TACKLING THE QUALIFIED IMMUNITY PROBLEM WITH STATE LAW

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INTRODUCTION

Abuse of power, police misconduct, brutality, and homicide are not new problems, but the protests that unfolded across the country in the wake of George Floyd’s murder during the summer of 2020 generated a new wave of interest in police reform.¹ Proposals for reform have ranged from specific clarifications, such as chokehold bans,² to broad restructuring, such as reallocating...

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² NEV. REV. STAT. § 193.305 (2020); COLO. REV. STAT. § 18-1-707. (2.5)(1)(a) (2020); Press

One proposal that has generated widespread national interest is eliminating qualified immunity. Qualified immunity is a defense available when government actors are sued for violating a person’s civil rights. It is a judicially created defense rooted in early common law tort defenses,\footnote{Qualified Immunity, National Conference of State Legislatures (Jan. 12, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx; William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 49–50 (2018).} but the current doctrine is much more protective than any common law defenses would have been.\footnote{Joanna C. Schwartz, After Qualified Immunity, 120 Colum. L. Rev. 309, 312 (2020).} Functionally, it operates to bar lawsuits against government officials, mainly police officers, in a great majority of police cases, even where a court ultimately determines that the officer violated the Constitution.

Qualified immunity is not the only barrier to holding officials accountable for unconstitutional actions. Federal statutes that criminalize civil rights violations have been interpreted to require a finding that the officer acted willfully,\footnote{Screws v. United States, 325 U.S. 91 (1945) (plurality opinion).} a high standard that results in very few successful federal prosecutions for civil rights violations.\footnote{Police Officers Rarely Charged for Excessive Use of Force in Federal Court, TracReports (June 17, 2020), https://trac.syr.edu/tracreports/crim/615/.} Civil litigants face additional barriers to recovery, including limits on governmental liability.\footnote{U.S. Const. amend. XI, Will v. Mich. Dep’t of State Police, 491 U.S. 58, 64 (1989) (holding that, even though state sovereign immunity does not bar suit in state courts, a state is not a person within the meaning of § 1983); Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978) (permitting suits against municipalities, but only for violations resulting from government “policy or custom”).} Federal investigations of police departments can be effective at changing policies, but they do not hold individual officers accountable or compensate victims.\footnote{They are also effective only if the Administration chooses to pursue them. Debo P. Adegbile, Policing Through an American Prism, 126 Yale L.J. 2222, 2251–53 (2017) (“The U.S. Attorney General has discretion over whether to initiate and pursue these investigations.”); Justin Hansford & Meena Jagannath, Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson, 12 Hastings Race & Poverty L.J. 121, 130–31 (2015); see also Memorandum from Attorney General Jeffrey Sessions, Dep’t of Just. (Mar. 31, 2017) (proclaiming cooperation and def-
qualified immunity doctrine is an important way to increase police accountability. It is practically important because qualified immunity directly bars many suits against individual officers, and symbolically important because the Supreme Court’s current interpretation of the doctrine creates the public impression that police officers will always win in court, no matter how egregious their actions. Moreover, as structural reform measures like police defunding are debated in the wake of news reports about a spike in violent crime, qualified immunity reform may emerge as a bipartisan, politically feasible avenue for police reform.

State legislatures have faced a great deal of pressure to implement police reform measures. Federal laws, while important, do not have as direct an impact on state police actions as state laws do. And, while police departments and unions can take action to increase internal accountability, changes to state law are likely to be viewed as more permanent and effective. Regarding qualified immunity reform, however, there are questions about whether state legislatures can do anything. Qualified immunity is a creature of federal law that applies in federal courts, so only Congress or the Supreme Court can eliminate or limit it. In the face of the Court’s unwillingness to do so and slim hopes for reform in Congress, states have pursued creative solutions to address the problem of qualified immunity. States and municipalities have enacted legislation that authorizes civil rights suits in state court for violations of state constitutions. These suits are analogous to federal causes of action under 42 U.S.C. § 1983, the federal law that authorizes civil rights lawsuits against state actors. Yet, because they are creatures of state law, procedures and defenses can be shaped by state legislatures, and cases proceed under state jurisdiction. In allowing these suits, some state legislatures have expressly banned the defense of qualified immunity or sought to limit when it is available, especially in police cases.

This Article examines recent legislative efforts to address the qualified immunity problem by relying on state constitutional law. These state law reforms are recent, so it is not yet possible to reliably measure their practical effects. However, this Article contends that they are important in restoring public perceptions of police accountability and are likely to increase the likelihood of

cherence to local police departments and prioritizing policing and public safety over investigations).


recovery for victims of police violence. Drawing on the strengths and weaknesses of other state laws, this Article proposes a similar law for Nevada. While the Supreme Court of Nevada recently recognized civil rights suits under the Nevada Constitution and rejected qualified immunity as a defense,\textsuperscript{12} this Article also addresses several other barriers to recovery and expands available state remedies. Part I explains the problem presented by qualified immunity. It traces the doctrine from the earliest Supreme Court cases through the most recent ones to show how the Court has strengthened it into an almost ironclad shield for police officers. It summarizes criticism of qualified immunity and describes how it operates to significantly limit police accountability. Part II considers federal Congressional efforts to address qualified immunity. A federal statute could directly limit or eliminate qualified immunity, but none has advanced in Congress thus far. Part III examines state efforts to eliminate it. It reviews and contrasts recent laws passed in four states and identifies important and potentially limiting provisions. Finally, this Article sets forth a proposed Nevada statute.

State laws eliminating or limiting qualified immunity are an example of how state constitutions and legislatures are increasingly emerging as protectors of civil rights where federal law is perceived to be failing. Federal civil rights statutes, including § 1983, have their genesis in the problem of recalcitrant states whose legislatures and courts refused to protect the rights guaranteed by the Constitution. These federal statutes, and the federal courts that hear cases arising under them, were viewed as protectors of individuals against states that refused to recognize and enforce full constitutional protections. In the case of qualified immunity, however, the U.S. Supreme Court has crafted a rule that is hostile to civil rights and Congress appears unlikely to coalesce across party lines to protect those rights. In this climate, state constitutions can be a source of stronger protections and state courts a knowledgeable, community-based arena in which to enforce them.

I. THE QUALIFIED IMMUNITY PROBLEM

When a state official violates an individual’s civil rights, the individual may sue the officer, the department, and sometimes the government. These civil suits for damages, authorized by 42 U.S.C. § 1983, are an important tool for compensating individuals and for discouraging future rights violations.\textsuperscript{13} Various procedural rules limit the ability to recover; one significant barrier is the doctrine of qualified immunity.\textsuperscript{14} In its current form, qualified immunity shields

\textsuperscript{14} See Joanna C. Schwartz, \textit{How Qualified Immunity Fails}, 127 Yale L.J. 2, 6–7, 9, 10 (2017) [hereinafter Schwartz, \textit{How Qualified Immunity Fails}] (summarizing scholarly assumptions that qualified immunity results in the dismissal of civil rights suits; reporting based
individual state officers from liability when they act unconstitutionally if no specific law or case held that their conduct violated the constitution in factually similar circumstances. In this Part, we describe how the law of qualified immunity works, how it has evolved, and how it presents a barrier to recovery in civil rights cases.

A. What is Qualified Immunity?

The Ku Klux Klan Act of 1871 that later became 42 U.S.C. § 1983 was enacted to give a civil right of action to people who were deprived of their Constitutional rights by persons acting under color of law. Courts interpreted this new cause of action in light of common law immunities. The resulting doctrine provides that various state officials are completely immune from suit, while police officers have what is referred to as qualified immunity. With qualified immunity, an officer is immune from suit in cases where the officer acted in good faith and did not violate a clearly established constitutional right.

The Supreme Court has detailed the importance of having the qualified immunity doctrine, and ultimately determined that it was a better alternative than absolute immunity. It sought to balance the need for a civil remedy to vindicate the violation of constitutional rights against the social costs of wrongful claims, including “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.” The Court also feared that potential liability would “dampen the ardor” of public officials for carrying out their duties. These policies became repeated driving forces behind the continued use of qualified immunity. In this Section, we show how the doctrine has evolved in Supreme Court and Ninth Circuit case law from a seemingly limited immunity to a broad protection, and we provide details of important cases to illustrate their context and how the rules have applied to specific police conduct.

on a study of civil rights dockets that qualified immunity “is rarely the formal reason” such suits are dismissed but concluding “there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways”).

15 Joanna C. Schwartz, Qualified Immunity’s Boldest Lie, 88 U. Chi. L. Rev. 605, 616–619 (2021) [hereinafter Schwartz, Qualified Immunity’s Boldest Lie].


18 Id.

19 Id.

20 See Harlow, 457 U.S. at 814 (describing qualified immunity as “the best attainable accommodation of competing values”).

21 Id.

22 Id. (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)).
I. Qualified Immunity in the Supreme Court

The Supreme Court created the doctrine of qualified immunity in 1967.23 Carl Rachlin and Elizabeth Watkins Hulen Grayson argued before Chief Justice Earl Warren and Associate Justices Hugo Black, William O. Douglas, Tom C. Clark, John M. Harlan II, William J. Brennan Jr., Potter Stewart Byron White, and Abe Fortas in the matter of Pierson v. Ray.24 Pierson involved the police response to “a group of 15 white and Negro Episcopal clergymen” with bus tickets who dared to enter a segregated interstate bus terminal in Jackson, Mississippi in 1961 to eat a sandwich before boarding their bus.25 Because the group disobeyed a sign that read “White Waiting Room Only—By Order of the Police Department,” they were arrested and taken to jail.26 The group was charged with disorderly conduct under a Mississippi law that made it a misdemeanor to congregate “with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refusal[ing] to move on when ordered to do so by a police officer.”27 Each member of the group was sentenced to the maximum jail time under the statute, four months, and given a $200 fine.28 That amount is equivalent to about $1,985.26 today.29 In sum, the group of clergymen in Pierson were sentenced to four months in jail and fined over $1,900 in today’s dollars because, although they were ticket-carrying passengers, they refused to leave the “Whites Only” train station lobby when told to do so by the police. The petitioners argued that the police officers violated their constitutional rights and subjected them to false arrest and imprisonment by enforcing the segregation law, which was held by a court in 1965 to be unconstitutional, when there was no risk of violence or threatened disturbance.30 The lens of history has shown us that laws such as the Mississippi disorderly conduct law have been abused and applied disproportionately against people of color.31 It was precisely because of this type of abuse of power that § 1983 was enacted.

