. Bracey*, the Sixth Circuit found an officer had qualified immunity after he instructed a police dog to attack a burglary suspect who was sitting on the ground in a residential basement with his hands up, in surrender.<sup>29</sup> The victim pointed to past Sixth Circuit precedent that held an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was lying on the ground with his hands at his sides.<sup>30</sup> Yet, the Sixth Circuit concluded that the plaintiff failed to point to “any case law

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<sup>26</sup> *Kisela*, 138 S. Ct. at 1152 (quoting *White*, 137 S. Ct. at 551).

<sup>27</sup> *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>28</sup> *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)) (internal quotations omitted).

<sup>29</sup> 751 F. App’x 869, 872 (2018); *cert. denied*, 140 S. Ct. 1862, 1865 (2020) (“I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.”) (Thomas, J. dissenting from denial of certiorari).

<sup>30</sup> *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013).

suggesting that [a suspect] raising his hands, on its own” was enough to put the officer in the case on notice that his actions were unlawful.<sup>31</sup> This is but one of many troubling examples of how generality in the qualified immunity inquiry is actually not generality, but specificity. Making the issue worse, the Supreme Court has refused to provide any further guidance on what level of factual similarity is needed,<sup>32</sup> resulting in courts demanding a higher level than what is attainable by plaintiffs. As a result, this prong has transformed qualified immunity into an absolute shield against officer accountability.

The “clearly established” prong also creates the danger of inconsistent standards of justice across the country. Courts have ruled that a clearly established right must be one recognized by the Supreme Court, the U.S. Court of Appeals with jurisdiction over where the violation occurred, or the state supreme court of that jurisdiction.<sup>33</sup> This means that a clearly established right in the District of Columbia might not be one recognized across the Potomac River in Arlington, VA—something that Congress in 1871 surely did not intend.

### **B. Courts Do Not Have to Consider the First Prong of the Qualified Immunity Test, Making Future Accountability Unachievable.**

The second problem with the Supreme Court’s two-prong test is that it no longer requires both of its two prongs, further eroding the ability of victims to hold law enforcement accountable. In 2001, the Supreme Court was clear that a trial judge must first consider whether the victim’s constitutional rights were violated, followed by a consideration of whether those rights were clearly established at the time.<sup>34</sup> By 2009, though, the Supreme Court in *Pearson v. Callahan*<sup>35</sup> discarded the strict order of the two-

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<sup>31</sup> Add pin cite.

<sup>32</sup> See *United States v. Lanier*, 520 U.S. 259, 271 (1997) (“In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question....” (internal citations omitted)).

<sup>33</sup> See, e.g., *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998), *aff’d*, 526 U.S. 603 (1999) (clarifying that the law is clearly established only when it has been decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the forum state).

<sup>34</sup> See *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (“[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level ...”).

<sup>35</sup> 555 U.S. 223 (2009).

prong test, thereby expanding this shield against officer accountability. *Pearson* held that courts may consider the second question in the qualified immunity analysis before the first. In other words, judges may now hold that a right was not clearly established, without ever having to address whether a constitutional right has even been violated. This prevents further developments in the law because courts can circumvent the merits of the suit by finding that no clear right existed. In turn, there would be no precedent created that establishes the right for the future, meaning defendant-law enforcement officers could continue their pattern of misconduct while continuing to argue that the right has not been clearly established.<sup>36</sup>

By not having to consider the first prong, courts never have to determine whether specific facts, if proven, amount to civil rights violations. In 2001, victims of police misconduct might not have been able to successfully sue because the facts underlying their claims had not yet been clearly established civil rights violations. But at least courts were forced to consider the first prong of qualified immunity in examining these cases: whether there was a violation of constitutional rights. To this extent, based on specific case facts, courts could clearly establish a constitutional violation so that future plaintiffs who experienced similar facts would be able to prosecute their lawsuits. After 2009, though, and the Supreme Court's ruling that the first prong of the qualified immunity test did not actually have to be considered first, constitutional rights are prone to be frozen in time. The country is now faced with a Catch-22: how can plaintiffs demonstrate that a right is clearly established when courts can refuse to clearly establish them?

