Santa Clara Law Review

Volume 63 | Number 3 Article 3

2024

RESTORING BALANCE TO QUALIFIED IMMUNITY: MODIFIED MANDATORY SEQUENCING

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Qualified immunity continues to confound and frustrate judges, lawyers, law professors, law students, and even those outside the legal industry. Much of this frustration results from outcomes that shock the conscience, such as when government officials are granted qualified immunity despite stealing money while executing a search warrant or when government officials lock a prisoner in a highly unsanitary cell for a week.

Legal scholars have examined two main areas within the qualified immunity doctrine: the common law origins and the clearly established prong of qualified immunity analysis. The common law origins of qualified immunity have been thoroughly examined, and until recently, it was thought there was no common law basis for qualified immunity. What was once a one-sided criticism has become a debate. Further, the clearly established test has finally been addressed by the Supreme Court in a recent per curium opinion.

However, another issue within qualified immunity deserves attention. Specifically, how the current standard from Pearson v. Callahan *disserves present and future plaintiffs in § 1983 suits.* Pearson *allows courts to pass on a constitutional inquiry into whether a constitutional right was violated if the case could be resolved on another ground. In not determining whether a constitutional right exists, future plaintiffs will be unable to defeat qualified immunity because a court chose not to determine whether a constitutional right exists.*

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This article critically analyzes mandatory sequencing in qualified immunity and the reasons behind the Saucier v. Katz *and* Pearson *decisions. Assuming that there is a common law foundation to qualified immunity and considering the lightening of the clearly established standard, I offer a solution to the future plaintiff problem of* Pearson*. A modified, mandatory sequencing that attempts to find a better balance between the goals of qualified immunity: a damages remedy to protect the rights of citizens against the need to protect officials in their discretionary acts.*

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I. INTRODUCTION

Many outraged Americans were introduced to the doctrine of qualified immunity following the deaths of Breonna Taylor,[1] Eric Garner,[2] and George Floyd.[3] The Supreme Court created this doctrine in the 1950s and in doing so, conferred immunity to civil suits for public officials acting under the authority of state law.[4] The doctrine attempts to balance two important values: the importance of a damages remedy to protect the rights of the citizens against the need to protect officials who are required to exercise their discretion in discharging their duties.[5]

The qualified immunity doctrine makes sense in light of public policy. Still, courts often confuse legal scholars, lawyers, and concerned citizens with their application of qualified immunity to questionable police misconduct. For example, in *Jessop v. City of Fresno*, police officers were granted qualified

1. David Alan Sklansky, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, STAN. L. SCH. (Sept. 28, 2020), https://law.stanford.edu/2020/09/28/stanfords-david-sklanskyon-the-breonna-taylor-case-no-knock-warrants-and-reform/.

2. Tori B. Powell, *"We have to get more justice:" Eric Garner's Mother Calls for Continued Changes to Law Enforcement*, CBS NEWS (June 26, 2021, 5:52 PM), https://www.cbsnews.com/news/eric-garner-mother-lawenforcement-reform-justice/.

3. Sarah D. Wire, *What is qualified immunity, the court creation that keeps cops from being sued over civil rights abuses?*, L.A. TIMES (May 25, 2021), https://www.latimes.com/politics/story/2021-05-25/what-is-qualified-immunity-how-is-georgefloyd-connected/.

4. Pierson v. Ray, 386 U.S. 547, 557 (1967).

5. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

immunity even though the Ninth Circuit Court of Appeals found that the officers stole over $225,000 worth of cash and rare coins while executing a search warrant.[6] The court found that despite the officers' morally reprehensible actions, the officers were entitled to qualified immunity because there was no "clearly established" right to be free from the theft of property seized pursuant to a search warrant.[7] Further, the Ninth Circuit declined to determine whether property theft violates a constitutional right.[8]

Likewise, in *Kelsay v. Ernst*, Ms. Kelsay, a five-foot-tall woman, was unexpectedly tackled by a police officer following a verbal argument outside a public swimming pool in Wymore, Nebraska.[9] When this detained woman heard her child being yelled at by another woman, she began to walk in the direction of her child.[10] The police officer viewed this action as non-compliant and tackled Ms. Kelsay.[11] The police officer's tackle was so violent that Ms. Kelsey momentarily lost consciousness after her head hit the pavement.[12] Ms. Kelsey also suffered a fractured collarbone due to that tackle.[13]

The Eighth Circuit Court of Appeals reversed a denial of qualified immunity, finding that it was not "clearly established" that the police officer was forbidden from performing a takedown on Ms. Kelsay.[14] The Eight Circuit also declined to determine whether Ms. Kelsey was compliant or noncompliant because the constitutionality of performing a takedown under either scenario was "not beyond debate" and thus the officer was entitled to qualified immunity.[15]

There are many other cases like *Jessop* and *Kelsay* where a court declines to determine whether a constitutional right was violated.[16] In those cases, courts inquire whether a

6. Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019).
7. *Id.* at 943.
8. *Id.* at 940.
9. Kelsay v. Ernst, 933 F.3d 975, 978 (8th Cir. 2019).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 978-79.
14. *Kelsay*, 933 F.3d at 981.
15. *Id.* at 982.
16. *See generally* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34-38 (2015) (calculating the percentage

constitutional right was "clearly established." A constitutional right is a protection and liberty guaranteed by the U.S. Constitution that may be expressed, implied, or unenumerated.[17] A "clearly established" constitutional right "is sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[18]

This note argues that the fundamental issue with the qualified immunity doctrine is that the Supreme Court erred when it allowed lower courts to use their discretion to pass on the question of whether a constitutional right was violated. I contend that this was a mistake because it hinders the constitutional rights of future victims like the plaintiffs in *Jessop* or *Kelsay*.

Section II of this note covers the confusing judicial history of qualified immunity and recent developments in the common law inquiry by legal scholars that will allow me to offer my proposal. Section III of this note identifies the three issues with the current qualified immunity standard: the common law question, the problems with *Pearson*, and the frustrations with the "clearly established" standard. Section IV of this note analyzes the reasons given by the Supreme Court (the Court) in *Pearson* and argues that the Supreme Court went further than it needed to in ending the *Saucier* experiment. Section V of this note offers my proposal, a middle ground to *Saucier* and *Pearson*: a modified, mandatory sequencing requiring lower court*s* to answer the constitutional right prong first. Lastly, I conclude this note with the hope that this proposal will correct the imbalance between the two important values of qualified immunity.[19]

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of post-*Pearson* cases where a court declines to determine whether a constitutional right was violated).