During oral argument, Mr. Rachlin, who represented the clergymen, advocated against granting immunity to the police officers that arrested the clergy-

24 Id.
26 Id. at 552–53.
27 Id. at 549.
28 Id. at 549–50.
30 Pierson, 386 U.S. at 550.
men as well as the judge who convicted and sentenced them. On the other side, Elizabeth Watkins Hulen Grayson argued that both the policemen and the judge were entitled to immunity. She maintained that the type of judicial immunity existing in the common law should be extended to the statute and that the officers were likewise entitled to immunity because the law was valid on the Mississippi books and they were acting in good faith. In support of this argument Ms. Grayson looked to the custom and practices in Mississippi at the time as validation, stating: “I hope the Court will recall and keep in mind that this could in 1961, we would look at the facts of the case in view of the times. We must look at the facts in the case in the view of the mood of the people, of the tenseness of the people in the City of Jackson.”

In *Pierson*, the Supreme Court of the United States stood at the intersection of the Civil Rights Movement and sham laws that were unconstitutional and disproportionately enforced against people of color to legalize systemic racial oppression. The “mood of the people” in places that enforced these laws conformed such conduct. It was in this moment in history that the Supreme Court made the decision to create the doctrine of qualified immunity to protect the police officers who, under color of state law, violated the constitutional rights of the clergymen when they enforced segregation of a public bus station by prohibiting ticket-carrying passengers from eating a sandwich solely because they were not white. Specifically, the Court held that the common law tort defense of “good faith and probable cause” were available to officers in civil rights suits, and noted that officers were not required to predict the outcome of future cases overturning unjust laws. Qualified immunity was born of this moment, and as shown below, it has been strengthened throughout the years in the U.S. Supreme Court and in the Ninth Circuit.

In 1974, the Supreme Court expanded application of qualified immunity based on a good faith belief by making the defense available to all officers in

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32 The group of clergymen waived a jury trial and were convicted by municipal police justice James Spencer. *Pierson*, 386 U.S. at 549. Mr. Rachlin argued that Congress did not intend for legislators to be punished, but instead the person who under the color of law does the act of depriving someone’s constitutional rights should be punished. He went on to state: “the intent of the Congress of 1871 from reading the Congressional Globe at that time is so carefully drawn against the sham justice that was perpetuated in the period from 1866 through period of 1871 but the very kind of conduct that is considered in this case is the kind of conduct the 1871 Congress was concerned about. They were concerned about the phony justice, the sham justice, the police who arrest and the judges who convict when there was no evidence of any wrongdoing.” Transcript of Oral Argument, Pierson v. Ray, 386 U.S. 547 (1967) (No. 79), https://www.oylez.org/cases/1966/79.
34 *Id.*
35 *Id.*
36 *Pierson*, 386 U.S. at 547.
37 *Id.* at 557.
the executive branch of government. A year later, in 1975, the Supreme Court applied the defense to school board members. In 1976, the Supreme Court doubled down on its findings in *Pierson* and affirmed that tort immunity defenses apply to claims brought under § 1983. In 1979, the Supreme Court separated § 1983 claims from tort claims.

In 1982, the Supreme Court added the “clearly established” requirement. The “clearly established” prong requires that plaintiffs show that actions that gave rise to the § 1983 claim had already been deemed unconstitutional in other cases; this requirement applies in cases where the official’s conduct was malicious.

In 1984, the Supreme Court added support for the doctrine and the “clearly established” requirement. The Court reasoned that officials can only do their

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38 See *Scheuer v. Rhodes*, 416 U.S. 232, 245–48 (1974) (“When a court evaluates police conduct relating to an arrest its guideline is ‘good faith and probable cause’ [...] in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon 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. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.”).


40 See *Imbler v. Pachtman*, 424 U.S. 409, 417–18 (1976) (recognizing that § 1983 “creates a species of tort liability that on its face admits of no immunities [...] s 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.”).

41 See *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (“Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.”).


43 *Id.* at 817–19. (“[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery [...] government officials performing discretionary functions generally are 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 [...] Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many substantive claims on summary judgment.”). “If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.” (internal citations omitted).
job if they have the security of knowing what kind of conduct could be the basis for a § 1983 claim, and knowing that frivolous claims would be swiftly dismissed.\(^{44}\) In 1986, the Supreme Court granted qualified immunity to protect officers who obtained a warrant without probable cause and resulted in an unconstitutional arrest.\(^{45}\) By this point in the evolution of the doctrine, the Court had expanded the contours so that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”\(^{46}\) By 1987, qualified immunity protected officers who conducted unlawful warrantless searches of innocent third parties under the belief that the search was lawful.\(^{47}\)

By 1991, the Supreme Court stated that the qualified immunity question should be decided early in the case.\(^{48}\) In 1993, qualified immunity became the norm for executive officers.\(^{49}\) In 1994, the Supreme Court reiterated that qualified immunity is designed to be a shield for public officials.\(^{50}\) In 1997, the Supreme Court held that the “clearly established” doctrine equates to giving officials fair warning.\(^{51}\) In 1998, the Supreme Court stated that the qualified

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\(^{44}\) Davis v. Scherer, 468 U.S. 183, 195 (1984) (“The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”).

\(^{45}\) Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (“[T]he same standard of objective reasonableness applied in the context of a suppression hearing . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.”) (citing United States v. Leon, 468 U.S. 897, 923 (1984)).

\(^{46}\) Id. at 341.

\(^{47}\) Anderson v. Creighton, 483 U.S. 635, 641, 646 (1987) (“The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. . . . Subjective beliefs about the search are irrelevant. . . . Officers can know that they will not be held personally liable as long as their actions are reasonable in light of current American law. . . . We therefore decline to make an exception to the general rule of qualified immunity for cases involving allegedly unlawful warrantless searches of innocent third parties’ homes in search of fugitives.”).

\(^{48}\) Hunter v. Bryant, 502 U.S. 224, 228 (1991) (“Immunity ordinarily should be decided by the court long before trial . . . [and] the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.”).

\(^{49}\) Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (“[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. Qualified immunity ‘represents the norm’ for executive officers, so when a prosecutor ‘functions as an administrator rather than as an officer of the court’ he is entitled only to qualified immunity.” (citations omitted)).

\(^{50}\) Elder v. Holloway, 510 U.S. 510, 511 (1994) (“The doctrine of qualified immunity shields public officials like respondents from damages actions unless their conduct was unreasonable in light of clearly established law.”).

\(^{51}\) United States v. Lanier, 520 U.S. 259, 270-71 (1997) (“[T]he object of the ‘clearly established’ immunity standard is not different from that of ‘fair warning’ . . . and in effect the
immunity question should be resolved at the earliest possible state to protect public officials from unnecessary litigation.\(^{52}\)

By 2001, the Supreme Court added another prong to qualified immunity by creating a two-part test.\(^{53}\) Known as the “Saucier two-part test,” this analysis required that the facts of the case must first establish a constitutional violation; if a constitutional violation was found, the court would apply step two, which required the “clearly established” factor to be applied with a case in the same circuit.\(^{54}\)

In 2002, the Court clarified that the facts of a case need not be identical\(^{55}\) when looking to whether the constitutional violation was “clearly established,” and held that “fair warning” is satisfied when an officer’s actions would have been clear to a reasonable officer in the same situation.\(^{56}\) This clarification is especially important in excessive force cases because the precise facts of each case vary so much that it can be difficult to imagine that any prior case could clearly establish a violation if identical facts were required.

But, by 2009, the Supreme Court did away with Saucier two-part test and held that district courts have discretion to decide which prong of the test to apply first.\(^{57}\) In 2011, the Supreme Court clarified that although a case on point

qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than ‘clearly established’ would, then, call for something beyond ‘fair warning.’\(^{58}\).

52 Crawford-El v. Britton, 523 U.S. 574, 597–98 (1998) (“When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. . . . [I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery. . . . [T]he court must determine whether, assuming the truth of the plaintiff’s allegations, the official’s conduct violated clearly established law.”).

53 Saucier v. Katz, 533 U.S. 194, 200 (2001) (“[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the [Ninth Circuit] Court of Appeals. . . . [T]he requisite of a qualified immunity defense must be considered in proper sequence.”).

54 See e.g., id. at 201.

55 Hope v. Pelzer, 536 U.S. 730, 741 (2002) (“[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . Although earlier cases involving ‘fundamentally similar’ facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with ‘materially similar’ facts.”).

56 Id. at 746 (“[N]o immunity is available for official acts when ‘it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’” (quoting Saucier, 533 U.S. at 202)).

57 Pearson v. Callahan, 555 U.S. 223, 236 (2009) (“On reconsidering the procedure required in Saucier, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of ap-
was not necessary, qualified immunity should be granted if the existing precedent did not put an official’s actions “beyond debate.”58 While still stopping short of requiring identical facts in a previous case, the Court’s articulation of its test inched closer to such a requirement in practice.