These limitations are compounded by the real-world impact of qualified immunity. Specifically, the collateral order doctrine, when applied to qualified immunity cases, effectively gives police officers at least three chances to have lawsuits against them thrown out at the appellate level. First, if a district court denies qualified immunity at the motion-to-dismiss stage, the officer can file an interlocutory appeal. Second, if the first appeal is unsuccessful and the district court denies qualified immunity at the summary judgment stage, the officer can then appeal a second time. And third, if the second appeal is denied, the case goes to trial and the officer may, yet again, appeal. The practical result is a Hobson's choice for civil rights plaintiffs: either litigate the question of qualified immunity across years of time-consuming and expensive litigation that often ends in a

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<sup>36</sup> Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 5 (2015).

result favorable to the officer, or do not bother to seek justice at all. In a 2011 study of more than 40 attorneys or law firms with multiple civil rights cases from 2006 through 2011, “[n]early every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense played a substantial role at the screening stage.”<sup>37</sup> Victims of police misconduct can be now effectively shut out of court—something that Congress in 1871 never intended, and something that this Congress should find deeply troubling.

### III. QUALIFIED IMMUNITY DISPROPORTIONATELY PREVENTS BLACK PEOPLE AND OTHER PEOPLE OF COLOR FROM SEEKING REDRESS

The issues inherent in the qualified immunity doctrine make it unworkable and nearly impossible for civil rights victims to be made whole. And this hurdle disproportionately affects people of color—particularly Black Americans. People of color experience fear of police violence at far greater rates than white people. One recent study found that among a nationwide sample, approximately 45% of the Black respondents preferred to be robbed or burglarized than to have unprovoked contact with officers—compared to just 18% of white respondents feeling that way.<sup>38</sup> This fear is rooted in reality: empirical evidence shows that Black Americans suffer the most from injustice by the police. Although Black people make up only about 13% of the total U.S. population, Black Americans account for 26% of those killed by police and about 37% of those killed while unarmed.<sup>39</sup> In short, Black people killed by police are more than twice as likely to be unarmed as white people.<sup>40</sup> Indeed, for young men, police violence is a leading cause of death that is disproportionately borne by young Black men.<sup>41</sup> Approximately 1 in 1,000

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<sup>37</sup> Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

<sup>38</sup> Justin T. Pickett, Amanda Graham, Francis T. Cullen, *The American Racial Divide in Fear of the Police*, CRIMINOLOGY (forthcoming 2022), available at <https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12298>.

<sup>39</sup> German Lopez, *There are huge racial disparities in how US police use force*, VOX (Nov. 14, 2018), available at <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities>.

<sup>40</sup> Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird’s Eye View of Civilians Killed by Police in 2015*, 16 Criminology and Public Policy 309, 309 (Feb. 2017).

<sup>41</sup> See Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*, 116 Proceedings of the National Academy of Sciences 16793, 16793–94, Aug. 2019, available at [https://www.pnas.org/content/116/34/16793?source=post\\_page-----1a2ce329f8e0-----](https://www.pnas.org/content/116/34/16793?source=post_page-----1a2ce329f8e0-----).

Black men are killed by police—a rate 2.5 times higher than for white men.<sup>42</sup> And police use force in their interactions with Black people 3.6 times more often than with white people, regardless of whether death is a result.<sup>43</sup>

In addition to use of force, police disproportionately enforce laws against Black people across the country. For example, in San Francisco in the second half of 2018, Black people amounted to 5 percent of the city’s population but represented 26 percent of all police stops.<sup>44</sup> In Washington, D.C., while there is little difference in rates of drug use, there are significant disparities between white and Black people in drug arrests: almost 9 out of 10 arrests for drug possession are of Black people.<sup>45</sup> And for many years, the New York Police Department engaged in widespread racial profiling of Black and Latinx residents as reflected in its stop and frisk policies.<sup>46</sup> This troubling pattern of misconduct persists: a recent report found that NYPD’s Internal Affairs Bureau investigated 2,947 civilian complaints related to race-and-bias-based policing from 2014-2019—and did not substantiate a single one.<sup>47</sup> Across the country, communities of color are intentionally targeted and disproportionately charged with violations of law.<sup>48</sup>

The devastating impact of police abuse on communities of color, along with the high burdens to overcome a qualified immunity defense, has created a crisis of legitimacy for law enforcement, thereby undermining public safety in the very communities police aim to protect. When communities of color suffer from police injustice, and federal courts

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<sup>42</sup> *Id.*

<sup>43</sup> Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force*, at 15 (July 2016), available at [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf).