17. *Constitutional Right*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/constitutional_rights (last visited Apr. 22, 2023).

18. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

19. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). (The Court's aim is to balance two competing values: "the importance of a damages remedy to protect the rights of the citizens . . . but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.").

II. BACKGROUND

The challenges facing the modern standard of qualified immunity are nothing new. Since its inception in the early 1950s, qualified immunity has baffled courts and parties alike. Whether it is judicial confusion regarding which standard to apply, which analogy to draw upon, or which order to analyze a claim under,[20] the history of qualified immunity is anything but consistent. What is clear, however, is that the Court has generally sought to find a way to keep this defense to § 1983 suits alive and workable.

A. The Judicial Problem

1. The Origins of the Qualified Immunity Doctrine

On April 20, 1871, Congress enacted the Ku Klux Klan Act in response to a "reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States."[21] In Section 1 of the Act, now codified under 42 U.S.C. § 1983,[22] a remedy for civil damages was allowed which makes liable every person who, under the color of the law, deprives another of their civil rights.[23] While this act gave individuals a statutory right to sue state officers for damages to remedy a violation of their constitutional rights, § 1983 does not mention defenses or immunities.[24] For nearly a century, the Court did not recognize immunity for good-faith conduct by state officials under § 1983.[25] However, the Court began to consider whether immunity would be available to state officials in the 1950s.[26]

In the 1950s, the Court began to consider whether the common law would allow an official immunity for a claim under a tort analogous to § 1983.[27] In 1951, the Court

20. *See* Pearson v. Callahan, 555 U.S. 223, 242 (2009) (explaining that lower courts now have the discretion to determine whether to examine whether there is a constitutional right being violated or whether the right was clearly established first).

21. Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) (citing Briscoe v. LaHue, 460 U.S. 325, 337 (1983)).

22. 42 U.S.C. § 1983.

23. *Id.*

24. Baxter, 140 S. Ct. 1862, 1862 (Thomas, J. dissenting) (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017)).

25. *Id.*

26. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

27. Baxter v. Bracey, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting).

recognized absolute immunity for legislators.[28] However, in *Pierson v. Ray*, the Court declared a doctrine of qualified immunity of good faith and probable cause for police officers relating to unconstitutional arrest and detention.[29] The Court held that this defense, which was rooted in the common law tort claim for false arrest, was now also available for claims under § 1983.[30] The Court, believing it to be unfair to police officers to hold them accountable for unknown determinations of constitutional law, explained that "a police officer is not charged with predicting the future course of constitutional law."[31] While the Court initially limited this defense to specific circumstances based on clear common law analogies,[32] the Court quickly expanded the applicability of this defense.[33]

The Court shifted the scope of the defense from analogies to common law to an emphasis on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[34] This shift from common law analogies to practical considerations began the Court's evolving approach to the doctrine of qualified immunity.

2. The Harlow Approach

The next notable change to the qualified immunity defense came in *Harlow v. Fitzgerald*.[35] The Court thought that the good faith analysis of qualified immunity cases created efficiency concerns.[36] So the Court attempted to balance two

28. Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (explaining that absolute immunity for legislators did not impinge on the tradition of legislative immunity grounded in history and reason in the language of § 1983).

29. Pierson v. Ray, 386 U.S. 547, 557 (1967).

30. *Id.* at 556-57.

31. *Id.* at 557.

32. Baxter v. Bracey, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting).

33. *See* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975); *see also* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

34. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (remanding on the issue of the application of qualified immunity to state executive officials, National Guard members, and a university president).

35. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (the Court expanded the scope of qualified immunity to "clearly established statutory or constitutional rights.").

36. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 672 (2009) (explaining that "subjective good faith

competing values: "the importance of a damages remedy to protect the rights of citizens . . . [against] 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[37] Although *Harlow* did not involve a § 1983 action, the Court would later extend this holding to § 1983 actions because it thought it would be untenable to distinguish the purpose of immunity law.[38]

Harlow held that government officials are shielded from liability for civil damages as long as their conduct does not violate "clearly established" statutory or constitutional rights.[39] The goal of *Harlow*'s objective reasonableness standard was to avoid excessive disruption of government and decide insubstantial claims on summary judgment.[40] Courts begin by examining whether a right was clearly established, and if a right was clearly established, a court then asks whether a reasonably competent public official should have known that the right was clearly established.[41] Thus, if a right was clearly established, a public official could only successfully claim qualified immunity if they demonstrated that they never knew of the relevant legal standard.[42]

In *Malley v. Briggs*, the Court helped clarify the meaning of "clearly established law."[43] In *Malley*, a police officer wrongfully arrested a person based on a warrant that lacked probable cause.[44] The Court held that qualified immunity is lost where a warrant is lacking in probable cause and the officers know or reasonably should know that the warrant is lacking in probable cause.[45]

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is a factual matter best suited for jury resolution" and results in insubstantial claims proceeding to trial).

37. *Harlow*, 457 U.S. at 807 (citing Butz v. Economou 438 U.S. 478, 504-06 (1978)).

38. *Baxter*, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting) (citing Harlow, 457 U.S. 800, at 818) (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

39. *Harlow*, 457 U.S. at 818.

40. *Id.*

41. *Id.* at 818-19.

42. *Id.* at 819.

43. Malley v. Briggs, 475 U.S. 335, 349 (1986).

44. *Id.* at 338.

45. *Id.* at 345-46 (the Supreme Court also rejected the argument that an application of a warrant is *per se* objectively reasonable).

Similarly, in *Anderson v. Creighton*, the Court found that an FBI agent that conducts a warrant can be entitled to qualified immunity so long as that agent reasonably believes that the execution of that warrant was consistent with the Constitution.[46] *Anderson* helped develop the "clearly established" law element of qualified immunity by establishing a two-part test: the action in question must have been *clearly* unlawful in the light of pre-existing law, and its unlawfulness must have been apparent to a reasonable official.[47] Absent those circumstances, an official would still be granted qualified immunity despite an unlawful warrant. However, problems began to arise in lower courts regarding which prong of analysis should come first.