In 2014, the Supreme Court applied the standard of review for dispositive motions to the qualified immunity analysis, requiring that a determination of whether a constitutional violation was “clearly established” be made using the context of the case without making determinations of genuine issues of material fact.59 By 2018, qualified immunity was broadened once again when officials were given its protections unless the constitutional right was “sufficiently definite” such that “any reasonable official in the defendant’s shoes would have understood that he was violating it.”60

2. Ninth Circuit Case Law

In the Ninth Circuit, which encompasses Nevada, a standard has evolved that is arguably even more restrictive than the standard articulated by the Supreme Court. Perhaps more importantly, where the Ninth Circuit has declined to grant qualified immunity, it has been reversed by the Court, suggesting that the Court is moving in the direction of interpreting the rule in an even more restrictive manner.61 This section describes recent outcomes and trends in Ninth Circuit cases. It also highlights those cases that arose in Nevada to illustrate the current legal landscape faced by Nevada civil rights litigants.

58 See e.g., Ashcroft v. al-Kidd, 563 U.S. 731, 741, 743 (2011) (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . . Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”).
59 Tolan v. Cotton, 572 U.S. 650, 657 (2014) (“[Q]ualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, . . . a court decides only the clearly-established prong of the standard. . . . Courts should define the ‘clearly established’ right at issue on the basis of the ‘specific context of the case.’ Accordingly, courts must take care not to define a case’s ‘context’ in a manner that imports genuinely disputed factual propositions.” (citations omitted)).
60 Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (“Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer ‘cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.’” (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014))).
Recently, in *Evans v. Skolnik*, the Ninth Circuit explained that it relies on the principle that “courts should think hard, and then think hard again” before deciding whether the officer’s conduct was a constitutional violation, and when they can, courts should dispose of the case by only determining whether clearly established right existed. In *Evans*, the Court stressed that “the focus is on whether the officer had fair notice that her conduct was unlawful [and] reasonableness is judged against the backdrop of the law at the time of the conduct... Thus, cases decided after the relevant conduct are ‘of no use in the clearly established inquiry.’” Further, the Ninth Circuit is reluctant to rely on district court decisions, an intermediate state court, or unpublished decisions to find that a right has been clearly established.

*Evans* granted qualified immunity to a prison official who monitored calls between an inmate and the attorney who represented him in civil actions. The inmate relied on the Ninth Circuit decision, *United States v. Van Poyck*, which held that prison officials did not violate an inmate’s Fourth Amendment rights when they recorded prisoners’ personal calls and contained a footnote that stated the analysis did not “apply to ‘properly placed’ telephone calls between a defendant and his attorney, which the [prison] does not record or monitor.” The *Evans* court held that “[b]ecause *Van Poyck* did not address the question whether the prison could record legal phone calls, it did not establish a Fourth Amendment right to protection from such conduct[.]” The Court went on to say that the attorney-client privilege is a rule of evidence and not a constitutional right.

The Ninth Circuit also recently evaluated the application of qualified immunity to an excessive force case in *O’Doan v. Sanford*. Reno police received a call from O’Doan’s girlfriend who said that he had a history of epilepsy and was having a grand mal seizure. She asked the 911 operator to convey to the police that Mr. O’Doan was in the middle of a seizure, as police and paramedics were en route to respond to the call, which was labeled as “Code 3” for a “violent” individual.” When paramedics and police arrived, Mr. O’Doan was naked, walking down the street. Officers used a takedown maneuver on Mr. O’Doan called a “reverse reap throw” alleging that they feared for their safety. Mr. O’Doan was transported to a hospital where he was diagnosed with a

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62 Evans v. Skolnik, 997 F.3d 1060, 1066 (9th Cir. 2021).
63 *Id.* at 1066.
64 *Id.* (citing Brosseau v. Haugen, 543 U.S. 194, 198, 200 n.4 (2004)).
65 *Id.* at 1067.
66 *Id.* at 1063.
67 *Id.* at 1067–68.
68 *Id.*
69 *Id.*
70 O’Doan v. Sanford, 991 F.3d 1027, 1032 (9th Cir. 2021).
71 *Id.*
72 *Id.* at 1033.
73 *Id.*
seizure and abrasions. Mr O’Doan was later charged with resisting a public officer and indecent exposure and released on bail the next morning. The charges were dismissed without prejudice about five months later. Mr. O’Doan filed suit alleging that he was wrongfully arrested, the officers violated due process by filing “deliberately fabricated police reports,” and that the reverse reap throw constituted excessive force. All his claims were dismissed on summary judgment.

Addressing the excessive force claim, the Ninth Circuit stated that because an excessive force claim “depends very much on the facts of each case, . . . police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.” Therefore, in Mr. O’Doan’s case, “clearly established” law had to prohibit the officer “using the degree of force that he did in the specific circumstances that the officers confronted.” The Ninth Circuit balanced “the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against ‘the countervailing government interests at stake.’” Applying the Supreme Court’s test for excessive force, the Ninth Circuit considered: the type and amount of force inflicted, the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. This analysis must allow for “the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly resolving—about the amount of force that is necessary in a particular situation.”

The Ninth Circuit said that it had “little difficulty concluding that, at the very least, Officer Sanford did not violate clearly established law when he executed a reverse reap throw on O’Doan” because officers found O’Doan naked, he resisted commands, and turned to officers in a threatening manner with fists clenched. In support of this reasoning, the Ninth Circuit stated that the reverse reap throw was a “modest deployment of force,” O’Doan’s injuries were minor, and it was not apparent that his “injuries resulted from the reverse

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74 Id. at 1034.
75 Id. at 1035.
76 Id.
77 Id.
78 Id.
80 Id. at 1037 (citations omitted).
81 Id. (quoting Miller v. Clark Cnty., 340 F.3d 959, 964 (9th Cir. 2003) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989))).
82 Id.
83 Id. (quoting Graham, 490 U.S. at 396–97).
84 Id. at 1037.
85 Id.
reap throw per se, rather than O’Doan’s combativeness once taken to the ground and the fact that O’Doan was naked.”86 The Ninth Circuit further stated:

O’Doan identifies no precedent that would suggest the force used here was excessive, much less that excessiveness was clearly established on these facts. Indeed, we have held that officers were entitled to qualified immunity in cases involving much more significant uses of force in less challenging situations. See, e.g., Shafer v. County of Santa Barbara, 868 F.3d 1110, 1113, 1117–18 (9th Cir. 2017) (officer did not violate clearly established law when college student “refuse[d] to comply with the officer’s orders” to drop water balloons and the officer “progressively increase[d] his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver,” sending student “face first onto the pavement”); Ames, 846 F.3d at 344–45 (use of force not excessive when officer, responding to mother’s call about her son’s suicide attempt, “employed a hair hold to distract” the mother and then “slammed [her] head into the ground three times”).87

In other words, in order for a plaintiff to overcome qualified immunity on an excessive force claim in the Ninth Circuit, the plaintiff must show that the facts at issue are more egregious than, for example, police grabbing a worried mother by the hair and slamming her head into the ground three times in order to distract her son suffering a mental health episode and attempting suicide.

For his wrongful arrest claim, O’Doan argued that because he was having a seizure, he did not have the required mens rea to commit the crimes he was charged with, and that officers knew this because the 911 operator and, as alleged by O’Doan, the officers themselves were informed of this fact which must be taken as true and all inferences drawn in O’Doan’s favor at the summary judgment stage.88 The Ninth Circuit, relying on Columbia v. Wesby,89 found that in a probable cause analysis the facts must be viewed from a reasonable officer’s viewpoint, and doing so is not a high bar because it “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”90 Further, the circuit court held that officers were entitled to qualified immunity because O’Doan did not identify “a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation ‘under similar circumstances.’”91 As an example, the Court cited to the Sixth Circuit case of Everson v. Leis,92 which granted qualified immunity to officers who hog tied a man suffering a seizure in a shopping mall, arrested him, took him to jail, and charged him with assault and disorderly conduct, even though the man told them he was epileptic and the charges were later dropped.93 The Ninth Circuit reasoned that O’Doan’s conduct was

86 Id.
87 Id. at 1037–38.
88 Id. at 1038.
91 Id. (citing Wesby, 138 S. Ct. at 591 (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017))).
92 Everson v. Leis, 556 F.3d 484 (6th Cir. 2009).
93 Id. at 489.
facially unlawful.94 Nothing in the officer’s interview with O’Doan the next day at the hospital showed that O’Doan had not engaged in illegal conduct or that the basis for the probable cause had dissipated.95 And although O’Doan was diagnosed with a seizure, that diagnosis was based on his “self-reporting,” so the officers were not required to credit the information provided by O’Doan’s girlfriend that he had suffered a seizure and was in a post-seizure state.96

The Ninth Circuit also granted qualified immunity on O’Doan’s claim for a violation of his due process rights when the officers omitted the information regarding his seizure from their police report and affidavit in support of probable cause.97 Although O’Doan cited to Devereaux v. Abbey,98 which held that “there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government,”99 the Ninth Circuit held that Devereaux did not govern because O’Doan did not show a “deliberate fabrication.”100 The Ninth Circuit reasoned that a deliberate fabrication “must mean something more than a mere omission” and “Devereaux held that ‘withholding exculpatory evidence … cannot in itself support a deliberate-fabrication-of-evidence claim.’”101 As a basis for its decision, the Ninth Circuit stated although it would have been “preferable” for the officer to include more specific information about O’Doan’s “possible seizure,” the officer’s report did state that O’Doan “was transported to a hospital to be ‘evaluated for his injuries and other possible health issues.’”102

Senior District Judge Block dissented from the opinion on O’Doan’s § 1983 false arrest and due process claims, stating that “[t]he majority’s opinion is a textbook example of highly skilled craftsmanship and spot-on articulation … of the legal principles governing qualified immunity for police officers…”103 Senior District Judge Block’s dissent provided a detailed analysis of the case and the evidence presented, which at minimum created genuine issues of material fact prohibiting summary judgment.104 Unfortunately, he was in the minority and O’Doan’s entire case was dismissed.