<sup>44</sup> Darwin Bond Graham, *Black people in California are stopped far more often by police, major study proves*, The Guardian (Jan 3, 2020), available at <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force>.

<sup>45</sup> Washington Lawyers’ Committee for Civil Rights and Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011*, 2-3 (July 2013), available at [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf).

<sup>46</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013) (finding that “NYPD implements its policies regarding stop and frisk in a manner that intentionally discriminates based on race” and that “the use of race is sufficiently integral to the policy of targeting ‘the right people’ that the policy depends on express racial classifications.”). See also *Davis v. New York*, 10-cv-0699-AT (S.D.N.Y.) (challenging NYPD’s racially discriminatory and unconstitutional trespass-enforcement practices in public housing); *Ligon v. City of New York*, 12-cv-2274 (S.D.N.Y.) (challenging NYPD’s discriminatory stops and arrests in private buildings it patrolled).

<sup>47</sup> Tenth Report of Independent Monitor, *Davis et al. v. City of New York, et al.*, 10-cv-0699-AT, Dkt. No. 496, at 73.

<sup>48</sup> See, e.g., U.S. Dep’t of Justice, *Investigation of the Ferguson Police Department*, 62 (March 4, 2015); Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 Stan. L. & Pol’y Rev. 257 (2009).

use qualified immunity to shield officers from liability, those communities begin to view the federal courts as illegitimate. It sends the wrong message to people of color that police officers are above the law. This, in turn, denigrates people of color, and undermines their confidence in our institutions. As a result, the federal courts are transformed from havens for civil rights abuse victims to places where state-sanctioned violence is not remedied.

#### IV. REAL-LIFE EXAMPLES OF QUALIFIED IMMUNITY ESTABLISH HOW POLICE AVOID ACCOUNTABILITY

There are many tragic examples how the “clearly established” standard has enabled officer wrongdoing without legal remedy. These are just four examples of the absurd results that qualified immunity has yielded.

In the first example, police officers were called to a home because a man was suicidal, was holding a gasoline can, and was threatening to set himself on fire.<sup>49</sup> Despite one officer shouting out, “[i]f we tase him, he is going to light on fire,” the police nevertheless used their tasers after the man doused himself with gasoline, causing his death. The man’s widow sued the police officers. But the U.S. Court of Appeals for the Fifth Circuit ruled that the case should have been dismissed on qualified immunity grounds because the officers’ use of a taser, which they correctly predicted would result in a suicidal man covered in gasoline being set on fire, was reasonable under the specific circumstances of the case.<sup>50</sup> In short, the court determined without trial that the widow failed to meet the first prong of the qualified immunity test, which is that the police violated her deceased husband’s constitutional rights. The man’s widow, who had called the police so that they could assist her husband, was thus prevented from holding the police accountable after the police caused the very thing that she wanted them to prevent—her husband’s death.

In another case, police officers pursued a criminal suspect into an unrelated family’s backyard where one adult and six minor children happened to be playing.<sup>51</sup> An officer entered the backyard area and demanded that they all get on the ground, and everyone including the minor children complied. While the family was laying down as

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<sup>49</sup> *Ramirez v. Guadarrama*, 3 F.4th 129, 132 (5th Cir. 2021).

<sup>50</sup> *Id.* at 137.

<sup>51</sup> *Corbitt v. Vickers*, 929 F.3d 1304, 1318 (11th Cir. 2019).

demanded by the officer, the family's pet dog approached the family, but did not show any aggression or pose a threat to the officers. One of the officers started firing shots at the dog. He repeatedly missed, but struck a ten-year-old who was still lying on the ground nearby, resulting in the child suffering severe pain and requiring ongoing medical care. The boy's mother sued the officer who shot her son, but the case was dismissed on qualified immunity grounds after review by the U.S. Court of Appeals for the Eleventh Circuit. The court "conclude[d] that [the mother's] argument cannot overcome [the police officer's] claim of qualified immunity. No case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person."<sup>52</sup> The court, in this way, ruled that the plaintiff failed to pass the second prong of the qualified immunity test, finding that the boy's rights were not clearly established with specificity at the time of the shooting.