3. Sequencing in Qualified Immunity

In *Siegert v. Gilley*, the Court introduced sequencing to qualified immunity.[48] Sequencing is a legal analysis that requires one element to be analyzed before another.[49] The Court granted certiorari to decide the required order of analysis.[50] In *Siegert*, the D.C. Circuit found that the defendant was entitled to qualified immunity because the law was not clearly established.[51] The Court held that the proper analytical structure in assessing qualified immunity is *first* to allege a violation of a constitutional right, then inquire into whether the law was not clearly established.[52]

In *Wilson v. Layne*, the Court again addressed sequencing in qualified immunity claims.[53] In *Wilson*, the Court affirmed a Fourth Circuit judgment that held that law enforcement officials were entitled to qualified immunity because the state

46. Anderson v. Creighton, 483 U.S. 635, 646 (1987) (vacating and reversing for further proceedings to determine if the officer had a reasonable belief that the warrant was lawful considering clearly established principles governing execution of warrants).

47. *Id.* at 640 (emphasis added).

48. Siegert v. Gilley, 500 U.S. 226, 228-29 (1991).

49. *See id.* at 232 ("We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case, nor proceeded to examine the sufficiency of the allegations of malice.").

50. *Id.* at 231.

51. *Id.* at 230-31.

52. *Id.* at 231.

53. Wilson v. Layne, 526 U.S. 603, 603 (1999).

of the law was not clearly established at that time.[54] However, the Court's reasoning differed from the Fourth Circuit.[55] "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'"[56] However, despite the Court's clear preference to resolve constitutional violations first, a split arose among the federal courts.[57]

Settling a split in federal courts, the Court in *Saucier v. Katz* [58] established a new standard for qualified immunity that would last until 2009.[59] *Saucier* involved a Fourth Amendment excessive force claim where a police officer sought qualified immunity for arresting a protestor, Mr. Katz, at Vice President Gore's speech at an army base in San Francisco, California.[60] During the arrest, the police officer put Mr. Katz in a van.[61] Mr. Katz alleged that the government official who threw him in the van and the other government officials had violated his Fourth Amendment rights by using excessive force to arrest him.[62] The District Court granted motions for summary judgment against all claims except for the qualified immunity claim against the police officers.[63] The Ninth Circuit Court of Appeals first considered "'whether the law governing the official's conduct was clearly established' . . . [and then whether] a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful."[64]

The Court held that a ruling on the issue of an alleged violation of a constitutional right must be considered in proper sequence early in the proceedings so that the costs and expenses of a trial are avoided.[65] Thus, qualified immunity is

54. *Id.* at 605-06.
55. *Id.* at 608.
56. *Id.* at 609 (citing Conn v. Gabbert, 526 U.S. 286, 290 (1999)).
57. Leong, *supra* note 36, at 674.
58. Saucier v. Katz, 533 U.S. 194 (2001).
59. *See* Pearson v. Callahan, 555 U.S. 223 (2009).
60. *Saucier*, 533 U.S. at 197-98.
61. *Id.* at 198.
62. *Id.* at 199.
63. *Id.*
64. *Saucier*, 533 U.S. at 199 (citing Katz v. United States, 194 F.3d 962, 967 (9th Cir. 1999)).
65. *Id.* at 200.

an entitlement to avoid the burdens of trial rather than simply a defense to liability, and is lost if a case is allowed to go to trial.[66] Further, the Court in *Saucier* mandated a two-step sequencing.[67] The Court held that the initial inquiry is whether a constitutional right would have been violated on the facts alleged because, absent a violation of a constitutional right, there is no need for a further inquiry into immunity.[68] However, if a violation is found, the next step is to determine whether the right was clearly established.[69] The Court held that the government officials here were entitled to qualified immunity.[70]

Notably, the Court believed that if lower courts were to forgo the inquiry into the violation of a constitutional right, it would hinder the elaboration of the law from case to case.[71] The Court found that sequencing is critical because it is the finding of a constitutional right that helps set the precedent that leads to clearly established rights.[72] However, the mandatory sequencing of *Saucier* was short-lived despite the public policy benefits articulated by the Court.

4. The Current Qualified Immunity Doctrine

In *Pearson v. Callahan*,[73] the Court revisited the mandatory sequencing of *Saucier* following criticism from lower court judges and members of the Court.[74] In *Pearson*, the Court held that the *Saucier* sequencing was no longer required.[75] The Court justified this departure from *Saucier* on the consequences of adhering to the mandatory sequencing.[76]

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66. *Id.* (this part of *Saucier* has still survived to today).
67. *Id.* at 195 (mandating the sequencing found in *Anderson*).
68. *Id.*
69. *Saucier*, 533 U.S. at 196 (adopting the holding of *Wilson*).
70. *Id.*
71. *Id.* at 201.
72. *Id.*
73. Pearson v. Callahan, 555 U.S. 223 (2009).
74. *Id.* at 234-35; *see, e.g.*, Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008) (criticizing mandatory sequencing on practical, procedural, and substantive grounds); *see also* Morse v. Frederick, 551 U.S. 393, 432 (2007) (Thomas, J., concurring in part) (stating his desire to "end the failed Saucier experiment now"); *see also* Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum.").
75. *Pearson*, 555 U.S. at 236.
76. *Id.* at 234.

Writing for the Court, Justice Alito argued that while *Saucier* is often proper, lower courts should use their discretion when deciding which prong to address first.[77] Justice Alito gave several reasons why *Saucier's* sequencing is no longer mandatory. First, the sequencing often results in unnecessary expenditures of judicial resources on questions that do not affect the outcome of a case.[78] Second, in cases where it is unclear if a right is clearly established, it is largely an expensive academic exercise to analyze the constitutional violation first.[79] Third, the Court believed that *Saucier's* sequencing protocol "disserve[s] the purpose of qualified immunity . . . [by forcing] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily."[80] Fourth, opinions that have followed *Saucier* frequently fail to contribute to further development of precedent.[81] Lastly, strict "[a]dherence to *Saucier's* two-step protocol departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"[82]

Thus, despite the often-beneficial outcomes resulting from adherence to *Saucier's* two-step protocol, the Court felt that the negatives outweighed the benefits, and removed the lower court mandate to inquire into the plaintiff's constitutional rights first.[83] *Pearson* controls and is the last landmark case governing the doctrine of qualified immunity.

