HAVE A LITTLE (GOOD) FAITH: TOWARDS A BETTER BALANCE IN THE QUALIFIED IMMUNITY DOCTRINE

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ABSTRACT

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[1]

Qualified immunity is an issue that is receiving unprecedented public attention because of concerns about police abuses of power. This Essay seeks to shed light on the dangers posed by qualified immunity in a different setting: the threats to student and faculty rights that are prevalent at public institutions of higher education. Qualified immunity in its current form—as set forth in two seminal Supreme Court cases, Harlow v. Fitzgerald *and* Pearson v. Callahan*—has both prevented the development of constitutional law in this area and served as a significant impediment to recovery for students and faculty. This Essay explores how the doctrine could be reformed to better promote justice not only for students and faculty but also for anyone deprived of their constitutional rights by public officials.*

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INTRODUCTION

Qualified immunity is an issue that has received unprecedented public attention because of concerns about police abuses of power. In 2020, the Supreme Court declined to hear a number of cases that presented the opportunity to review its qualified immunity

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1. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

jurisprudence,[2] but there are signs that the high court may be moving towards a reevaluation of the doctrine. In *Baxter v. Bracey*,[3] Justice Clarence Thomas dissented from the Court's denial of certiorari in a case involving a plaintiff who was "bitten by a police dog that was unleashed on him while he was sitting with his hands in the air, having surrendered to police."[4] In his dissent, Justice Thomas expressed "strong doubts" about the Court's qualified immunity jurisprudence.[5]

In November 2020, the Court overturned a decision of the Fifth Circuit granting qualified immunity to correctional officers who had forced an inmate to spend six days in a pair of "shockingly unsanitary cells" covered in feces.[6] The Fifth Circuit had concluded that the inmate's confinement under those conditions violated the Eighth Amendment's prohibition on cruel and unusual punishment, but that it was not clearly established that "'prisoners couldn't be housed in cells teeming with human waste' 'for only six days.'"[7]

While most people associate qualified immunity with cases involving law enforcement officers,[8] administrators at public colleges and universities are also government officials who the doctrine often shields from liability.[9] For years, this protection from liability has served as a significant barrier to justice for students and faculty who have suffered deprivations of their constitutional rights by public university administrators.[10] It has also served as a barrier to the development of new constitutional precedent in this area of the law.[11] Qualified immunity was intended to shield public officials from liability simply for discharging their duties in good faith.[12] Increasingly, however, it has become a sword that public university officials use to violate students' rights with impunity.

On July 1, 2020, Stockton University student Robert Dailyda used a photograph of Donald Trump as a Zoom background.[13] Some students expressed their unhappiness with Dailyda's choice via Zoom's private chat feature, but there was no disruption to class.[14] Several students later criticized Dailyda's background in a class GroupMe chat, from

2. Josh Gerstein, *Supreme Court Turns Down Cases on 'Qualified Immunity' for Police*, POLITICO (June 15, 2020, 3:08 PM), http://www.politico.com/news/2020/06/15/supreme-court-qualified-immunity-police-cases-320187 [https://perma.cc/5DAK-Z7BK].

3. 140 S. Ct. 1862 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari).

4. *Baxter v. Bracey*, ACLU, http://www.aclu.org/cases/baxter-v-bracey [https://perma.cc/6ZAX-FLKD] (last updated July 2, 2020).

5. *Baxter*, 140 S. Ct. at 1864–65.

6. Taylor v. Riojas, 141 S. Ct. 52, 52–53 (2020) (per curiam).

7. *Id.* at 53 (quoting Taylor v. Stevens, 946 F. 3d 211, 222 (5th Cir. 2019)).

8. *See infra* Section I.

9. *See infra* Section II.

10. *See infra* Section II.

11. *See infra* Section II.

12. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

13. Tyler Olson, *College Student Faces Potential Disciplinary Action over Trump Photo, Political Facebook Post*, FOX NEWS (Aug. 10, 2020), http://www.foxnews.com/politics/college-student-disciplinary-action-trump-photo-zoom-political-facebook-post [https://perma.cc/QYB8-B88W].

14. *See id.*

which Dailyda removed himself to "avoid continued conflict."[15] Dailyda later posted on Facebook:

> I have gotten to the point that I have to say something. I love this country. We are a diverse, yet assimilated population from all backgrounds. I believe all must have the same opportunities and I commit to make that a priority . . . . Beyond that, I am done with the leftist agenda of BLM and the white self haters. I have seen it in action in my doctoral classes at Stockton and the general media. I'm not backing down. If we can't get past this, ok, I'm ready to fight to the death for our country and against those that want to take it down. I believe there are also many like me.[16]

On July 10, Dailyda was called into a meeting with Stockton officials where he was asked to explain his use of the Zoom background, his Facebook post, as well as his political views.[17] On July 16, Dailyda was officially charged with numerous conduct code violations.[18] This case is just one example of how public college and university administrations routinely censor or retaliate against students and faculty for their protected speech.

Public university faculty around the country frequently face retaliation for expressing viewpoints that bring negative attention to their employing institution. For example, Midwestern State University recently alleged that Professor Nathan Jun had violated the university's policy on academic freedom and responsibility for posts he made on his private Facebook page.[19] In the posts, Professor Jun expressed sympathy for Antifa and called for the abolishment of police.[20] After local conservative activists circulated screenshots from Professor Jun's private, friends-only Facebook page, people began complaining about his posts to the university.[21] Despite the fact that Professor Jun was speaking as a private citizen on matters of public concern, the university president informed Jun that she did not believe his Facebook posts were consistent with the university's academic freedom policy.[22] She let him know that going forward, he was "required" to "exercise appropriate restraint" and "show respect for the opinions of other[s]."[23]

In late May and early June 2020, Professor Charles Negy of the University of Central Florida (UCF) posted several tweets to his personal Twitter account that led to

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15. *Id*.

16. *Id*. (internal quotation marks omitted).

17. *Student Faces Possible Suspension, Fine for Zoom Background of President Trump*, FIRE (Aug. 7, 2020), http://www.thefire.org/student-faces-possible-suspension-fine-for-zoom-background-of-president-trump [https://perma.cc/YA2Z-Z229].

18. Letter from Craig Stambaugh, Assistant Vice President for Student Affairs, