RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to enact legislation to eliminate or substantially curtail the defense of qualified immunity in civil actions brought against law enforcement officers to redress deprivations of rights, privileges, and immunities secured by the Constitution and laws of the United States, including federal, state, local, tribal, and territorial laws.
Recent incidents in which unarmed civilians, many African-American, have been killed by law enforcement officers have renewed and highlighted concerns about the legal system’s effectiveness in deterring and remedying such abuses. A solution to the problem requires many different measures, but a truly effective system of civil remedies for those who suffer abuses at the hands of the government is one essential part. This resolution, which calls on legislatures to curtail the doctrine of “qualified immunity,” reflects the increasing recognition that current civil remedies for abuses by governmental actors, especially law enforcement officers, are insufficient.

Qualified immunity is a court-developed legal doctrine that prevents those who have suffered injuries to their constitutional rights from recovering civil damages against individual government officials and employees unless those rights were “clearly established” in law at the time the injury took place. Qualified immunity has been defended as necessary to ensure that individual government employees will not be subjected to potentially significant personal civil liability merely for making honest mistakes or for failing to anticipate doctrinal developments in constitutional law. In recent years, however, it has become clear that qualified immunity has made it impossible for persons who have suffered injuries to their constitutional rights to obtain any effective remedy. These deficiencies are particularly salient where individuals have suffered violations by law enforcement officers.

This report explains why qualified immunity should be eliminated or substantially curtailed. First, qualified immunity is in fact not well grounded in either history or precedent. Second, qualified immunity has made it virtually impossible for people who have suffered serious constitutional injuries to recover; it wastes scarce judicial resources; it has proven exceptionally difficult for courts to apply in a consistent manner; and it has left constitutional rights effectively unremedied in many circumstances. Third, the prospect of personal liability for individual officers is remote. The report concludes that because the Supreme Court has refused to reconsider fundamental aspects of qualified immunity, legislatures should now consider substantially curtailing the doctrine.

I. The Doctrine Of Qualified Immunity Is Not Well Grounded In History Or Precedent.

A. The Evolution of the Qualified Immunity Standard

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The Supreme Court first articulated the concepts that are now known as qualified immunity in Pierson v. Ray.\(^2\) Pierson was a lawsuit brought under 42 U.S.C. § 1983 by white and African-American members of the clergy who were arrested in Jackson, Mississippi, when they attempted to use segregated facilities at a bus terminal. The police officers argued that they should not be liable under § 1983 “if they acted in good faith.”\(^3\) The Supreme Court agreed. Stressing that “[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause,” the Court concluded that Congress had not intended to abrogate that defense when it enacted Section 1983 in 1871.\(^4\)

The Supreme Court refined these principles in the 1970s and 1980s.\(^5\) In Scheuer v. Rhodes, the Court stressed that “officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.”\(^6\) As a result, the Court held, an official who acted reasonably and in good faith would be entitled to qualified immunity from suit.\(^7\)

The Court refashioned the qualified immunity inquiry in Harlow v. Fitzgerald.\(^8\) Harlow was intended to simplify the inquiry, but in fact, as discussed below, that decision has made qualified immunity immensely complicated. Harlow rested on the perceived need to protect officials from monetary damages if they pursued a “reasonable” course of action that was later shown to have been unconstitutional.\(^9\) Harlow emphasized “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” as well as the “danger that fear of being sued will dampen the ardor” of public officials in carrying out those duties.\(^10\) To avoid those “social costs,” the Court concluded that officials should be “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^11\) Further, the Court emphasized, that inquiry should be undertaken early in the litigation, on motion for summary judgment or at the pleading stage and without the need for discovery.\(^12\)

In subsequent cases, the courts have applied Harlow expansively, often making claims for constitutional injuries effectively impossible to pursue. In Malley v. Briggs, the Court explained that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”\(^13\) The Court has been particularly

\(^2\) 386 U.S. 547 (1967).
\(^3\) Id. at 555.
\(^4\) Id. at 556-57.
\(^6\) 416 U.S. at 246.
\(^7\) Id. at 247.
\(^8\) 457 U.S. 800 (1982).
\(^9\) Id. at 814.
\(^10\) Id.
\(^11\) Id. at 818.
\(^12\) Id. at 818-19.
\(^13\) 475 U.S. 335, 341 (1986).
insistent on upholding qualified immunity in cases involving law enforcement officers. In *Messerschmidt v. Millender*, a case in which a massive police SWAT team executed a pre-dawn raid on a home in Los Angeles with a defective warrant, the Court concluded that the officers were entitled to qualified immunity because the threshold for establishing the objective unreasonableness of the officers’ actions was “a high one, and it should be.” Similarly, in *Carroll v. Carman*, the Court held that police officers who had executed a warrantless search on a home were entitled to qualified immunity, and stressed that an official will be entitled to immunity unless “existing precedent must have placed the statutory or constitutional question beyond debate.”

### B. Qualified Immunity As The Supreme Court Has Articulated It Did Not Exist At Common Law

The Court has justified the qualified immunity doctrine in part on the ground that, when Section 1983 was enacted in 1871, government officials were already entitled to a form of immunity from damages liability for their official acts. But scholarship has persuasively established that, at common law, officials (other than those performing certain functions, such as judges and prosecutors) did not have anything like qualified immunity. Indeed, in most circumstances, officers who violated legal and constitutional rights were strictly liable—although certain torts with analogies to constitutional violations, such as false arrest, may have included a “good faith” defense similar to the defense recognized in *Pierson*.

In *Little v. Barreme*, a naval captain seized a ship for violating certain blockade orders issued by President Adams. The Court concluded that President Adams’s orders were not authorized federal law and were thus illegal. Critically for present purposes, the Court also concluded that the naval officer could be personally liable for damages, even though he had relied on the President’s order. Similarly, in *Murray v. Schooner Charming Betsy*, the Court concluded that an officer’s in seizing a vessel without probable cause did not defeat a claim for compensatory damages. It would be difficult to state a holding less consistent with the modern doctrine of qualified immunity. Justice Story’s influential treatise on agency law adopted a similar view. This was the landscape of the law of official immunity when Congress enacted Section 1983 in 1871—there was no such immunity for illegal acts taken by executive officers.

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17 See, e.g., Baude, *supra* note 15, at 58-60; Woolhandler, 34 Case W. L. Rev. at 415.
19 Id. at 178-9.
20 6 U.S. (2 Cranch) 64, 125 (1804).
21 For other early examples, see *Otis v. Bacon*, 11 U.S. (7 Cranch) 589, 595 (1813); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Sands v. Knox*, 7 U.S. (3 Cranch) 499, 501-02 (1806).
Cases decided after 1871 adopted the same rule. In *Myers v. Anderson*, the Supreme Court upheld a damages verdict against local election officials who had refused to register Black citizens and voters, in reliance on a state “grandfather” law intended to restrict the franchise to white persons. The Court summarily dismissed the defendants’ arguments for nonliability, including their good faith.

II. The Supreme Court’s Qualified Immunity Jurisprudence Has Severely Undermined The Effectiveness of Any Remedy For Unconstitutional Conduct

Qualified immunity doctrine has transformed civil rights litigation—virtually shielding from judicial review many types of unconstitutional acts by government officials. The standard has been very difficult for courts to apply, leading to unjustifiably inconsistent results, and in many cases there is effectively no other way to remedy and deter certain constitutional violations, essentially leaving some officials’ unlawful conduct entirely unchecked and unremedied by courts.

A. Qualified Immunity Makes It Virtually Impossible to Recover for Serious Constitutional Injuries

The barriers erected by the qualified immunity doctrine effectively prevent recovery for a wide range of constitutional injuries. The requirement that a right be “clearly established at the time of the alleged conduct” has led courts to require that the precedent and the conduct at issue be virtually identical in order to defeat qualified immunity, essentially foreclosing liability for unconstitutional actions that are not identical to conduct that the courts had previously declared unconstitutional. The Supreme Court has compounded the problem by encouraging lower courts to resolve cases by addressing the applicability of qualified immunity without deciding whether the underlying conduct is unconstitutional. And nowhere has this problem been more visible than in cases of police misconduct, where a situation-specific standard already often requires a fact-based inquiry into each claim.

Because of the “clearly established law” doctrine’s requirement of pre-existing precedent establishing that a particular action was unlawful, it is very difficult for those who have suffered injuries to their constitutional rights to defeat qualified immunity. All the federal courts of appeals analyze whether a right is “clearly established” by comparing the conduct alleged in a case with the conduct declared unlawful in prior precedent. As a result, there are countless decisions in which courts have applied qualified immunity to

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23 238 U.S. 368, 382-83 (1915).
24 See id. at 378: Baude, supra note 16, at 57-58.
25 See, e.g., *Cleveland v. Bell*, 938 F.3d 672, 677 (5th Cir. 2019) (requiring close factual similarity between existing precedent and the conduct at issue, because “[t]he dispositive question . . . is ‘whether the violative nature of particular conduct is clearly established’” (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)); *Sims v. Labowitz*, 885 F.3d 254, 263 (“[A] constitutional right is clearly established . . . not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked” (quoting *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002))).
deny relief in situations similar, but perhaps not identical, to existing precedent—often based on narrow and seemingly inconsequential distinctions.

For instance in *Lowe v. Raemisch*, the Tenth Circuit found that denial of outside exercise to a prisoner for two years did not violate a clearly established right, even though a previous Tenth Circuit decision, *Housley v. Dodson*, had held that “total denial of exercise for an extended period of time would constitute cruel and unusual punishment” and had pointed to the importance of outdoor exercise even for prisoners who pose a high security risk. The *Lowe* court reasoned that *Housley* “addressed the denial of any out-of-cell exercise rather than outside exercise[,] . . . [which] could lead reasonable prison officials to question the applicability of *Housley.*” In *Gonzalez v. Huerta*, a Fifth Circuit panel found that the detention of the plaintiff by a school district police officer solely for refusing to provide identification did not violate a clearly established right, despite direct Supreme Court precedent for the notion that detaining an individual solely for refusing to identify themselves is unlawful, because “neither of th[e] [prior] cases dealt with incidents occurring on school property.” In *Gilmore v. Hodges*, the Eleventh Circuit found that depriving a prisoner of hearing aids did not violate a clearly established right despite prior cases recognizing that depriving prisoners of eyeglasses, prosthetic devices, or dentures violated the Eighth Amendment as deprivations of medical treatment, because there was no Eleventh Circuit precedent directly addressing hearing aids.

The “clearly established law” standard reaches particularly problematic outcomes when courts deal with new types of alleged unconstitutional acts, involving fact patterns not previously reviewed by courts. In such cases, a plaintiff’s claims will typically succumb to the qualified immunity doctrine, even when the conduct alleged is outrageous. For instance in *Jessop v. City of Fresno*, the Ninth Circuit granted qualified immunity to police officers alleged to have stolen over $225,000 from the plaintiff while executing a search warrant because, at the time of the incident, the circuit had never addressed a situation involving theft of property seized pursuant to a search warrant by police officers. Similarly, in *Brent v. Wayne County Department of Human Services*, the Sixth Circuit granted qualified immunity to a social worker alleged to have executed a removal order that would not have been issued if not for false statements the social worker made to the court, because it had not addressed such a situation at the time of the removal. In *Mattos v. Agarano*, the court concluded that police officer’s repeated use of a taser on a nonviolent pregnant woman who refused to step out of her car did not obviously violate her constitutional rights.

These obstacles to recovery have been made even more forbidding in recent years by the Supreme Court’s decision in *Pearson v. Callahan*. In *Pearson*, the Court unanimously

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26 846 F.3d 1205, 1210 (10th Cir. 2017).
27 41 F.3d 597, 599 (10th Cir. 1994) (overruled on other grounds).
28 846 F.3d at 1210.
29 826 F.3d 854, 858 (5th Cir. 2016).
30 738 F.3d 266, 280 (11th Cir. 2013).
31 936 F.3d 937, 941 (9th Cir. 2014).
32 901 F.3d 656, 685 (6th Cir. 2018).
33 661 F.3d 443,449 (9th Cir. 2011).
overruled its prior decision in *Saucier v. Katz*, which had required courts evaluating qualified immunity claims to first determine whether there was a constitutional violation before evaluating whether the constitutional right at issue was clearly established. 34 Instead, *Pearson* held that reviewing courts “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.” 35 And since *Pearson*, most lower courts have seized on that discretion, increasingly “avoid[ing] scrutinizing the alleged offense by skipping to the simpler second prong.” 36 One survey of around 800 cases in the first six years following *Pearson* found that, in 45% of cases, courts skipped past the constitutional wrong analysis and directly analyzed whether the alleged right that was violated was clearly established. 37

As Judge Willett of the Fifth Circuit has explained, “the inexorable result [of *Pearson*] is ‘constitutional stagnation.’” 38 With “fewer courts establishing law at all, much less clearly doing so, . . . [p]laintiffs must produce precedent even as fewer courts are producing precedent[:][i]mportant constitutional questions go unanswered precisely because no one’s answered them before,” and “[c]ourts then rely on that judicial silence to conclude there’s no equivalent case on the books.” 39 As a result, in addition to making it more difficult for constitutional rights to become clearly established as new fact patterns emerge, the *Pearson* doctrine has resulted in the same constitutional issues coming up repeatedly before courts without resolution. 40

The doctrine creates particularly difficult problems when dealing with allegations of police misconduct. First, police misconduct most frequently involves alleged violations of the Fourth Amendment, which the Supreme Court has noted “is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.” 41 Appellate courts, too, have noted the high specificity required for similar precedent to clearly establish a right in the Fourth Amendment context. 42 And second,

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35 *Id.*
36 *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).
39 *Id.*
40 See, e.g., *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (“This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation.”).
42 E.g., *Gonzalez v. City of Schenectady*, 728 F.3d 149, 162 (2d Cir. 2013) (noting that “there are so many permutations of fact that bear upon the constitutional issues of a search . . . . The policeman is not expected to know all of our precedents or those of the Supreme Court, or to distinguish holding from dicta, or to put together precedents for line-drawing, or to discern trends or follow doctrinal trajectories. Otherwise, qualified immunity would be available only to a cop who is a professor of criminal procedure in her spare time”).
because of the power they wield, misconduct by police officers can result in much more severe consequences than misconduct by other government officials.

Unless a prior case involving very similar conduct has already been decided, a police officer will most likely benefit from qualified immunity, leading to the situation where police officers can "duck the consequences for bad behavior—no matter how palpably unreasonable—as long as they were [the] first to behave badly."43 For instance, in West v. City of Caldwell, police officers had been given consent to enter a home in order to arrest the homeowner’s former boyfriend, but instead extensively tear-gassed the house, causing significant damage to the home and the owner’s possessions that prevented her from living in the home for two months.44 While it found the conduct to be unreasonable under the Fourth Amendment, the Ninth Circuit extended qualified immunity to the officers involved because there was no caselaw at the time clearly establishing that “the use of tear gas and the resulting destruction [was] unreasonable in those circumstances.”45 Similarly in Corbitt v. Vickers, the Eleventh Circuit addressed a unique set of circumstances—officers who pursued a suspect into a private yard where children were playing ordered the children to lie face down on the ground as they were arresting the now-cooperative suspect.46 The family’s dog entered the yard, following which a police officer shot at the dog twice, missing both times but hitting one of the children, lying just a foot and a half from the officer, on his second shot.47 In a civil suit brought by the child, the court granted qualified immunity to the officer because the child could not point to any precedent involving the shooting of a plaintiff who was not the intended target of the shot.48

And even when there is existing case law on the issue, the degree of specificity required often leads to a grant of qualified immunity based on very thin distinctions between existing precedent and the case at hand. Kelsay v. Ernst, provides a salient example. In that case, after police were called to the scene of an alleged domestic assault at a public pool complex, a police officer sought to arrest the plaintiff for interfering with the arrest of her friend, who the police believed had assaulted her.49 As the plaintiff was walking away from him, the officer ran up to her, grabbed her arm, and told her to "get back here."50 The plaintiff told the officer she had to check on her daughter, who was arguing with an unrelated third party, and as she began walking away from the officer a second time, he grabbed her in a bear hug and threw her to the ground, causing her to lose consciousness and fracturing her clavicle.51 The Ninth Circuit granted qualified immunity to the officer because none of the numerous cases the plaintiff cited “squarely govern[ed] the specific facts at issue.”52 Similarly in Baxter v. Bracey, a police officer seeking to effectuate an

43 Zadeh, 928 F.3d at 479.  
44 931 F.3d 978, 980–82 (9th Cir. 2019).  
45 Id. at 986.  
46 929 F.3d 1304, 1308 (11th Cir. 2019).  
47 Id.  
48 Id. at 1318.  
49 933 F.3d 975, 978 (8th Cir. 2019).  
50 Id.  
51 Id. at 978-79.  
52 Id. at 980 (quoting Kisela, 138 S. Ct. at 1153).
arrest unleashed a police dog on the plaintiff, who had been hiding in a basement but had come out with his hands up when the police entered the basement. The Eighth Circuit granted qualified immunity to the police officer, reasoning that a previous case involving a dog released on a non-fleeing suspect was insufficient to show that the officer had violated a clearly established right because the previous case involved an inadequately trained dog (as opposed to the trained dog involved in Baxter).

Ultimately, the current contours of the “clearly established right” doctrine make it extremely difficult for those who allege violations of their constitutional rights, and particularly those complaining of police misconduct, to successfully pursue claims. Even if there should be some protection for officials from liability for good faith or honest mistakes, the doctrine as it currently stands is far too broad to effectively serve those goals—a result that has been criticized not just by scholars and practitioners, but also by a number of judges and Supreme Court Justices.

B. Qualified Immunity Wastes Judicial Resources by Requiring Parties to Brief Complex Issues, Including on Appeal

Although qualified immunity has been justified as reducing litigation costs for government officials accused of misconduct, in fact the doctrine increases costs for parties by requiring them to brief complex, fact-intensive issues that often cannot be resolved prior to trial. This is compounded by the availability of interlocutory appeal for denials of qualified immunity, which further extends the litigation with additional briefings and a lengthy appeal process.