5. A Small Narrowing of "Clearly Established"

A recent per curium opinion by the Supreme Court highlights a second problem that the Court should address when it next grants certiorari for a qualified immunity case.[84] In *Taylor v. Riojas*, the Court reversed a lower court's decision

77. *Id.* at 236.
78. *Id.* at 236-37.
79. *Pearson*, 555 U.S. at 237.
80. *Id.*
81. *Id.* (Justice Alito argues that because so many of these situations are fact specific, determinations of constitutional rights in these situations are problematic because they only apply to an identical or virtually identical fact pattern. This remained the threshold until Taylor v. Rojas).
82. *Id.* at 241 (citing Scott v. Harris, 550 U.S. 372, 388 (2007)).
83. *Id.* at 242.
84. *See generally* Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curium opinion).

that a law was not clearly established for only the second time in its history.[85] The Court held that even though there was no clearly established right at issue, a reasonable officer should have known that a constitutional right was violated due to the particularly egregious facts of the case.[86]

The lower court granted qualified immunity to the prison officials because there was not a case on point that clearly established those acts as unconstitutional.[87] The Court rejected the lower court's reasoning because absent any exigent circumstances or necessity, there was no way a reasonable prison officer in that situation could find that behavior constitutional.[88]

Here, it appears that the Court is aware that lower courts are in need of guidance as to what is and what is not "clearly established" under qualified immunity. By holding that particularly egregious conduct can satisfy the clearly established element of qualified immunity, lower courts will no longer need to point to a factually identical case to satisfy this requirement. However, legal scholars still have doubts about the common law basis for this judicially created doctrine despite this limited clarity regarding the clearly established standard.

B. The Common Law Problem

In the years following *Pearson*, widespread media attention to victims of police brutality increased the focus on the defense many officers asserted in civil suits.[89] As a result, many legal scholars and concerned citizens began questioning the legitimacy of qualified immunity. Strangely enough, criticism of qualified immunity is non-partisan; both the Cato

85. Erwin Cherminsky, *SCOTUS hands down a rare civil rights victory on qualified immunity*, ABA J. (Feb. 1, 2021, 9:11 AM), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity ("But the court's reasoning also is potentially quite significant. The court in its per curiam opinion relies on two prior decisions: *United States v. Lanier* and *Hope v. Pelzer*. These are the rare cases where the court said that there does not have to be a prior decision on point to overcome qualified immunity.").

86. *Id.* (Where a prisoner was confined to an extremely unsanitary cell for six days).

87. *Taylor*, 141 S. Ct. at 53.

88. *Id.*

89. *See supra* notes 1-3.

Institute (a libertarian think tank) and the ACLU (an American nonprofit civil rights group) have called for abolishing qualified immunity.[90] Even Justices Sotomayor and Thomas, two Supreme Court justices on the opposite side of the judicial spectrum, have called for the Court to revisit its thinking on qualified immunity.[91] What makes qualified immunity unique is that despite the non-partisan agreement that the doctrine in its current state needs revision, qualified immunity remains and has not been abolished or reversed since *Pearson*. That is because there is a debate in the legal community about the lawfulness of qualified immunity.

1. The Arguments that Qualified Immunity is Unlawful

The argument that qualified immunity is unlawful hinges on the common law origins of the defense. The Court, as I discussed earlier, created this doctrine in *Pierson* based on a common law tort.[92] As the first premise to qualified immunity is based on the common law origins of the defense, a common law origin is essential. Without it, qualified immunity has no basis at all. As the Court has stated, even where a statute lacks an explicit defense (as is the case in § 1983 regarding qualified immunity), statutes are subject to defenses from common law.[93]

The Court's common law justification for the defense of qualified immunity comes from *Pierson v. Ray*.[94] While the Court justified qualified immunity in *Pierson* based on the common law tort of false arrest and imprisonment,[95] the limited application of qualified immunity in Fourth Amendment contexts was quickly expanded to all cases under

90. Lawrence Hurley & Andrew Chung, *A United Front Takes Aim at Qualified Immunity*, REUTERS (May 8, 2020, 3:10 AM), https://www.reuters.com/investigates/special-report/usa-policeimmunity-opposition/.

91. John M. Aughenbaugh, *Calls to reform qualified immunity are coming from left and right. I'm still skeptical*, USA TODAY (Nov. 7, 2021, 7:52 PM), https://www.usatoday.com/story/opinion/2021/11/07/qualified-immunity-roadblocks-lie-aheadpath-reform/6104866001/.

92. Pierson v. Ray, 386 U.S. 547, 557 (1967).

93. William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 50 (2018) (explaining that the common-law rules of self-defense, duress, and necessity can all apply to criminal statutes that fail to mention them explicitly and that state sovereign immunity is another example of an unwritten defense).

94. Pierson v. Ray, 386 U.S. 547, 557 (1967).

95. *Id.* at 556-57.

§ 1983.[96] Professor Baude notes that despite originally applying the common law subjective defense of good faith to claims under § 1983, the Court transformed the subjective defense to an objective analysis of "the objective reasonableness of an official's conduct, as measured by reference to clearly established law."[97]

This shift from subjective to objective analysis is not rooted in the common law.[98] However, as Professor Baude notes, the Court recently relied on the common law origins of the defense in *Filarsky*.[99] The Court relied on history when it decided the question of immunity in *Filarsky*:

> At common law, government actors were afforded certain protections from liability, based on the reasoning that 'the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions.' Our decisions have recognized similar immunities under § 1983, reasoning that common law protections 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983.[100]

The Court's reliance on common law in *Filarsky* highlights the inconsistency of the Court's reasoning in qualified immunity cases. While the Court has used common law in reaching their opinions after *Harlow*,[101] that is not always the case. For example, in *Anderson*[102] and *Malley*,[103] the Court justified a ruling on qualified immunity by relying on policy grounds. However, Professor Baude notes that the Court has announced that they look to the traditional common law, as

96. Baude, *supra* note 93, at 47 (citing Scheuer v. Rhodes, 416 U.S. 232, 247 (1974)).

97. *Id.* at 53 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

98. *Id.* (citing David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 38-42 (1989)).

99. *Id.* (citing Filarsky v. Delia, 566 U.S. 377 (2012)).

100. *Id.* at 53-54 (citing Filarsky v. Delia, 566 U.S. 377, 383-84 (2012)) (quoting Wasson v. Mitchell, 18 Iowa 153, 155-56 (1864)).

101. *Id.* at 54.