In yet another case, police investigating an idling car found a man asleep at the wheel.<sup>53</sup> A police officer, who never identified himself, knocked on the window of the car, causing the man to start to drive away. The police officer dove into the car and, as the man was driving, used his taser on the man, used the taser to beat the man, and eventually shot the man five times, killing him. The man's mother's lawsuit against the police officer was dismissed based on qualified immunity, with the U.S. Court of Appeals for the Sixth Circuit ultimately affirming the trial court's dismissal of the case. The Sixth Circuit held that the plaintiff failed to show sufficient specificity under the second prong of the qualified immunity test: "[Plaintiff] has pointed to no cases in this circuit involving an officer being driven in a suspect's car, much less a case that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness."<sup>54</sup>

Finally, the police were called to a hospital to help control a patient.<sup>55</sup> The patient was ill for several days before being admitted with pneumonia. The patient's blood oxygen levels dropped drastically and he became disoriented, refused treatment, ultimately resulting in his belief that he was Superman. The police, in attempting to

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<sup>52</sup> *Id.* at 1318.

<sup>53</sup> *Stewart v. City of Euclid*, 970 F.3d 667 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2690 (2021).

<sup>54</sup> *Id.* at 675.

<sup>55</sup> *Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016).



control the patient, used their tasers on him, struggled with him, and held him down so that a nurse could inject him with a sedative. After the injection, though, the patient went into cardiac arrest and subsequently died. The medical examiner determined that “exertion during the struggle with the officers exacerbated his underlying pneumonia.”<sup>56</sup> The man’s estate sued the police officers under a theory that they used excessive force. The U.S. Court of Appeals for the Tenth Circuit ruled that the case should have been dismissed on qualified immunity grounds, finding that “[u]nder [the] rules [of qualified immunity], the Estate cannot show that the officers violated clearly established law.”<sup>57</sup> Once again, a plaintiff was prevented from having a case tried because a court determined that there was not sufficiently specific precedent to meet the second prong of the qualified immunity test.

Each of these cases illustrate how qualified immunity has been exploited by police officers to prevent plaintiffs from even having a jury hear their cases. The cases also illustrate for Congress how the doctrine permits courts to inject themselves into a case in ways that the Civil Rights Act of 1871 and Section 1983 never intended. It is time to abolish this defense.

## **V. ABOLISHING QUALIFIED IMMUNITY WILL ALSO BENEFIT THE POLICE**

While there are many ways in which qualified immunity harms victims and the broader community, abolishing it would also better serve police officers themselves. Abolishing qualified immunity would allow victims whose rights have been violated to have their day in court, and to be heard and receive a chance at justice. Abolishing qualified immunity would also send a broader signal to the community that everyone has access to justice and that police abuse will not be tolerated by society. But perhaps least understood, abolishing qualified immunity would help police officers in two ways: by providing clearer guidelines on what is permitted and what is not, resulting in clearer rules for the police officers and leading to better policing overall; and by increasing public trust in the police.

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<sup>56</sup> *Id.* at 876 (internal quotations omitted).

<sup>57</sup> *Id.* at 877.

Recent years have shown an increased public mistrust of law enforcement, which serves to make communities less safe while also undermining police officer morale. It is clear that public confidence in policing has declined over the past decade.<sup>58</sup> In 2020, public confidence in police fell below 50 percent for the first time on record.<sup>59</sup> Police officers see the effects of this erosion in public trust: 86% of police officers surveyed themselves acknowledged that high-profile incidents where police had fatal encounters made it harder for them to do their jobs.<sup>60</sup> The perception that police officers are above the law also clearly lowers public confidence in police, which makes the job of policing more difficult. Abolishing qualified immunity would send a strong message to the community that police misconduct will not be tolerated, a strong message to victims that they can and will be heard in court, and a strong message to police departments and state and local governments that bad actors have no place in law enforcement. And individual police officers would have clearer guidelines of what is and is not appropriate behavior in law enforcement.