The Supreme Court has indicated that one of the primary goals of the qualified immunity doctrine is reducing the burdens of litigation on government officials. Qualified immunity “provides ‘an entitlement not to stand trial or face the other burdens of litigation

53 751 F. App’x 869, 870 (6th Cir. 2018).
54 Id. at 872.
55 See, e.g., Kisela, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (noting that the Court’s grant of qualified immunity in the case “sends an alarming signal to law enforcement officers and the public” by “tell[ing] officers that they can shoot first and think later, and . . . tell[ing] the public that palpably unreasonable conduct will go unpunished”); Anderson v. Creighton, 483 U.S. 635, 668 (1987) (Stevens, J., dissenting) (noting that application of the Court’s qualified immunity jurisprudence in the Fourth amendment context “unjustifiably and unnecessarily upsets the delicate balance between respect for individual privacy and protection of the public servants who enforce our laws”); Zadeh v. Robinson, 902 F.3d 483, 499–500 (5th Cir. 2019), rev’d en banc, 928 F.3d 457 (5th Cir. 2019) (Willet, J., concurring) (“I add my voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence.”); Ventura v. Rutledge, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) (“In short, this judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases.”); Manzanares v. Roosevelt Cty. Adult Detention Ctr., 331 F. Supp. 3d 1260, 1293–94 n.10 (D.N.M. 2018) (“The Court disagrees with the Supreme Court’s approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy.”).
56 See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery’” (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).
conditioned on the resolution of the essentially legal [immunity] question,”57 and the Court has accordingly admonished lower courts to “exercise [their] discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.”58 In practice, however, qualified immunity not only fails to reduce—and potentially increases—district court litigation costs, but also often results in additional, unnecessary costs associated with interlocutory appeals.

It is questionable whether qualified immunity doctrine effectively serves as a gatekeeper to dispose of misconduct claims before they proceed to discovery. One recent study of 1,183 Section 1983 cases in five districts found that qualified immunity was raised in fewer than 40% of the cases where it could be raised.59 When it was raised, the qualified immunity defense was only asserted in a motion to dismiss 36.9% of the time—leaving 63% of cases where the defense was brought at the summary judgment stage or at trial, after discovery.60 “Courts granted 9.1% of the motions to dismiss on qualified immunity grounds, and 4.5% of th[ose] motions resulted in case dismissals.”61 The numbers were higher at the summary judgment stage, where courts granted 13.8% of motions on qualified immunity grounds, resulting in case dismissal 9.5% of the time. Cases most often proceeded to trial, with the associated litigation costs increased by the parties having briefed the qualified immunity issue.62 In 11% of cases, defendants raised the qualified immunity defense both at the motion to dismiss and at the summary judgment stage, resulting in multiple rounds of briefing.63

As the author of the study explains, this is “because the doctrine is ill suited to dispose of many cases before trial.”64 The doctrine is fact-intensive, which makes dismissal on the pleadings and even at the summary judgment stage difficult where there are unresolved factual disputes between the parties.65 And such disputes are likely to arise when determining the specific facts of each case frequently requires navigating conflicting witness testimony or evidence as to the government official’s conduct. Ultimately, qualified immunity “may actually increase the costs and delays associated with Section 1983 litigation,” as “it must be researched, briefed, and argued” each time it is raised while failing to resolve claims early on in the litigation process.66

60 Id. at 30.
61 Id. at 44.
62 Id.
63 Id. at 30.
64 Id. at 53.
65 Id. This is a problem both practitioners and academics have long recognized. See, e.g., Alan K. Chen, The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 Am. U. L. Rev. 1, 5 (1997) (noting that “the abundance of qualified immunity appeals” is not surprising “[t]o any judge, practitioner, or scholar who has experience with this area of the law” and that “[l]ower courts struggle with the doctrine’s application, finding that, at least in some circumstances, contested factual issues preclude summary judgment”).
66 Schwartz, How Qualified Immunity Fails, 127 Yale L. J. at 60.
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These costs are compounded by the availability of interlocutory appeals from denials of qualified immunity. In *Mitchell v. Forsyth*, the Supreme Court held that denial of qualified immunity by a district court could be challenged through an interlocutory appeal under the collateral order doctrine.67 A study found that interlocutory appeals were brought in more than 20% of cases in which an interlocutory district court decision denied a qualified immunity defense.68 Such interlocutory appeals significantly add to case length and cost. Indeed, one court recently noted that interlocutory appeals “increase[] the burden and expense of litigation both for government officers and for plaintiffs” because they “add[] another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision.”69

C. The Qualified Immunity Standard Is Difficult to Apply and Leads to Unjustifiably Inconsistent Results

Courts facing substantially similar situations disagree on the degree of similarity with prior cases that is required for a clearly established right to have been violated.