102. Anderson v. Creighton, 483 U.S. 635, 642-43 (1987).

103. Malley v. Briggs, 475 U.S. 335, 342 (1986).

opposed to contemporary common law, when they interpret § 1983.[104]

Professor Baude's argument against the legality of qualified immunity is based on three grounds.[105] First, the Court never applied the defense of good faith (the initial defense to qualified immunity in *Pierson*) in situations that resemble modern-day qualified immunity cases in the time prior to the enactment of § 1983.[106] Professor Baude argues that because the defense does not exist at common law in analogous situations (situations that involve civil suits against public officials for their acts as public officials) and that the Court explicitly rejected anything resembling an implied good faith defense in those suits, there is no common law basis for the court's.[107]

Second, when the Court has found a good faith defense in the common law, that defense came from areas of tort law, not constitutional causes of action.[108] Further, the role of good faith was an element of those specific torts.[109] Professor Baude argues that while finding elements of common law in a federal statute related to those torts is possible, it would be expected to find those elements explicitly listed.[110]

Lastly, even assuming that good faith could be applied to § 1983 and that good faith did not need to be included in the statute explicitly, the application of good faith extends beyond the specific analogies at common law in what Professor Baude calls the "mismatch problem."[111] The "mismatch problem" describes how adoption from common law needs to be limited to the types of claims that are analogous rather than "across the board."[112] This position is consistent with the beliefs of Justice Kennedy and Justice Scalia, who had argued on separate occasions that the Court had strayed from the

104. Baude, *supra* note 93, at 54 (noting that the court examines whether immunities were established in 1871 when Section 1983 was enacted) (citing Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993)).

105. *Id.* at 55.

106. *Id.* (explaining that the Court focuses on the legality of the act, rather than the subjective intent behind the officer committing the act).

107. *Id.* at 56-58.

108. *Id.* at 58.

109. *Id.* at 59 (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)).

110. Baude, *supra* note 93, at 60.

111. *Id.*

112. *Id.*

common law immunities that existed when § 1983 was written.[113]

2. The Argument for Common Law Qualified Immunity

A recent article by Scott A. Keller examines the history behind qualified immunity and argues that the common law around 1871 did recognize an immunity resembling the modern-day qualified immunity defense.[114] In Keller's research, he examined four nineteenth-century treatises on the common law in 1871.[115] Keller found qualified immunity protecting government officers' discretionary duties.[116] While this immunity is not identical to the modern-day qualified immunity of *Pearson*, Keller's analysis takes an in-depth look at the scope of government-officer immunity at common law.[117]

Keller first looks at officer actions that categorically lacked immunity at common law.[118] In 1871 the Supreme Court recognized that officers are liable for damages to private citizens when they neglect or fail to do a ministerial act.[119] However, this liability only applies when an officer owes a duty to the individual instead of the public.[120] The common law found legislators and judges duties to the State are protected activities and are entitled to immunity from civil suit.[121] Thus,

113. *See* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

114. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021).

115. *Id.* at 1337.

116. *Id.* at 1344-45 (citing Otis v. Watkins, 13 U.S. (9 Cranch) 339, 356 (1815); Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129-31 (1849); and Kendall v. Stokes, 44 U.S. (3 How.) 87, 87 annot. 2 (1845).

117. *Id.* at 1347.

118. *Id.*

119. Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138 (1871) (noting that an officers' mistake as to their duty and honest intentions do not excuse the officer); *see also* Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849) (ministerial duties are defined as mandatory duties in the performance of which officials lack discretion).

120. Keller, *supra* note 114, at 1348 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 381 (Chicago, Callaghan & Co. 1879)).

121. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 379-81 (Chicago, Callaghan & Co. 1879).

the focus is on the duties themselves and not the effect of the failure to follow that duty.[122]

Keller then finds that both legislators and judges were afforded absolute immunity in common law for their discretionary duties.[123] This immunity differs from qualified immunity as it prohibited any inquiry into an officer's subjective motives.[124] While this immunity differs from the common law immunity, the underlying principles of the Speech or Debate Clause for legislators and public policy for the judiciary helped generate qualified immunity.[125]

Keller next discusses how some courts grappled with quasi-judicial acts, defined as acts that are neither ministerial nor judicial, that cover situations where an officer acts without specific direction from the law.[126] These types of acts became protected so long as the officer did not act with subjective malice.[127]

Lastly, in examining the four treaties, Keller finds a freestanding qualified immunity to all sorts of public officials including police officers, tax assessors, members of a school board, and many other kinds of public officials.[128] Further, the immunity granted to these public officials was qualified based on improper motives.[129] This question of public official motive was also a question for a jury, not for a court.[130]

Despite the differences between the current doctrine of qualified immunity and the common law equivalent, Keller brings new life to a debate and enables the Court to find a firmer foundation for this doctrine.

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122. Keller, *supra* note 114, at 1349-50.

123. *Id.* at 1355-57.

124. *Id.* at 1355.

125. *Id.* at 1355-57.

126. *Id.* at 1358-59.

127. Keller, *supra* note 114, at 1358-59; *see also* Otis v. Watkins, 13 U.S. (9 Cranch) 339, 355-56 (1815).

128. Keller, *supra* note 114, at 1372.

129. COOLEY, *supra* note 121, at 690-92.

130. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW AND ESPECIALLY AS TO COMMON AFFAIRS NOT OF CONTRACT, OR THE EVERY-DAY RIGHTS AND TORTS 93 (Chicago, T. H. Flood & Co. 1889).

III. IDENTIFICATION OF LEGAL ISSUE: THE PEARSON RULE BETRAYS THE PURPOSE OF THE DOCTRINE OF QUALIFIED IMMUNITY

The Court has lost its way in its quest to find a better way to handle the defense of qualified immunity. In *Harlow*, the Court stated its goal was to balance two competing values: "the importance of a damages remedy to protect the rights of citizens . . . but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[131] However, following *Pearson*, the Court has unintentionally put its thumb on the scale in favor of public officials and police officers.[132] Since 2007, defendants have seen a thirteen percent increase in grants of qualified immunity.[133]

In addition to media criticism of the doctrine, the legal community has had a lot to say about qualified immunity. Some have called for the abolishment of qualified immunity from § 1983 lawsuits, believing there is no common law basis for the defense,[134] while others have defended qualified immunity on those grounds.[135] This debate will likely be critical in future Supreme Court cases on qualified immunity. As Justice Thomas recently explained in his dissent from the denial of certiorari in *Baxter v. Bracey*,[136] "we at least ought to return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law."[137]

131. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-06 (1978)) (internal quotation marks omitted).