The first quarter of 2022, the Ninth Circuit decided approximately eighteen cases that either affirmed or reversed a grant or denial qualified immunity by the district court. In ten out of the eighteen cases reviewed, the Ninth Circuit

94 O’Doan, 991 F. 3d at 1041.
95 Id. at 1042.
96 Id. at 1042–43.
97 Id. at 1045–46.
98 Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) (en banc).
99 Id. at 1074–75.
100 O’Doan, 991 F. 3d at 1045.
101 Id. (quoting Devereaux, 263 F.3d at 1079).
102 Id. at 1045–1046.
103 Id.
104 See generally id. at 1046–55.
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granted qualified immunity to the defendants; in six of them, the Ninth Circuit denied qualified immunity; and in two cases, the Ninth Circuit granted qualified immunity on some claims but denied it in others.\textsuperscript{105} Based on this sample, the first quarter of 2022 supports the position that qualified immunity is still a significant hurdle for plaintiffs in civil rights suits and more than half the time a claim will be dismissed on qualified immunity grounds.

B. Criticism of Modern Qualified Immunity Doctrine

Today's qualified immunity doctrine is made up of a patchwork of decisions that grew out of cases from all over the country in which government actors deprived people of their Constitutional rights.\textsuperscript{106} For example, caselaw that addressed acts like segregation, which were condoned in Jackson, Mississippi in 1961, now govern whether a deprivation of Constitutional rights in Nevada, in 2023, is civilly actionable.\textsuperscript{107} As a result, states and their communities are subject to a judicially created federal doctrine arising from a range of jurisdictions and historical circumstances and sometimes supported by unsound, outdated, and unsubstantiated reasoning.

\textsuperscript{105} Hughes v. Rodriguez, Case No. 20-17144 (9th Cir. 2022) (holding that the officer was not entitled to qualified immunity); Russell v. Lumitat (9th Cir. 2022) (reversing the district court’s denial of qualified immunity to Nurse Trout, and affirming its denial of qualified immunity to Dr. Le and Nurses Teofilo and Lumitat); McClam v. Verhelst (9th Cir. 2022) (affirming grant of qualified immunity on summary judgment that right was not clearly established); Warden v. Cowan (9th Cir. 2022) (affirming denial of qualified immunity on summary judgment); Moret v. Ranganathan (9th Cir. 2022) (affirming grant of qualified immunity on summary judgment); Estate of Aguirre v. Cnty. of Riverside (9th Cir. 2022) (affirming the district court’s denial of qualified immunity); Turner v. Johnigan (9th Cir. 2022) (reversing district court’s denial of summary judgment on qualified immunity); Smith v. Smith (9th Cir. 2022) (affirming district court’s denial of qualified immunity); Riley’s Am. Heritage Farms v. Elsasser (9th Cir. 2022) (affirming district court’s grant of qualified immunity); Wright v. Penzone (9th Cir. 2022) (affirming grant of qualified immunity to all three officers); Ballentine v. Tucker (9th Cir. 2022) (reversing grant of qualified immunity); Miller v. Acosta (9th Cir. 2022) (affirming grant of qualified immunity);" Banks-Reed v. Mateu (9th Cir. 2022) (denying qualified immunity to officer on appeal from a jury verdict); Weber v. Reif (9th Cir. 2022) (affirming grant of qualified immunity); Morales v. Cate (9th Cir. 2022) (affirming grant of qualified immunity on 2 claims and remanding on other grounds); Williamson v. City of Nat’l City, 23 F.4th 1146 (9th Cir. 2022) (reversing denial of qualified immunity); Flull v. Cnty. of Sacramento (9th Cir. 2022) (affirming grant of qualified immunity); Hyde v. City of Willcox, 23 F.4th 863 (9th Cir. 2022) (affirming denial of qualified immunity for excessive force claim and reversing denial of qualified immunity on other claims).

\textsuperscript{106} See Rivas-Villegas v. Cortes Luna, 595 U.S. (2021) (per curiam) (distinguishing where an “obvious case” for liability has clearly established answer without a body of case law versus the alternative where there must be a case such that the police officer is on notice that their conduct was unlawful). See generally, e.g., Pierson v. Ray, 386 U.S. 547 (1967) (concerning Constitutional rights deprivations that occurred in Mississippi); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (concerning Constitutional rights deprivations that occurred in New York).

\textsuperscript{107} See Pierson, 386 U.S. at 548–51.
Modern qualified immunity doctrine has many critics. Some criticism focuses on its impact, arguing that the original rule has been interpreted so restrictively as to make recovery nearly impossible. Other criticism focuses on the doctrine itself, arguing that the Court has mischaracterized its common law roots and thereby restricted the application of federal statutory law much more than is appropriate. In the landscape of police reform, it is a rare site of agreement between organizations on the political left and right.

Scholars and commentators agree that qualified immunity acts as a barrier to recovery in civil rights cases, but the manner in which it does so is complex. First, it may act as a procedural barrier if a large portion of civil rights suits are dismissed on qualified immunity grounds. Joanna Schwartz has demonstrated that this claim is not empirically supported. In a study of over one thousand civil rights dockets, she found that only a small percentage were formally dismissed on qualified immunity grounds. Second, it may impede or foreclose necessary discovery if it results in dismissal at an early stage. Here again, Professor Schwartz found that an even smaller percentage were dismissed before discovery, and many suits remained in court on other grounds even after dismissal. Third, the doctrine seems to have a chilling effect on civil rights litigation that is more difficult to measure. In recent years the Supreme Court has granted immunity in most cases and has reversed several lower court decisions that did not grant immunity, signaling to lower courts and litigants that § 1983 claims may not be likely to survive. Because § 1983 suits are frequently litigated on a contingency basis, the knowledge that they are unlikely to

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109 See, e.g., Schwartz, Case Against Qualified Immunity, supra note 10, at 1801–03.

110 While the clamor to eliminate or change qualified immunity has been loud, some scholars caution that states have relied on it in determining a range of policies so any change would greatly impact both individual officers and state governments. Aaron L. Nielson & Christopher J. Walker, Qualified Immunity and Federalism, 109 Geo. L.J. 229, 236 (2020).


112 Schwartz, How Qualified Immunity’s Boldest Lie, supra note 15, at 46.


114 Schwartz, Qualified Immunity’s Boldest Lie, supra note 15, at 42.

succeed means fewer attorneys who are willing and able to take the cases.\textsuperscript{116} Many cases do end in recovery by settlement, but governments have little incentive to agree to large settlements if they know they are likely to prevail in litigation.

A related criticism focuses on how modern qualified immunity rules indirectly impede the development of civil rights case law. In § 1983 claims where qualified immunity is asserted, the court must determine two core issues: whether the defendant violated the plaintiff’s constitutional right and, if so, whether the right in question was clearly established enough that the defendant should be liable. In \textit{Saucier v. Katz}, the Supreme Court mandated that lower courts consider the merits of a constitutional claim before addressing immunity.\textsuperscript{117} The merits-first order meant that, even if a case were dismissed on qualified immunity grounds, the lawsuit could still result in a judicial determination that the plaintiff’s civil rights were violated. Such determinations, in turn, would make recovery more likely in future similar cases by creating clearly established law regarding the constitutionality of that behavior.\textsuperscript{118} Empirical studies have found that the \textit{Saucier} regime resulted in richer development of constitutional rights jurisprudence.\textsuperscript{119} Eight years later, in \textit{Pearson v. Callahan}, the Supreme Court ruled that lower courts could consider the issues in any order.\textsuperscript{120} After \textit{Pearson}, lower courts were free to dismiss cases on immunity grounds before reaching the merits of the constitutional claim.\textsuperscript{121} When courts choose to avoid adjudicating the merits of the constitutional claim, qualified immunity is strengthened as a defense because opportunities to define new constitutional rights will be rare since most cases will be dismissed on qualified immunity.

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\item \textsuperscript{116} See generally Alexander A. Reinert, \textit{Does Qualified Immunity Matter?}, 8 \textit{UNIV. OF ST. THOMAS L. J.} 447, 491–94 (2011) (examining the role of qualified immunity in attorney screening in \textit{Bivens} cases).
\item \textsuperscript{117} 533 U.S. 194, 207 (2001).
\item \textsuperscript{118} Sam Kamin, Harmless Error and the Rights/Remedies Split, 88 VA. L. REV. 1, 50 (2002); see also Sam Kamin, An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz, 16 \textit{GEO. MASON L. REV.} 53, 88–91 (arguing that addressing the merits first does not raise Article III concerns in most cases).
\item \textsuperscript{120} \textit{Pearson} v. \textit{Callahan}, 555 U.S. 223, 227 (2009).
\end{enumerate}
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grounds before the underlying rights violation is addressed. Without published judicial opinions declaring that specific behaviors violate constitutional rights, defendants will continue to prevail because little to nothing will be clearly established.

Another criticism is doctrinal. While not rooted in the text of § 1983, the modern doctrine is ostensibly based on common law tort immunities enjoyed by state officials at the time the statute was enacted. Scholars and judges have questioned, however, whether these common law immunities existed and, if they did, whether modern qualified immunity doctrine bears any resemblance to them. Will Baude has argued that “there was no well-established, good faith defense in suits about constitutional violations” such that Congress could not be said to have legislated against the backdrop of an established common law immunity. To the extent that an immunity defense existed at common law, Professor Baude argues, it was an element of specific torts, not a freestanding defense that would apply in constitutional cases. Attorney Scott Keller, on the other hand, argues that there was a “freestanding qualified immunity” that applied to discretionary duties carried out by executive officials. This immunity, Keller explains, amounted to a good faith defense for “quasi-judicial” acts that involved exercising policy discretion by looking into facts and acting upon them. Both Professor Baude and Keller agree, though, that if a common law good faith defense did exist, modern qualified immunity doctrine bears little resemblance to it. Where any common law defense would have focused on the official’s good faith, modern qualified immunity is an objective inquiry based on existing case law. As Professor Baude explains, “even the official who acts in bad faith is entitled to the defense if a different official could have reasonably made the mistake.” Keller thus concludes that in modern cases the Court

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122 Schwartz, Case Against Qualified Immunity, supra note 10, at 1814–16; Jay Shweikert, Qualified Immunity: A Legal, Practical, and Moral Failure, 901 CATO INST. 8 (2020) (“Indeed, if courts grant qualified immunity without at least deciding the merits question, then the same defendant could continue committing exactly the same misconduct indefinitely—and never be held accountable.”).