Substantively, courts have disagreed over how closely a given situation must match prior case law to result in a violation of a “clearly established right.” That is to say, “courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist.”70 For example, the Fifth Circuit has generally been more restrictive in its interpretation, requiring legal authority “that defines the contours of the right in question with a high degree of particularity.”71 The Eleventh Circuit has similarly admonished that “preexisting caselaw that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice.”72 By contrast, the Eighth Circuit “appl[ies] a flexible standard, requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles.”73 The Tenth Circuit has adopted a “sliding scale” approach—which it has nonetheless recognized in recent years “may arguably conflict with recent Supreme Court precedent” suggesting the Court’s preference for a narrower approach.74

67 472 U.S. 511, 530 (1985) (“[W]e hold that a district court’s denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable ‘final decision’ within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of final judgment.”).
70 Zadeh, 928 F.3d at 479.
72 *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir. 2003).
73 *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 932 (8th Cir. 2016) (quoting *Coates v. Powell*, 639 F.3d 471, 476 (8th Cir. 2011)).
74 *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) (citing *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) and *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016)).
Though it has taken on an increasing number of qualified immunity cases, the Supreme Court has never fully clarified the standard. The Court’s frequent per curiam reversals of denials of qualified immunity in recent years\(^75\) have, in the words of one district court judge, “sent unwritten signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established.”\(^76\) Yet the Court has also never overruled *Hope v. Pelzer*, which found that an official’s actions could violate a clearly established right without any precedent when the violation was sufficiently egregious.\(^77\) As a result, appellate courts often disagree in their interpretation of the doctrine—“[i]n day-to-day practice, the ‘clearly established’ standard is neither clear nor established among our Nation’s lower courts.”\(^78\)

This conflicting application of qualified immunity standards across circuits only increases the problems inherent in the doctrine. Depending on which circuit a case is brought (or which judge or appellate panel hears it), the same fact pattern can result in opposite results. And because the Supreme Court encourages lower courts to resolve qualified immunity disputes at the second step, by addressing whether a right is clearly established without necessarily addressing whether the right exists in the first place, differences between the circuits are slow to resolve. One law review note examining what it termed an “artificial circuit split” over the right to record law enforcement, which is recognized as clearly established in six circuits but is not in the Fourth Circuit, explained that “[t]he split did not arise because of local differences in the assessment of constitutional protection,” but rather because some circuits “opted to address the merits of the issue while the Fourth Circuit did not.”\(^79\) And “[u]nder the approach restricting clearly established law to controlling precedent, this split will persist until each of the remaining circuit courts of appeals individually recognizes the right to record as clearly established.”\(^80\)

D. Qualified Immunity Effectively Leaves No Other Way To Deter and Remedy Many Violations Of Constitutional Rights

Civil liability, of course, represents just one way in which constitutional rights could be prevented and remedied. Criminal prosecution, disciplinary enforcement, and structural reform, although providing no direct relief to the persons injured, could in theory constitute effective means to prevent and deter violations of constitutional rights. But decades of experience show that these other avenues are rarely effective, especially in preventing constitutional violations by police officers. Criminal prosecutions are exceptionally difficult to bring and rarely end in convictions; disciplinary measures are infrequently pursued and are often ineffective; and structural reform is often met with intense resistance. As a result,


\(^{78}\) *Zadeh*, 928 F.3d at 479.


\(^{80}\) Id. at 466.
qualified immunity doctrine, by placing civil liability out of reach in many cases, effectively means that many constitutional violations will go undeterred and unremedied.

The difficulty of bringing criminal prosecutions against police officers for violations of constitutional rights is well recognized. Criminal prosecutions for violations of constitutional rights usually proceed under 18 U.S.C. § 242, a Reconstruction-era companion to Section 1983. The Supreme Court’s decision in Screws v. United States made prosecutions under Section 242 exceptionally demanding. In Screws, the Court held that the element of willfulness in Section 242 requires proof of “a purpose to deprive a person of a specific constitutional right,” and that “the presence of a bad purpose or evil intent alone may not be sufficient.” In effect, Screws rules out criminal prosecution except in the most extreme cases where officers must have known that their conduct deprived someone of their constitutional rights.