132. *See generally* Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

133. *Id.*

134. Baude, *supra* note 93, at 47.

135. Keller, *supra* note 114, at 1348.

136. Baxter v. Bracey, 140 S. Ct. 1862 (2020).

137. *Id.* at 1864 (Thomas, J., dissenting) (internal quotations omitted) (citing Ziglar v. Abbasi 137 S. Ct. 1843, 1870 (2017) (Thomas, J. concurring)).

Further, while some have identified the benefits of *Saucier*'s mandatory sequencing,[138] the overwhelming majority of legal experts have defended the Court's rationale in eliminating the mandatory inquiry in favor of a discretionary investigation of the merits of the defense.[139] Lastly, some have called for a lightening of the clearly established element.[140]

In the fourteen years following *Pearson*, there are three main issues with the current qualified immunity doctrine. First, the Court needs to settle the questions regarding the legality of the qualified immunity defense based on its common law origins. Second, the Court erred by eliminating the mandatory sequencing requirement in *Saucier*. Third, the Court must re-examine the clearly established element considering common law findings. I contend that only through an inquiry into these three issues can the Court restore the balance that qualified immunity is meant to achieve. While there are three issues with the current qualified immunity doctrine, I will focus on the problems of eliminating the mandatory sequencing requirement from *Saucier* in *Pearson*.[141]

IV. ANALYSIS

While the debate surrounding the common law origins of qualified immunity are fascinating, they are beyond the scope of this Note. I will be operating under the assumption that qualified immunity is rooted in common law jurisprudence. If qualified immunity is rooted in common law, then much of the Court's jurisprudence about qualified immunity has a legal basis. Accepting this premise as a first condition changes the direction of the legal conversation surrounding this topic.

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138. Paul W. Hughes, *Not A Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 430 (2009).

139. Leong, *supra* note 36, at 682.

140. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021).

141. First, there is difficulty resolving the common law problem of whether qualified immunity existed in an analogous enough form before the enactment of § 1983. As I have discussed, there is an ongoing debate about this issue, and I think it is best to assume for this Note that there was enough of a common law basis for qualified immunity. Second, as discussed earlier in *Taylor v. Riojas*, "clearly established" has been given more clarity. In light of this added clarity, it is better to leave discussion of this newly changed standard for another time.

Because the Court's justification of this doctrine derives from the common law and sound policy, I believe there is a workable way to fix the imbalance created by *Pearson*. Further, I will assume that the Court's shift to the clearly established standard[142] was also sound. There has been much debate on that topic recently,[143] and examining that prong of the discretionary sequencing analysis would be too difficult to keep within the parameters of this Note.

Thus, by solely focusing on the order of sequencing, I will examine *Pearson* and the analysis the Court used to justify overruling *Saucier*. *Pearson* aimed to solve the judicial problems created by *Saucier*, [144] but it came up short concerning the purpose of qualified immunity. Accordingly, this section contends that the Court erred when it eliminated the mandatory sequencing in *Saucier* because the justifications behind *Pearson* are inconsistent with the purpose of the doctrine.

A. The Faulty Criticisms of Saucier

In *Pearson*, the Court, in response to criticism from members of the Court and by lower judges, granted certiorari to address the question of whether *Saucier* should be overruled.[145] Finding stare decisis applicable,[146] the Court overruled *Saucier* and found that the sequencing should no longer be considered mandatory.[147] Justice Alito, writing the opinion for the Court, listed several reasons to depart from mandatory sequencing.[148] I will analyze the most important reasons given by the Court below.

1. Situations with Unknown Constitutional Violations

In cases where it is apparent that there is no clearly established law, but the constitutional violation is unknown, courts would be asked under *Saucier* to examine the

142. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
143. Schwartz, *supra* note 140.
144. *See Harlow*, 457 U.S. at 807.
145. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
146. *Id.* at 234 (finding that "it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure.").
147. *Id.* at 236.
148. *Id.* at 227.

constitutional violation despite knowing that qualified immunity will be granted.[149] The Court argues that such a mandate will place an unnecessary burden on "[d]istrict courts and courts of appeals with heavy caseloads . . . [to complete] essentially [an] academic exercise."[150] Such an exercise sometimes "fail[s] to make a meaningful contribution to . . . development" of constitutional rights.[151]

However, the failure to follow such a procedure ensures that constitutional rights will not be developed. The Court even recognized that following mandatory sequencing can quickly resolve cases.[152] Further, the two-step procedure promotes the development of constitutional precedent and is especially valuable in cases where qualified immunity is not available as a defense.[153] For example, in *Corbitt v. Vickers*, the Eleventh Circuit Court of Appeals granted a police officer qualified immunity after accidentally shooting a ten-year-old boy while trying to effectuate an arrest.[154] However, the Eleventh Circuit found no clearly established right and passed on determining whether or not the officer violated a constitutional right.[155]

Passing on the determination of a constitutional right has become a consistent theme. How will future plaintiffs be able to defeat qualified immunity if lower courts are allowed to pass on the question of whether a constitutional right was violated? The result in *Corbitt* is not an anomaly. A Pulitzer-Prize-winning Reuters study examined two time periods; 2005-2007 (*Saucier*) and 2017-2019 (*Pearson*).[156] That study found that in excessive force cases against police officers, defendants saw an increase from a forty-four percent grant of qualified immunity

149. *Pearson*, 555 U.S. at 237 ("For one thing, there are cases in which the constitutional question is so fact bound that the decision provides little guidance for future cases.").

150. *Id.*

151. *Id.* at 224-25.

152. *Id.* at 236 (noting that "there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong.").

153. *Id.*

154. Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

155. *Id.* at 1323 (finding that there was no clearly established Fourth Amendment right in the absence of a "materially similar case or a governing legal principle or binding case that applies with obvious clarity to the facts of this case.").

156. *See generally* Chung, Hurley, Botts, Januta & Gomez, *supra* note 132.

to a fifty-seven percent grant of qualified immunity.[157] Further, since 2011, lower courts have increasingly ignored the underlying constitutional right question.[158]

While the Court makes a valid point that adhering to the rigid sequencing can result in unnecessary expenditure of judicial resources,[159] there should be a balance between conserving judicial resources and developing constitutional rights.[160] This would ensure that future plaintiffs are not denied justice because a lower court passes on the question of constitutionality unless it's unnecessary.