124 Baude, supra note 4, at 55. But see Nielson & Walker, supra note 121, at 1856–62, 1864–68 (arguing that common law immunities may have been closer to the current test than Professor Baude claims and that, in any event, stare decisis counsels in favor of retaining a rule developed by the Court in applying a statute).

125 Baude, supra note 4, at 59.


127 Id. at 1358.

128 Baude, supra note 4, at 60–61; see also Keller, supra note 126, at 1393 (“Justice Powell’s Harlow majority opinion eliminated the distinctive feature of ‘qualified’ immunity at common law—its subjective good faith standard—and replaced it solely with the clearly-established-law test.”).
has invented a new scheme rather than applying the immunities that existed at
common law.129

Despite scholarly debate on the nuances of these criticisms, policy advocates
have been relatively united in their calls for abolition or reform. The CATO
Institute describes qualified immunity as a “failure” that significantly
undermines official accountability, especially for police officers.130 The Pacific
Legal Foundation has called for an end to qualified immunity.131 One year after
officer Derek Chauvin’s murder of George Floyd, the ACLU called for abolition
of “the doctrine that often lets officers avoid accountability.”132 Indeed, in
the national conversation about policing and accountability that followed
Floyd’s death, abolishing or limiting qualified immunity was the rare reform
proposal that garnered widespread support across the political spectrum.133

II. FEDERAL LEGISLATIVE REFORM EFFORTS

Despite scholarly and public criticism, the U.S. Supreme Court has contin-
ued to reject challenges to qualified immunity.134 In light of mounting criticism
of qualified immunity and the Court’s unwillingness to revisit the doctrine,
both federal and state legislators have proposed to address the qualified immu-
nity problem by eliminating or restricting its application.135 Some of these pro-
posals have been previously raised by legal scholars, but political efforts to re-
form qualified immunity have taken hold as part of the legislative proposals for

129 Keller, supra note 126, at 1399–1400.
130 Jay Schweikert, The Supreme Court Won’t Save Us from Qualified Immunity, CATO
(March 3, 2021), https://www.cato.org/blog/supreme-court-wont-save-us-qualified-
immunity.
131 David Deerson, National Review: The Case Against Qualified Immunity, PACIFIC LEGAL
132 Ed Yohnka, Julia Decker, Emma Andersson & Ashra Ahmad, Ending Qualified
Immunity Once and for All is the Next Step in Holding Police Accountable, ACLU (Mar. 23,
and-for-all-is-the-next-step-in-holding-police-accountable/.
133 See Spencer Bokat-Lindell, The One Police Reform That Both the Left and the Right
Support, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/breonna-
taylor-police.html.
134 See Nick Sibilla, Supreme Court Refuses to Hear Challenges to Qualified Immunity, On-
challenges-to-qualified-immunity-only-clarence-thomas-dissents/?sh=791715aa7fad; An-
drew Chung, U.S. Supreme Court Rejects Case over ‘Qualified Immunity’ for Police, REU-
TERS, (March 8, 2021), https://www.reuters.com/article/us-usa-court-qualifiedimmunity/u-s-
supreme-court-rejects-case-over-qualified-immunity-for-police-idUSKBN2801L6; Schweikert, supra note 130 (noting that although the Supreme Court has heard minor cases,
these are more so to “clarify doctrine” rather than have serious reconsiderations of the qua-
ified immunity doctrine).
135 Emma Tucker, States Tackling ‘Qualified Immunity’ for Police as Congress Squabbles
immunity-police-reform/index.html.
police reform that have emerged in recent years.\textsuperscript{136} Because § 1983 is a federal statute, Congress could certainly pass a law eliminating the defense, barring it in specific cases, adjusting the standard, or restricting when the defense may be raised. This Part examines those federal efforts and concludes that federal legislative reform is unlikely.

Two bills relating to qualified immunity were introduced in the 117th Congress (2021-2022). The George Floyd Justice in Policing Act, H.R. 1280, passed the House on March 3, 2021, but the Senate did not act on it. The bill, which included a range of measures aimed at police reform, addressed the problem of qualified immunity by abolishing the defense in actions against law enforcement officers for violations of civil rights.\textsuperscript{137} The bill’s sponsor, Rep. Karen Bass, introduced similar legislation during the 116th Congress (2019-2020).\textsuperscript{138} In both years, the bill passed in the House largely along party lines.\textsuperscript{139}

On March 31, 2022, the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on qualified immunity entitled \textit{Examining Civil Rights Litigation Reform, Part 1: Qualified Immunity}.\textsuperscript{140} The subcommittee heard testimony from various sides, including from the Hon. Jon O. Newman, Senior Circuit Judge, United States Court of Appeals for the Second Circuit. Judge Newman suggested that the legislature create \textit{respondeat superior} liability under § 1983, and allow the jurisdiction’s local United States Attorney to initiate a civil suit under § 1983, or intervene in an existing suit, to remedy the denial of a person’s constitutional rights.\textsuperscript{141}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} Section 102 of the bill provides that it “shall not be a defense or immunity in any action brought under this section against a local law enforcement officer” that “the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of the deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.” George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong., 1st Sess., § 102 (2021). Another bill introduced in the 116th session would have clarified statutory authority to sue federal officers for violations of civil rights. Had both bills passed, qualified immunity would have been abolished for state and federal officers. \textit{See Reps. Johnson, Raskin Introduce Bill to Hold Federal Law Enforcement Officers Accountable} (June 15, 2020), https://raskin.house.gov/press-releases?ID=EE0E4DD-38FB-47F6-ASDC-9343492264D6.


\textsuperscript{139} In the 116th Congress, three Republicans voted in favor of the bill; fourteen did not vote, and the remaining Republican and Independent members voted against it. \textit{CLERK OF THE U.S. HOUSE OF REPS., H.R. 7120, Roll Call 119} (2020), https://clerk.house.gov/Votes/2020119. In the 117th Congress, only one Republican voted in favor, while two Democrats voted against it. \textit{CLERK OF THE U.S. HOUSE OF REPS., H.R. 1280, Roll Call 60} (2021), https://clerk.house.gov/Votes/202160. The 117th Congress had a smaller Democratic majority and the bill had slightly less support among both Democrats and Republicans.


\textsuperscript{141} Testimony of Judge Jon O. Newman before the U.S. House of Representatives, Commit-
While no resolution was reached by the subcommittee on this issue, these hearings were a first step in the contemporary discussion regarding qualified immunity reform. Additionally, the federal failure to pass any legislation does not come as a surprise as federal changes are slow and difficult to pass. We have seen this difficulty in Congress’ failure to pass legislation responding to Court’s historical decisions to limit civil rights laws such as voting rights.\textsuperscript{142} With the push back from the Court, Congress tends to be hesitant to propose changes, even when judicial interpretations of federal law results in substantial rollbacks in civil rights protections.\textsuperscript{143} Most recently, we are now seeing this same attack on women’s health rights through the Court’s decision on abortion cases.\textsuperscript{144} Without federal relief, we must then turn to states to fill in the necessary gaps.

III. STATE LAW AS AN ALTERNATIVE

State legislatures, of course, cannot change federal law. However, state legislatures, and even local governments,\textsuperscript{145} can create an avenue for victims to recover for violations of state constitutional rights. With regard to these state constitutional analogues to § 1983, state legislatures can eliminate or limit the defense of qualified immunity, making it possible for victims to avoid having their lawsuits dismissed. Legal academics have proposed such changes,\textsuperscript{146} but states have only recently begun to consider and enact them. Specifically, several states have created new legislation similar to federal § 1983 claims to provide accountability and protections to individuals.\textsuperscript{147} Proposals have also stemmed from a review of all state efforts.\textsuperscript{148} In this Part, we describe in detail how state constitutions may offer a solution to the intractable barrier that qual-


\textsuperscript{144} See Dobbs v. Jackson Women’s Health Organization, 142 S. Ct. 2228 (2022) (holding that the Constitution does not prohibit state pre-viability abortion bans and overruling Roe v. Wade).

\textsuperscript{145} See N.Y.C. ADMIN. CODE §§ 8-802–803 (2021) (efforts in New York City at the local government level).


\textsuperscript{147} See infra Part III.B for a discussion of state efforts to replicate § 1983.

fied immunity presents in federal court, review recent legislation passed or considered in other states, and outline a proposal for a Nevada law.

It has become necessary for the people of Nevada to codify a state version of § 1983. Nevada’s Constitution is based on the United States Constitution. Nevada’s legislators were elected to ensure that the fundamental societal principles that underscored the rights enumerated in the United States Constitution and the Nevada Constitution are codified in state law. To avoid Nevada judges turning to federal § 1983 caselaw for guidance, a Nevada statute can establish a guidepost standard for evaluating civil rights claims, establish vicarious liability for state and local public officials’ constitutional violations, and consistent with the Nevada Supreme Court decision, reject the qualified immunity defense.149

Nevada, like its neighboring states, is positioned to take the qualified immunity patchwork into its own hands and codify a state version of 42 U.S.C. § 1983. On December 29, 2022, the Nevada Supreme Court issued its decision in the Mack v. Williams case, which certified questions from Judge Andrew Gordon of whether there was a private right of action under the Nevada Constitution and, if so, whether any immunities applied.150

Sonjia Mack filed an action in federal court against High Desert State Prison alleging she was taken into an administrative building, strip searched for contraband, and despite no contraband being found, interrogated regarding her alleged possession of contraband and knowledge of ongoing crimes.151 After the strip search and visitation, she was denied visitation with her boyfriend who she was there to visit.152 In her complaint, Mack alleged violations of her federal and state constitutional rights.153 The Nevada Supreme Court rephrased the certified questions and decided the following:

1. Is there a private right of action for retrospective monetary relief under the Nevada Constitution, Article 1, Section 18?