Prosecutions under state law are also exceptionally difficult and rarely undertaken. Prosecutions of police officers are rarely even pursued unless the incident results in death or grave injury—and even then, prosecutions are infrequent and even less frequently successful. According to one recent account, although about 1000 people were fatally shot by police over a one-year period, only 110 officers were charged in a fifteen-year period with murder or manslaughter, and of those only 42 officers were convicted—in many cases of lesser included offenses; only five were convicted of murder (and did not have those convictions overturned). The Seattle Times conducted a review of 213 fatal police encounters over a ten-year period and found that only one police officer had been charged in state courts with the illegal use of deadly force. The dearth of successful prosecutions—or prosecutions at all—has been attributed to many causes, including excessively close relationships between prosecutors and the police. Whatever the cause, however, it is indisputable that criminal prosecutions of constitutional violations are pursued only in rare and extremely severe cases and are even more rarely successful.

Internal discipline of government officials for violations of constitutional rights is also no substitute for civil liability, largely because it is often ineffective. In the case of law enforcement officers, even when supervisors are willing to institute disciplinary proceedings—which is not frequent—those proceedings may take years, and often result

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81 325 U.S. 91 (1945).
82 Id. at 101.
83 Id. at 103.
in the police department being ordered to reinstate the officer. Union contracts, law enforcement officers’ statutory bills of rights, and civil service statutes all make it difficult for officers to be discharged based on reports of civil rights violations.

Finally, structural reform, especially of police departments, remains a largely theoretical possibility. Local reforms, such as civilian oversight of police departments, often meet strong political resistance. And although the federal government has the power to bring suit against law enforcement agencies that engage in a pattern or practice of constitutional violations, the Justice Department rarely does so. Indeed, the Trump Administration has not brought a single such lawsuit, and then-Attorney General Sessions issued guidance disfavoring both the filing of such lawsuits and the use of consent decrees against local governmental entities.

III. Qualified Immunity Is Unnecessary To Protect Government Officials From Unfair Civil Liability

As noted above, one of the principal arguments offered in defense of qualified immunity is that it is necessary to avoid government officials being unfairly subjected to civil liability for making a reasonable mistake in pursuing their duties, or for failing to anticipate the development of constitutional law doctrine. But scholarship has established that government officials almost never pay civil judgments out of their own pocket; they are almost always indemnified by their employers. One comprehensive study concluded, with respect to police departments in particular, that “[p]olice officers are virtually always indemnified. Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over $3.9 million awarded in punitive damages.” There is no reason to believe the pattern is different with respect to other government officials; indeed, most scholars have concluded that indemnification is widespread, though perhaps not universal.

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89 42 U.S.C. § 14141.
The widespread practice of indemnification casts serious doubt on the need for qualified immunity, especially in its broadest contours. To be sure, government officials may not want to be subject to a judgment, even if there is little prospect that they will actually pay such a judgment out of their own funds. But the negligible likelihood of such a prospect should surely mitigate the concern that officials will fail to carry out their duties with sufficient zeal out of fear of being held personally liable. And the prospect that officials may be diverted from their duties to defend against litigation, while of some concern, is not, by itself, sufficient justification to deprive virtually all who have suffered deprivations of their constitutional rights from a real civil remedy in damages. Moreover, such litigation will almost always be handled by the governmental entity that employed the official, and litigation by and against governmental entities is a commonplace occurrence in our system. The only real purpose that qualified immunity in its current broad form serves, therefore, is to deny any effective remedy for constitutional wrongs.

IV. Legislative Action Is Needed To Mitigate The Adverse Consequences Of Qualified Immunity

In recent years, the Supreme Court has been asked on several occasions to reconsider the scope of its qualified immunity doctrine. Yet the Court has turned down each such request. During the 2019-2020 Term, the Supreme Court denied review in at least eleven such cases, many of which alleged egregious facts.93

In both Congress and state legislatures, proposals have been introduced to eliminate or curtail the defense of qualified immunity. In June 2020, the House of Representatives passed a bill that would effectively eliminate the defense for federal, state, and local law enforcement officers.94 The accompanying House Judiciary Committee Report explains that, “[i]n the context of excessive force claims against police officers, qualified immunity has frequently barred victims of civil rights abuses from recovering in court,” and that “although some have contended that eliminating qualified immunity would unfairly subject police officers to liability and could thereby harm police recruitment or cause officers to hesitate in performing their functions, the Committee finds these arguments unpersuasive.”95 The House-passed bill does not curtail the defense for any other government officials, but the Judiciary Committee noted that “[i]n the future, the Committee may consider legislation to eliminate qualified immunity in cases against other types of officials, including by taking into account the nature of the officials’ duties and the types of constitutional claims likely to arise.”96 Another House bill would reach even more broadly and effectively abolish qualified immunity across the board.97

In the Senate, one resolution has been introduced that calls upon Congress to repeal qualified immunity for law enforcement officers. Another Senate Bill would take a different approach, eliminating the qualified immunity defense as it exists now but allowing a government official to defeat liability if several conditions are proved, including that (a) the conduct alleged to be unlawful was specifically authorized or required by a federal, state, or territorial law; (b) no court had held such a provision of law to be unconstitutional; and (c) the defendant reasonably believed his conduct was constitutional—or if a court had held the same “specific conduct” to be constitutional. It is uncertain, however, how different that standard is from the current standard of qualified immunity; much would depend on how courts would construe the “specifically authorized or required” and “specific conduct” elements.