2. The Judicial Virtue of Constitutional Avoidance

The Court's most substantial reason to pull back on the mandatory sequencing imposed by *Saucier* is the judicial virtue of constitutional avoidance. Constitutional avoidance is a judge-made general rule that advises courts to "not pass on questions of constitutionality . . . unless such adjudication is unavoidable."[161] In addition, applying the general rule of constitutional avoidance leaves lower courts with discretion in qualified immunity cases to elect which prong of the current sequencing test to address first.[162] Because both factors must be met in qualified immunity cases, lower courts can avoid the constitutional right inquiry altogether if an officer can show that the law was not "clearly established" at the time of the alleged act.[163]

While the Court may not have intended for lower courts to pass on the constitutional right inquiry frequently, that is what they do.[164] Nielson and Walker's study found that after *Pearson*, courts declined to decide the constitutional right in

157. *Id.*

158. *Id.*

159. Pearson v. Callahan, 555 U.S. 223, 236-37 (2009).

160. *Id.*

161. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); *see* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

162. *Pearson*, 555 U.S. at 225.

163. *See* Corbitt v. Vickers, 929 F.3d 1304, 1323 (11th Cir. 2019).

164. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34 (2015) (an empirical and comparative study on other various qualified immunity studies).

roughly twenty-five percent of qualified immunity cases, a nineteen percent increase from the *Saucier* sequencing.[165] This number was expected, as it is in line with the pre-*Saucier* numbers.[166] While this may be expected, it does present problems in cases where a court could plausibly find a violation of a constitutional right but decline to do so. This problem is exacerbated in circumstances that will likely repeat themselves.[167]

Considering the Court's aim in walking back the rigid sequencing structure of *Saucier*, it appears that the list of factors from the Court in *Pearson* had the desired effect of reducing burden on the courts.[168] However, it retained none of the benefits of *Saucier*.[169] I contend that under the guise of constitutional avoidance, the Court made a misstep when it could have advanced the doctrine of qualified immunity. If the purpose of qualified immunity is to balance "the importance of a damages remedy to protect the rights of citizens . . . but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority,"[170] then the Court should have factored in the benefits to future plaintiffs as they did when they mandated sequencing.[171]

While constitutional avoidance is the Court's strongest argument, it is a general rule[172] and not necessarily a mandate. Here, where plaintiffs rely on a court's finding that there was a constitutional right to prove that a law was clearly established, *Pearson* has an effect that allows defendants to walk on qualified immunity only because a prior court elected not to decide the constitutionality of that very same act. It is wise to practice constitutional avoidance, but in this limited context, practicing that avoidance in every context comes at the expense of future plaintiffs. Those plaintiffs are harmed

165. *Id.* at 34, 37 (compared to six percent during *Saucier*).

166. *Id.*

167. *See* Jessop v. City of Fresno, 936 F.3d 937, 943 (9th Cir. 2019); *see also* Kelsay v. Ernst, 933 F.3d 975, 978 (8th Cir. 2019).

168. *Supra* notes 78-82.

169. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

170. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-06 (1978)) (internal quotation marks omitted).

171. *Pearson*, 555 U.S. at 236 (noting that mandatory sequencing "promotes the development of constitutional precedent.").

172. *Id.* at 225.

and will not be able to see their day in court because a court might forgo the needed articulation of constitutional rights.

B. The Valid Criticisms of Saucier

While some of the criticisms the Court gave in *Pearson* were arguably faulty and inconsistent with the purpose of qualified immunity, other criticisms were valid. Accepting some of the criticisms allows a path to find a middle-ground approach that retains the benefits of *Saucier* but sheds the negatives.

1. Constitutional Determinations on Uncertain Interpretations of State Law

The Court in *Pearson* identified that one of the flaws of mandatory sequencing is that sometimes courts are required to give their own assessment of state law, even where that assessment must be based on ambiguous state law or an issue pending appeal to a higher court.[173] The Court even notes these situations caused lower courts to create an exception to the mandatory sequencing requirement.[174] The Court notes that in these exact types of situations, the constitutional rights will likely not be meaningfully advanced as a higher court will likely decide the issue differently soon.[175]

The Court has a valid point here given that a higher court will address the statute's constitutionality soon. Allowing courts to avoid the first prong of the mandatory sequencing analysis, in this exact situation, will not detract from the purpose of qualified immunity,[176] because this outcome will not hinder future plaintiffs. A higher court will hear and rule on the constitutionality of that ambiguous statute. Thus, future plaintiffs, defendants, and courts will have notice if that higher court finds a constitutional right. Further, the determination by a higher court will mean that that right is clearly established. Even if a higher court finds that the ambiguous

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173. *Id.*

174. *Id.*; *see, e.g.*, Egolf v. Witmer, 526 F.3d 104, 109-11 (3d Cir. 2008); *see also* Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003); *see also* Ehrlich v. Town of Glastonbury, 348 F.3d 48, 57-60 (2d Cir. 2003).

175. *Pearson*, 555 U.S. at 238 ("[Such an] action may have scant value when it appears that the question will soon be decided by a higher court.").

176. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-06 (1978)) (internal quotation marks omitted).

statute does not grant a constitutional right, then future plaintiffs will know that they will fail on the first prong of the mandatory sequencing analysis in that situation. For those reasons, it is okay not to address the constitutionality when it is set to be addressed in a higher court.

2. Situations Where the Facts are Insufficient to Make a Constitutional Determination

The Court notes that there are circumstances where a mandate for a court to find the constitutional violation may be too difficult, if not impossible, based on an inadequate briefing by an attorney.[177] Two reasons come to mind that explains this scenario. The first is bad lawyering. The second is due to the timing of claims for qualified immunity.[178] The "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented"[179] will not further the development of constitutional rights.

Here, the Court is persuasive in that adhering to mandatory sequencing is not optimal. The chance that any determination of a constitutional right could lead to a clearly established right is slim at best here. First, the determination of a constitutional right might be incorrect given the limited facts. One of the first lessons every first-year law student learns is that the facts determine the outcome, and without a clear picture, it is impossible to come to a solid conclusion. Such a forced conclusion runs counter to and strongly weighs in favor of constitutional avoidance. Second, judges should not be punished for the mistakes of inadequate pleading. The judge must uphold the law, and if they cannot decide on the first prong of the sequencing analysis, they should be permitted to move on to the second if that will grant an officer qualified immunity.