2. If there is a private right of action, can a state-actor defendant raise qualified immunity as a defense?154

In its decision, the Nevada Supreme Court relied on its prior decision in Alper v. Clark County, which stated that the provisions of the Nevada Constitution are “self-executing” and “give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one […]and] such rights cannot be abridged or impaired by statute.” As a result, the Nevada Supreme Court first concluded that a “private right of action against

150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
state actors for retrospective monetary relief exists to enforce search-and-seizure rights.\textsuperscript{156}

In answering the second question, the Nevada Supreme Court concluded that qualified immunity is a federally created doctrine that did not apply to Nevada Constitution claims.\textsuperscript{157} The \textit{Mack} decision is a monumental first step in recognizing the right to a civil action under the Nevada Constitution against abuse of government power, but the analysis applied only to search and seizure claims, and it leaves many questions unanswered.

For example, what is the statute of limitations of such an action?\textsuperscript{158} Does it allow for punitive damages? Is the only means for recovering attorney fees an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure and NRS 17.117? Can such an action be brought in Justice Court if the value is less than $15,000.00? Is a class action permitted?

Now, more than ever, the Nevada Legislature should step in and answer these practical questions by enacting a statute. The Nevada Constitution guarantees and protects people’s rights while establishing the limits on government power. A Nevada version of 42 U.S.C. § 1983 would define the contours of the private right of action to enforce those constitutionally protected rights, and, in line with the Nevada Supreme Court’s decision, abolish the artificial, judicially created federal immunities that were neither found nor contemplated in the original federal statute.

For its part, Nevada has a history of enacting state laws that recognize constitutional rights, such as the right to hear arms. Section 41.0395 of Nevada Revised Statutes allows an individual to bring a civil action against a State or political subdivision for the return of a firearm that was unlawfully confiscated.\textsuperscript{159} This statute allows a private right of action against the State of Nevada, its political subdivisions, and the officer, employee, or worker who confiscated or authorized the confiscation and provides for a mandatory award of reasonable attorney fees and costs if the plaintiff prevails.\textsuperscript{160}

\textbf{A. How a State Law Fix Would Work}

A Nevada version of § 1983 would codify at the state level the same protections Congress intended at the federal level, while unmistakably denouncing any immunities whatsoever. Nevada’s Constitution is an additional source of protection for many of the same rights guaranteed under federal law. For example, the United States Constitution guarantees certain protections:


\textsuperscript{157} \textit{Id}.

\textsuperscript{158} Section 1983 uses the state’s tort statute of limitations and NRS § 11.190(4) has a two-year statute, but the catch-all provision in NRS § 11.220 has a four-year statute of limitations.

\textsuperscript{159} NRS § 41.0395

\textsuperscript{160} \textit{Id}.
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No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{161}

In the same vein, the Nevada Constitution states that "[n]o person shall be deprived of life, liberty, or property, without due process of law,"\textsuperscript{162} and "[e]quality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin."\textsuperscript{163} Moreover, in 2022, Nevadans ratified Nev. Const. art. I, § 24, which states:

Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.\textsuperscript{164}

The people and the Nevada Supreme Court have spoken and cemented the self-executing rights of the people to be free from government overreach, abuse of power, and unequal treatment. Now it is time for the Nevada Legislature to answer these calls and codify a statute that establishes the mechanisms by which these claims can be brought.

As proposed here, a Nevada version of 42 U.S.C. § 1983 would put constitutional violation claims in the hands of Nevada juries, who are members of the community and better positioned to address constitutional issues in the communities in which they live and work, as it has been recognized in Nevada that the "community will impose a legal obligation upon one for the benefit of the other."\textsuperscript{165} By codifying the contours of Nevada's self-executing private right of action in a civil claim for a deprivation of rights, the remedies available to a plaintiff for such a claim, and eliminating any immunity defenses, Nevada would establish the mechanisms for state civil rights claims and join the emerging national movement of states and local governments that have already taken these necessary steps. Nevada can enact a version of 42 U.S.C. § 1983 that answers the questions left open by the Mack decision and establishes the structure for civil rights claims under the Nevada Constitution that conforms with the Nevada Supreme Court’s decision in Mack and fits the needs of the State and its communities.

\textsuperscript{161} U.S. CONST. amend. XIV.
\textsuperscript{162} NEV. CONST. art. I, § 8(2).
\textsuperscript{163} NEV. CONST. art. I, § 24.
\textsuperscript{164} NEV. CONST. art. I, § 24
\textsuperscript{165} Lee v. GNLV Corp., 22 P.3d 209, 212 (2001).
B. Efforts in Other States

Although state efforts to address the qualified immunity problem are relatively recent, at least four states—Colorado, Connecticut, Massachusetts, and New Mexico—have enacted such laws. Styled as police accountability measures, all the laws authorize state civil rights claims against police officers who violate rights. Their specific provisions differ. Some specifically eliminate qualified immunity, while others are less direct. Some include exceptions that may reduce the overall impact of the law. Some also address other barriers to recovery, such as damage caps. This section also considers and compares a proposed statute by the Institute of Justice alongside these state efforts.

Following Justice Neil Gorsuch’s concurrence in Browder v. City of Albuquerque, the Institute of Justice conducted a study reviewing the landscape for

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166 It would be remiss to ignore California’s legislative efforts through the Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1. Since California enacted the Bane Act in 1987, we will not be discussing it in this section, which focuses on more recent changes in response to the 2020 events.
169 MASS. GEN. LAWS ch. 12, § 11H(b) (2021).
171 It is important to note that there are other efforts that have been made by different states. This Article only analyzes a selection of states that have passed legislation after 2020. See Alexander Reinert et al., New Federalism and Civil Rights Enforcement, 116 NW. U. L. REV. 737 (2021), for a more thorough review of all 50 states’ current available causes of action and their interaction with qualified immunity.
175 Kimberly Kindy, Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill, WASH. POST (October 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cedf-11ec-aee1-42a8138f132a_story.html; see also Bane Act, Cal. Civ. Code section 52.1(b) (civil penalty of $25,000).
176 The Institute of Justice (IJ) is a public interest law firm. On January 25, 2022, IJ released a study providing an overview and understanding of the civil rights claims at the state level. See Morton & Cairns, supra note 148. Subsequently, IJ also released a state solution – a proposed statute discussed in this section. See Protecting Everyone’s Constitutional Rights Act, INST. OF JUST. (March 16, 2022), https://ij.org/legislation/protecting-everyones-constitutional-rights-act/.
civil claims in all 50 states. A key funding of the study was that lawsuits in all 50 states, to some extent, are still bogged down by immunities. Following the study, the researchers at the Institute for Justice released the Protecting Everyone’s Constitutional Rights Act (PECRA) model legislation for states to consider to protect civil rights statutes and restrict immunities. The proposed statute focuses largely on department liability and emphasizes the government’s responsibility to protect rights under the laws and constitution of the State and the United States. PECRA creates a state cause of action, eliminates the immunities that hinder meaningful enforcement, retains jurisdiction in the state courts, provides attorney fees, and among other things, creates an avenue for the government employer to end employment for the government employee. Importantly, the proposed statute takes into consideration the current legal landscape, adopts strengths of different approaches, considers federal level cautions, and provides a strong reform avenue for state legislatures to adopt.

Colorado Governor Jared Polis signed Senate Bill 20-217 on June 19, 2020, creating an individual cause of action against police officers similar to that of the federal § 1983 action. The scope of Colo. Rev. Stat. § 13-21-131 limits itself to “the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution.” This means that when officers violate the Colorado Constitution Bill of Rights, the act provides individuals the ability to seek civil retribution. Furthermore, it specifically states that both statutory immunities and statutory limitations on liability, damages, or attorney fees do not apply and explicitly eliminates qualified immunity as a defense to liability.

178 Wilson, supra note 177.
179 See id.
180 Id.
181 Id.
182 See Reinert et al., supra note 171, for an alternative focus that places individual liability as the emphasis.
184 COLO. REV. STAT. § 13-21-131(1) (2020). See also Reinert et al., supra note 171, at Part III.
186 COLO. REV. STAT. §§ 13-21-131(2)(a), (b).
One major criticism § 13-21-131 has faced is the cost allocation of who would end up paying for these suits. Because it eliminates qualified immunity and other defenses, it can be expected to lead to plaintiffs recovering damages in more cases, leading to concerns about whether such suits would drain government funds. The law specifies that the employer—police departments in the case of suits against officers—will bear the burden to pay in such suits. This might mean that taxpayers, and police insurance companies, will pay for these suits because of indemnification. Where it is demonstrated that an officer did not act upon good faith and reasonable belief, however, the law allocates the cost to individual officers. The long-term financial effects of this monetary liability shift have not been fully tested given how new this legislation is, but law enforcement officers have long been indemnified for their actions. In comparison to the PECRA, Colorado’s law applies only to law enforcement officers, without relief should the civil rights violation be based on any other government officials' acts. Additionally, the limitation on damages may translate to only symbolic relief rather than providing actual deterrence.

In July 2020, Connecticut Gov. Ned Lamont signed HB 6004 which, like Colorado’s law, provide a § 1983-like cause of action to protect individuals against state action. The Connecticut statute is likely to have a less drastic effect on state law than Colorado’s, however, because the Connecticut Supreme Court in 1998 already created a state constitutional tort remedy. Under the judicially created cause of action, however, the burden of proof was high: the plaintiff had to show officers were acting wantonly, recklessly, or maliciously.