Qualified immunity, in addition to providing no recourse for victims of police misconduct, fails to provide sufficient guidance to the police themselves. Despite repeated court precedent that cases with similar facts should define what is “clearly established,” courts, including the Supreme Court, have demanded much more specificity, further transforming qualified immunity to a doctrine of protection against almost any accountability whatsoever. Making the issue worse is the fact the Supreme Court has refused to define what factual similarity means.<sup>61</sup> Therefore courts—not to mention the police—are forced to adjust their qualified immunity analysis in an ad hoc manner, further shielding police officers from accountability but also leaving other officers uncertain of what is permissible conduct. Courts have substantial disagreements over which authoritative sources may be used to show “clearly established” law because

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<sup>58</sup> Megan Brenan, *Americans’ Confidence in Major U.S. Institutions Dips*, GALLUP (Jul. 14, 2021), available at <https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx>.

<sup>59</sup> James Craven, Jay Schweikert, and Clark Neily, *How Qualified Immunity Hurts Law Enforcement*, CATO (Feb. 15, 2022), available at <https://www.cato.org/study/how-qualified-immunity-hurts-law-enforcement>

<sup>60</sup> *Id.*

<sup>61</sup> See *United States v. Lanier*, 520 U.S. 259, 271 (1997) (“In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question....” (internal citations omitted)).

the Supreme Court has failed to articulate a single approach, resulting in lower courts employing conflicting standards.<sup>62</sup> By abolishing qualified immunity, Congress would eliminate this uncertainty, for both courts around the country as well as for the police.

The concern that police officers and police unions often express—that eliminating qualified immunity would make it harder for police departments to recruit and that police officers would be hesitant to do their jobs because they are exposed to financial ruin—is simply unrealized. State and local law nearly always ensures that police officers are not required to pay for settlements or judgements against them.<sup>63</sup> In nearly 10,000 cases against law enforcement agencies where the victim received payments, individual law enforcement officers contributed to settlements in less than one half of one percent of the cases, and paid approximately 00.02% percent of the total awards to plaintiffs.<sup>64</sup> This is because police officers and other government officials are almost always indemnified by government employers. Abolishing qualified immunity thus comes without risk of financial ruin for police officers, but increases guidance on what is permitted police conduct, resulting in increased community trust in the police and the courts.

## VI. CONCLUSION

The time to eliminate qualified immunity is long overdue. As conservative Fifth Circuit judge Don Willett noted in a 2019 dissent, “even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence.”<sup>65</sup> Justice Clarence Thomas has also made clear his view that the courts “should reconsider... qualified immunity jurisprudence.”<sup>66</sup> Although judges like these have urged such a reconsideration, the fact remains that courts

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<sup>62</sup> See, e.g., *Hatch v. Dep't. for Children, Youth, & Their Families*, 274 F.3d 12, 23 (1st Cir. 2001) (explaining that courts must look not only to Supreme Court precedent but to all available case law in order to determine the contours of a particular right). But see *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999) (clarifying that the law is clearly established only when it has been decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the forum state).

<sup>63</sup> Joanna C. Schwartz, *The Case Against Qualified Immunity*, 1797, May, 2018. See also NYC Comptroller, Fiscal Year 2019 Annual Claims Report (2020) at 18-20, available at <https://comptroller.nyc.gov/wp-content/uploads/documents/Claims-Report-FY-2019.pdf> (finding that NYPD claims accounted for \$220.1 million (36% of total) of New York City tort claim payouts).

<sup>64</sup> See Schwartz, 93 Notre Dame L. Rev. at 1805.

<sup>65</sup> *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., dissenting).

<sup>66</sup> *Ziglar v. Abbasi*, 137 S. Ct. at 1872 (Thomas, J., concurring)

around the country have not followed through. It is past time for Congress to act, and for this body to return the Civil Rights Act of 1871 to its original intent: to allow redress for people whose constitutional rights were violated by those—including law enforcement—acting under color of law. As in 1871, these violations continue to be endured disproportionately by Black people and other people of color. Thoughtful legal scholars on the left and right agree that the current regime is simply not working and fails to achieve the goals that supporters of qualified immunity seek to achieve. Congress has the opportunity to make this important change—a change that would result in increased police accountability. I urge you to seize this opportunity. Thank you for asking me to appear before you today to share the views of the Lawyers’ Committee for Civil Rights Under Law, and I look forward to your questions.