V. PROPOSAL: PATH FORWARD FOR QUALIFIED IMMUNITY –

177. Pearson v. Callahan, 555 U.S. 223, 225 (2009).

178. Plumhoff v. Rickard, 572 U.S. 765, 772 (2014).

179. Lyons v. City of Xenia, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring).

MODIFIED MANDATORY SEQUENCING

Much of the recent legal scholarship on qualified immunity focuses on the legality of qualified immunity at common law,[180] contending that qualified immunity is unlawful based on common law defenses available for officers.[181] The lawfulness of qualified immunity based on common law is critical, as the Court adopted it to justify their creation of the doctrine in *Pierson*.[182] Without that common law origin, there is no logical way for the Court to explain the development of the doctrine from *Pierson* to *Pearson*. Still, others claim that qualified immunity has evolved too much. Justice Sotomayor believes the current state of the doctrine is "a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers."[183] Likewise, Justice Thomas has called for the Court to "return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law."[184]

Beginning with the assumption that qualified immunity is rooted in the common law and that the Court did not err in deciding to shift the inquiry from a subjective determination of the defendant's conduct to an objective determination that the law was clearly established at the time,[185] I examined whether the Court erred in removing the mandatory sequencing in *Saucier*.[186] In light of a recent study by Reuters into the change in qualified immunity litigation following *Pearson*[187] and an empirical and comparative study on other various qualified immunity studies by Nielson and Walker,[188] it remains clear that *Pearson* exacerbated the problems that *Saucier* attempted to solve. Therefore, in the hope of solving the issues created by *Pearson*, I propose a modified mandatory sequencing.

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180. Baude, *supra* note 93.
181. *Id.*
182. Pierson v. Ray, 386 U.S. 547, 557 (1967).
183. Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).
184. Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (internal quotations omitted).
185. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
186. Pearson v. Callahan, 555 U.S. 223, 241 (2009).
187. Chung, Hurley, Botts, Januta & Gomez, *supra* note 132.
188. Nielson & Walker, *supra* note 164, at 6.

A. What Modified Mandatory Sequencing Would Look Like

First, the initial inquiry would be whether a constitutional right would have been violated on the facts alleged. Absent a violation of a constitutional right, there is no need for further inquiry into immunity. However, there is no need to follow sequencing in cases that would require a court to issue a determination on an ambiguous state statute, a state statute that is currently on appeal to a higher court, or where there are not enough facts present to make an accurate determination on the presence of a constitutional right. Here, a court need not waste precious judicial resources on the inquiry into a constitutional right.

If a court can find a constitutional right, the next step is to determine whether the right was clearly established. This step of the analysis will remain unchanged. The key difference is that in certain cases – cases with an ambiguous state statute, a state statute that is currently on appeal to a higher court, or where there are not enough facts present to make an accurate determination of a constitutional right – there would be mandatory sequencing, albeit a modified mandatory sequencing. This would solve many of the problems seen in qualified immunity cases since 2009 while retaining the benefits from 2001-2009. It would achieve a better balance of the purpose of the doctrine of qualified immunity.[189]

B. Why Modified Mandatory Sequencing Addresses the Problems of Pearson

Despite the many flaws listed by the Court in *Pearson*, mandatory sequencing brought several benefits to qualified immunity.[190] It allowed courts to establish precedent on unknown constitutional rights, that could be used in future cases to show that a right was clearly established.[191] It allowed police officers to be on notice that a type of behavior was unconstitutional,[192] and had the potential to improve policing over time. However, the Court added a third party to the qualified immunity purpose in *Pearson*; the judiciary.[193] I

189. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
190. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
191. Saucier v. Katz, 533 U.S. 194, 202 (2001).
192. *Id.*
193. *Pearson*, 555 U.S. at 236.

contend that this was a mistake. The Court, citing concerns about a waste of judicial resources in a small percentage of qualified immunity cases,[194] ignored the benefits to plaintiffs in qualified immunity cases.

The Court put their thumb on the scales of justice in favor of defendants and the judiciary. Everybody wins, except for the plaintiffs who, lest we not forget, are alleging that their constitutional rights were violated. In the years following *Pearson*, studies have shown that defendants are being granted qualified immunity at pre-*Saucier* rates.[195] If the goal of *Pearson* was to end the "failed experiment,"[196] the Court needs to acknowledge its mistake and correct it. I propose that if the Court slightly modifies the mandatory sequencing in *Saucier*, a balance can be found that serves the purpose of the doctrine.[197]

C. Potential Problems with Modified Mandatory Sequencing and a Response to Them

The first objection to my proposal, in light of my self-imposed parameters and two assumptions, is that this proposal runs counter to the general rule of constitutional avoidance.[198] While that is true in some circumstances, the constitutional determination is critical for future plaintiffs to avoid defeat on the clearly established prong of the qualified immunity analysis.[199] By allowing courts to pass on the first prong of the analysis in the three exceptions I suggested above, courts will both retain the benefits of *Saucier*[200] and avoid a flagrant violation of the general rule of constitutional avoidance.[201]

Second, lower courts will be frustrated by the additional judicial resources required to decide on the violation of a constitutional right. But as Justice Alito notes in *Pearson*,

194. *Id.* at 236-37.
195. Nielson & Walker, *supra* note 164, at 37.
196. *See* Morse v. Frederick, 551 U.S. 393, 432 (2007).
197. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
198. *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").
199. *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1323 (11th Cir. 2019).
200. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
201. *Id.* at 241.

often the two questions are so intertwined that doing so would not require much, if any, additional use of judicial resources.[202] Further, the benefits to future plaintiffs and courts far outweigh the slight cost to lower courts. If a constitutional right is violated, future cases can proceed directly to the second prong of the analysis, as the first has already been decided. On balance, it appears that by allowing three exceptions to the strict mandatory sequencing of Saucier, the balance that *Harlow* aimed to achieve[203] will be better served than by *Pearson*.

VI. CONCLUSION

In conclusion, the Court erred in deciding *Pearson*. The Court has struggled to find a working qualified immunity doctrine and has worked over the last seventy years to refine it. However, the current doctrine is not workable. It is inconsistent to achieve balance between plaintiffs and defendants. It provides too great a shield for police officers and other public officials when they violate the law. However, there are benefits to qualified immunity if there is a common law foundation to it.

I hope my proposal protects both the plaintiff's and the public official's interests. It's essential to keep in mind the future rights of parties so that the law can continue to improve over time. By implementing a modified mandatory sequencing, courts would retain the benefits of *Saucier* while allowing judges more opportunity to pass on determinations that aren't built on a solid enough foundation.

202. *Id.* at 236.
203. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).