The statute expands protections to all rights protected by Connecticut’s Bill of Rights. However, officers are still protected from personal liability.
thermore, HB 6004, makes no mention of qualified immunity.198 Unlike Colorado and the PECRA, there is no explicit statement that eliminates qualified immunity as a defense.199 The Connecticut law also includes a “good faith” exception.200 This loophole is unnecessary and it makes the law unlikely to address the problems created by qualified immunity’s expansive reach.201 PECRA provides an expansion of this “good faith” exception and provides an alternative that may better target what the legislatures likely intended to protect.202

On December 31, 2020, Massachusetts Governor Charlie Baker signed the Massachusetts policing reform statute into law.203 This legislation created a police certification commission that must revoke an officer’s certification whenever “clear and convincing evidence” shows an officer committed “a felony or hate crime, inflicted excessive force that resulted in death or serious bodily injury, failed to intervene, or submitted false timesheets.”204 PECRA also suggests a similar avenue for government employers to be able to terminate employment contracts.205 The commission must find that the officer is not fit for duty and a danger to the public.206 There are no far-reaching changes like eliminating qualified immunity as a defense or creating a § 1983-like state alternative.207

Like Connecticut, Massachusetts already had a constitutional tort cause of action under the Massachusetts Civil Rights Act that offered some protection to individual plaintiffs.208 However, like its Connecticut counterpart, it offered limited protection to plaintiffs and largely favored officers.209 Thus, Massachusetts’s legal stance on qualified immunity remains largely unchanged. MASS.

199 Id. See generally HB 6004; c.f. C.R.S. § 13-21-131 (2)(b) (“qualified immunity is not a defense to liability”).
200 Id. (“The “good faith” exception is particularly problematic, because it could incentivize “hear no evil, see no evil” behavior by police departments. If police are not told that certain types of dubious practices are illegal—or, perhaps even told they are appropriate—they could well plausibly have a “good faith belief” that illegal tactics are perfectly fine, and thus get immunity.”).
202 See Protecting Everyone’s Constitutional Rights Act, supra note 176, § 5.
204 Id.
205 See Protecting Everyone’s Constitutional Rights Act, supra note 176, § 5.
206 Id.
207 Id.
209 See Sibilla, supra note 203; see also tit. 2, § 11H (“interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion”).
chusetts’s approach to address qualified immunity is unique in the manner as it appoints a special police certification commission that focuses mostly on certification and decertification of officers.\textsuperscript{210} The ultimate goal of the Massachusetts police policy reform bill was not to eliminate qualified immunity but to better understand its effects on policing and how to create legislation.\textsuperscript{211}

Massachusetts is the only state out of the new legislation reviewed in this Article to tie the officer’s actions back to their own certification and decertification.\textsuperscript{212} The PECRA, likewise, offers this section to protect government employers as an accountability measure.\textsuperscript{213} There is little information to show whether this commission has decertified any officers yet. Police officers who lose their certification then lose qualified immunity protections, which provides plaintiffs with an avenue for recourse. The difficulty in suing officers still remains, and Massachusetts’ statute only provides a promise that the studies will lead to police reform legislation. However, given that in Massachusetts qualified immunity protections still largely remain, the effectiveness of this new addition may be extremely limited unless decertification efforts are successful. At the very least, Massachusetts does impose actual penalties on the officer by decertifying them if they are found to have violated the law.

Most recently, New Mexico Governor Michelle Lujan Grisham signed the New Mexico Civil Rights Act in April 2021.\textsuperscript{214} Like the Colorado statute, the New Mexico Civil Rights Act can only regulate state violations of civil rights.\textsuperscript{215} Additionally, Section 4 of the New Mexico Civil Rights Act explicitly bans the use of qualified immunity as a defense.\textsuperscript{216}

The New Mexico Civil Rights Act, however, is broader in scope. While Colorado’s original statute only applied to police officers, New Mexico Civil


\textsuperscript{211} Id. (Sen. Cindy Friedman and Sen. John Velis debating the swiftness required to address qualified immunity versus continuing the disproportionate effects); see also S.B. 2963, 191st Gen. Ct. (Mass. 2020) (a number of other study groups and commissions were created to study and develop police reform legislation).


\textsuperscript{213} See Protecting Everyone’s Constitutional Rights Act, supra note 176, § 5.

\textsuperscript{214} New Mexico Civil Rights Act, H.B. 4, 55th Leg., 1st Sess. § 1 (N.M. 2021); see Daniele Selby, New Mexico is the Second State to Ban Qualified Immunity, INNOCENCE PROJECT (Apr. 7, 2021), https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability/.

\textsuperscript{215} H.B. 4 at § 3; see Jay Schweikert, New Mexico’s Landmark Qualified Immunity Reform Gets It Mostly Right, CATO INSTITUTE (Apr. 11, 2021), https://www.cato.org/commentary/new-mexicos-landmark-qualified-immunity-reform-gets-it-mostly-right.

\textsuperscript{216} H.B. 4 § 4; Schweikert, supra note 215.
Rights Act applied to all public officials, like Connecticut’s law.\textsuperscript{217} In addition, the law provides automatic and absolute indemnification to the public officials.\textsuperscript{218}

Little has been written on the New Mexico Civil Rights Act given that it is a recent development.\textsuperscript{219} (It just went into effect on July 1, 2021.) The statute is not retroactive and has strict limits on the amount of recovery a plaintiff can obtain.\textsuperscript{220} While it does explicitly eliminate qualified immunity as a defense like Colorado, no suits had been filed in New Mexico at the time of this writing so the statute is untested in the courts.\textsuperscript{221}

Overall, these laws have provided an important redress avenue for victims of police violence to seek civil recovery and an opportunity for the police force to consider the individuals that make up the force to protect citizens.\textsuperscript{222} It is too early to measure how these new laws will impact recovery and, in turn, whether they change police behavior, create unsustainable costs, or have other unintended effects.\textsuperscript{223} Some may be more effective than others. For example, while Colorado and New Mexico clearly eliminate the defense of qualified immunity, Connecticut’s “good faith belief” exception might operate the same way qualified immunity does in federal court. And Massachusetts does not attempt to eliminate the qualified immunity defense by statute. Similarly, the New Mexico Civil Rights Act may have less impact on police officer behaviors because it provides to them complete and absolute indemnification.

What is evident is that these state, and local, changes to civil rights enforcement can provide a strong foundation and basis to work around the federal inhibitors. The reforms, thus far, have not seen devastating effects on local government.\textsuperscript{224} In these four states, civilians now have a new opportunity to

\begin{footnotesize}
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  \item[217] Schweikert, \textit{supra} note 215.
  \item[218] H.B. 4 § 7 (“A judgment awarded pursuant to the New Mexico Civil Rights Act against a person acting on behalf of, under color of or within the course and scope of the authority of the public body shall be paid by the public body.”).
  \item[219] New Mexico’s Civil Rights Act was enacted in 2021. See \textsc{N.M. CIV. RIGHTS COMM’N, REPORT 9} (Nov. 20, 2020), https://perma.cc/UG88-2EJP for the reasoning behind the civil rights act. \textit{See also} Reinert et al., \textit{supra} note 171 (thorough review of all states efforts or lack thereof).
  \item[220] H.B. 4 § 6.
  \item[221] \textit{Id.} at § 4.
  \item[223] See Morton & Cairns, \textit{supra} note 148, for further details on early criticisms on these statutes and other remedies available at the state level.
  \item[224] See Reinert et al., \textit{supra} note 171, at 803-05.
\end{itemize}
\end{footnotesize}
vindicate civil rights violations by the government. The Nevada legislature should now follow in these states’ footsteps.

C. *A Proposal for Nevada*

The Nevada legislature considered police reform proposals during a special session in summer 2020 and again during its regular session in 2021.\(^{225}\) Officials and advocates have proposed enactment of a 42 U.S.C. § 1983 analogue with a qualified immunity ban as part of this conversation.\(^{226}\) Nevada leadership indicates that police reform legislation continues to be a priority. Given the difficulties faced by Nevada civil right litigants in federal court, qualified immunity reform should be considered as part of any police reform package. The legislature can learn from the experiences of other states and pass a comprehensive statute defining civil rights claims under the Nevada Constitution, barring qualified immunity, and addressing state-specific barriers to recovery.

To aid consideration of this proposal, we offer the following draft statutory language:\(^{227}\)

1. In any civil action brought against a person who, under color of any statute, ordinance, regulation, custom, or usage, subjects, or causes to be subjected, any person within the jurisdiction of the State of Nevada to the deprivation of any rights, privileges, or immunities secured by the Constitution of the State of Nevada, and any laws

   * **No Immunities Allowed.** Neither state or federal statutory nor common law immunities, nor doctrines of immunity, nor statutory limitations on liability, damages, or attorney fees shall be applied to claims brought to enforce or vindicate any violation of any right under the Constitution of the State of Nevada or any state laws. Neither qualified immunity, nor a defendant’s good faith but erroneous belief in the lawfulness of the conduct complained of, is a defense to liability.\(^{228}\)

      a. Nothing in this statute abrogates judicial or legislative immunity at any level of government.

\(^{225}\) S.B. 2 § 1, 32nd Spec. Sess. (Nev. 2020); Assemb. B. 3 § 1, 32nd Spec. Sess. (Nev. 2020); S.B. 212 § 1, 81st Leg. Sess. (Nev. 2021).


\(^{227}\) Many portions of this statute were incorporated from the Protecting Everyone’s Constitutional Rights Act: A State Solution to the Problem of Qualified Immunity that Stymies Federal Litigation under 42 U.S.C. 1983 (PECRA), used with permission from Lee McGrath, Esq., Ben Field, Esq., and Keith Neely, Esq. of the Institute for Justice.