Similar action has been proposed in state legislatures. Colorado has recently enacted legislation that, although not eliminating the defense of qualified immunity under federal law, allows those who have been injured by local law enforcement officers to avoid the defense if they sue in state court. The Colorado legislation enacts a state analogue to Section 1983, providing a civil action for violations of state constitutional rights, and further providing that qualified immunity shall not be a defense to such actions. That legislation passed with broad bipartisan support, passing the Colorado House by 52-13 and the Senate by 32-1. Similar legislation is presently under consideration in Massachusetts.

Conclusion

For all these reasons, the American Bar Association calls on federal, state, local, tribal, and territorial legislatures to eliminate, or at a minimum, to substantially curtail the defense of qualified immunity. Qualified immunity has proven to be a profound obstacle to one of the most fundamental objectives of our justice system: remedying the deprivation of constitutional rights. The American Bar Association has long advocated the vigorous enforcement of constitutional rights. Without an effective civil remedy, serious abuses of governmental power will persist unchecked, many motivated by racial discrimination. That is not acceptable in the United States in the twenty-first century.

Respectfully submitted,

Wendy K. Mariner
Chair, ABA Section of Civil Rights and Social Justice
August 2020

1. **Summary of Resolution(s).** The resolution urges federal, state, local, territorial, and tribal governments to enact legislation to eliminate or substantially curtail the defense of qualified immunity in civil actions brought against law enforcement officers.

2. **Approval by Submitting Entity.**

   The Section of Civil Rights and Social Justice approved the resolution on July 14, 2020.

   The Coalition on Racial and Ethnic Justice approved cosponsorship of the resolution on July 17, 2020.

   The Commission on Homelessness & Poverty approved cosponsorship of the resolution on July 17, 2020.

   The Commission on Disability Rights approved cosponsorship on July 20, 2020.


   The Commission on Domestic and Sexual Violence approved cosponsorship of the resolution on July 23, 2020.

   The Commission on Sexual Orientation and Gender Identity and the Commission on Hispanic Legal Rights and Responsibilities approved cosponsorship of the resolution on July 24, 2020.

   The California Lawyers Association approved cosponsorship of this resolution on July 24, 2020.

   The Criminal Justice Section approved cosponsorship of this resolution on July 27, 2020.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption**
None have been identified.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Qualified Immunity in the wake of the many civilian deaths at the hands of police requires the ABA take a particular stance and have policy in order to weigh in on legislation and, current events.

6. **Status of Legislation.** The George Floyd Justice in Policing Act of 2020, H.R. 7120, was passed in the House of Representatives June 2020. In the Senate, one resolution has been introduced that calls upon Congress to repeal qualified immunity for law enforcement officers. Colorado passed legislation that enacts a state analogue to Section 1983, providing a civil action for violations of state constitutional rights, and further providing that qualified immunity shall not be a defense to such actions. Massachusetts is considering a similar legislation.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Section will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. **Cost to the Association.** The adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. **Disclosure of Interest.** N/A

10. **Referrals.**

Center for Human Rights  
Commission on Homelessness and Poverty  
Commission on Racial & Ethnic Diversity in the Profession  
Commission on Youth at Risk  
Government and Public Sector Lawyers Division  
Law Practice Division  
National Conference of Federal Trial Judges  
Section of Litigation  
Standing Committee on Legal Aid & Indigent Defense  
Criminal Justice Section  
Section of State & Local Government Law  
Diversity and Inclusion Center  
National Association of Criminal Defense Lawyers  
Coalition on Racial and Ethnic Justice

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution urges federal, state, local, territorial, and tribal governments to enact legislation to eliminate or substantially curtail the defense of qualified immunity in civil actions brought against law enforcement officers.

2. Summary of the Issue that the Resolution Addresses
This Resolution addresses the issue that qualified immunity has made it difficult for persons who have suffered injuries to their constitutional rights to obtain any effective remedy in cases where individuals have suffered violations by law enforcement officers.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The proposed Resolution will address the issue by supporting the substantial curtailment or elimination of the defense of qualified immunity, allowing effective remedy to cases in which persons have suffered injuries to their constitutional rights.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None have been identified.