\(^{228}\) This Section disallows any immunities such as discretionary immunity, qualified immunity, and tort cap immunity along with the good faith defense upon which the doctrine of qualified immunity was based.
2. **Vicarious Liability.** The State of Nevada or any of its agencies or political subdivisions shall be liable for damages caused by an act or omission of a present or former officer or employee of the State or any political subdivision, or immune contractor, who violates a right under the laws or Constitution of the State of Nevada.

   a. The proper defendant in an action shall be the State of Nevada, the appropriate agency, or political subdivisions of the present or former officer, employee, or immune contractor whose acts or omissions forms the basis of a claim.

   b. The present or former officer, employee, or immune contractor shall not be found individually financially liable for a violation of a right under the laws or Constitution of the State of Nevada.  

3. **Right to Intervene.** A present or former officer, employee, or immune contractor of the State or any of its agencies or political subdivisions whose acts or omissions form the basis of a claim shall be notified of such claim within 10 calendar days of the State of Nevada, the appropriate agency, or political subdivision being served with process. The present or former officer, employee, or immune contractor has an unconditional right to intervene in the action, as a third-party defendant, pursuant to Rule 24 of the Nevada Rules of Civil Procedure.

4. **Not Exclusive Remedy.** The remedies in this statute are not exclusive and shall be in addition to any other remedies prescribed by law or available pursuant to common law.

5. **Burden of Proof.** The plaintiff bears the burden of proving a violation of a right under the laws or Constitution of the State of Nevada by a preponderance of the evidence.

6. **Attorney Fees and Costs.** In any action brought pursuant to this statute, attorney fees and costs shall be awarded to the prevailing plaintiff against any adverse party. If a judgment is entered in favor of a defendant, the court may award reasonable costs and attorney fees to the defendant only when the court finds that the claim was brought or maintained without reasonable grounds or to harass the defendant.

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229 In Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), the U.S. Supreme Court held that a municipality can be liable for constitutional torts. The defenses and immunities available to an individual present or former officer, employee, or immune contractor are not available to a municipality. Currently, there is no *respondeat superior*, also known as vicarious liability, under 42 U.S.C. § 1983 and Monell claims are permitted only against municipalities. This section allows for *respondeat superior* claims and resolves the issue of an individual officer or employee being personally financially liable for a judgment or settlement, except in certain extreme circumstances.

230 This Section allows claimants to file their civil rights claims along with other claims, such as applicable tort claims.

231 This Section incorporates the discretionary provisions of 42 U.S.C. § 1988 and NRS 18.010(2)(b) and makes attorney fees a mandatory award such as is currently codified in
a. The court may recognize that a plaintiff’s claim prevails if the plaintiff obtains any relief the plaintiff seeks in the complaint, whether the relief is obtained via judgment, settlement, consent decree, or the government’s voluntary change in behavior.\footnote{232}

b. The court may dismiss a frivolous claim pursuant to Rules 12 and 56 of the Nevada Rules of Civil Procedure and may award reasonable attorney fees and costs to the defendant for defending against a frivolous claim.\footnote{233}

7. Collateral Source Not Allowed. In an action for injury or death brought under this statute, evidence of collateral source benefits such as any amount payable as a benefit to the plaintiff under Medicare, Medicaid, pursuant to the United States Social Security Act, any state or federal income disability or worker’s compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, mental health, dental or other health care services, shall not be introduced as evidence.\footnote{234}

8. Statute of Limitations. A civil action pursuant to this statute must be commenced within two years after the cause of action accrues.\footnote{235}

NRS 41.0395 for the violation of a person’s Second Amendment right in the confiscation of a firearm.

\footnote{232}{This sub-Section recognizes the state of the law in the Ninth Circuit which has held that a Plaintiff is a “prevailing party” when the plaintiff “enters into a legally enforceable settlement agreement against the defendant.” Barrios v. CA. Interscholastic Fed., 277 F.3d 1128 (9th Cir. 2002). A settlement may also impart “prevailing party” status on a litigant. Cabonell v. I.N.S., 429 F.3d 894, 899 (9th Cir. 2005) (finding that recognized that “litigants who achieve relief other than a judgment on the merits or a consent decree are prevailing parties…”). The Ninth Circuit applies a two-part test to determine whether a Plaintiff is a “prevailing party.” Id. The Court looks at whether 1) there is a material alteration in the legal relationship between the parties; and 2) the material alteration is stamped with some “judicial imprimatur” such as incorporating the agreement into an order. Id. As part of this analysis, if a court “incorporates the terms of a voluntary settlement into an order, ‘it may thereafter enforce the terms of the parties’ agreement… [and] its authority to do so clearly establishes a ‘judicially sanctioned change in the legal relationship of the parties,’ […] because the plaintiff thereafter may return to court to have the settlement enforced.” Id. at 901.}

\footnote{233}{This provision empowers the court to dismiss claims deemed to be frivolous and provides discretion to award attorney fees for frivolous claims, without the defendant having to obtain a defense verdict.}

\footnote{234}{This Section incorporates the Nevada Supreme Court’s ruling in Proctor v. Castelletti, 112 Nev. 88, 911 P.2d 853 (Nev. 1996), and utilizes the language from NRS 42.021(2), that identifies collateral sources.}

\footnote{235}{This proposal imports the state tort statute of limitations to facilitate consistency across various tort claims in Nevada courts. We note, however, that § 1983 claims, especially where serious injuries are involved, can be complex and difficult. The legislature may wish to incorporate a longer statute of limitations. See Dani Kritter, The Overlooked Barrier to Section 1983 Claims: State Catch-All Statutes of Limitations, CALIFORNIA LAW REVIEW BLOG (Mar. 2021) (criticizing the approach outlined in Wilson v. Garcia and Owens v. Okure, which in-}
9. Jurisdiction. An action brought to enforce or vindicate any violation of any right under the Constitution of the State of Nevada or any state laws arises out of state law and jurisdiction rests in Nevada’s judicial system established pursuant to NRS Chapter 3 and the Nevada Rules of Civil Procedure.236

10. Termination of Employment. A finding pursuant to the terms of a consent decree, a decision by a court, or a verdict determining that a present or former officer, employee, or immune contractor violated a right under the laws or Constitution of the State of Nevada is per se evidence that the State of Nevada or any of its agencies or political subdivisions has just cause for terminating the employment of the officer, employee, or immune contractor. A government’s termination of employment of the officer, employee, or immune contractor shall not affect the liability of the State of Nevada or any of its agencies or political subdivisions under this chapter.237

11. Review by Attorney General. Nothing in this statute shall preclude the State of Nevada Attorney General from conducting an independent review or investigation of the present or former officer, employee, or immune contractor, of the State or any of its agencies or political subdivisions, on behalf of the State or on behalf of the injured party.238

12. Severability. The provisions of this section are severable. If any provision of this section or the application thereof is declared by a court of competent jurisdiction to be invalid or unconstitutional, such declaration shall not affect the validity of the section as a whole or any provision thereof other than the part declared to be invalid or unconstitutional.239

Directly addressing the problem of qualified immunity, the proposed law would establish the parameters for suits in state courts for violations of civil rights under either the Nevada Constitution. A Nevada version of 42 U.S.C. §

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236 This Section rests jurisdiction with the State of Nevada courts and divests jurisdiction from the federal courts. The purpose of this Section is to ensure that Nevada courts shall retain jurisdiction over cases and controversies which require the application of Nevada law and the interpretation of the Nevada Constitution.

237 The purpose of this Section is to enable the State of Nevada and its municipalities to address issues with officers and employees who have been determined to have violated a person’s constitutional rights, without facing retribution from police and labor unions.

238 This Section allows the Attorney General to conduct an independent review and investigation into civil rights complaints such as is contained in Section 8-2.100 of the United States Department of Justice, Justice Manual (JM), previously known as the United States Attorneys’ Manual (USAM) and codified in 28 CFR § 0.50.

239 This section complies with the Nevada Supreme Court’s ruling in Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502, 517 (2009) (holding that severed portions of a statute can stand alone if the portion severed was not the central component of the statute).
1983 will allow civil rights plaintiffs to file all potential civil rights claims together in state court. It would eliminate qualified immunity as a defense in any civil rights claim, not just those involving police. It would also exempt civil rights claims from the damage caps that apply to suits brought under state tort law. This is important because, while state tort suits can provide an alternative route to recovery for civil rights plaintiffs, the damage caps that apply to those actions in Nevada limit the utility of state law without this provision.\textsuperscript{240} Further, the \textit{Mack} the Court disagreed that commonalities between state tort-law claims and constitutional protections provided meaningful recourse for violations of a constitutional right because “state tort law ultimately protects and serves different interests than such constitutional guarantees.”\textsuperscript{241}

\textbf{CONCLUSION}

Thankfully, we have seen much progress in the civil rights movement in the fifty-six years since \textit{Pierson v. Ray} was decided. Yet, there is still a long way to go. Progress is achieved when communities rectify the mistakes of the past, and with an eye toward the future choose to move forward in a different direction. The pathway of change is often paved through academic research, litigation efforts, and legislation.\textsuperscript{242} The pursuit of justice in American society is inextricably linked to faithfulness to the Constitution under which it was founded. For this reason, allowing deprivation of individuals’ Constitutional rights to occur without remedy is unjust, un-American, and destructive to the fabric of a free and democratic society. Yet, the federal government has been slow to act when it comes to qualified immunity. The Nevada Legislature should, like its sister states and in keeping with the Nevada Supreme Court’s recent decision, exercise its power to protect civil rights by codifying a state constitutional cause of action. We offer this proposed language as a starting point.

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\textsuperscript{240} \textit{See Nev. Rev. Stat.} § 41.035 (2019); S.B. 245 § 1, 80th Leg. (Nev. 2019).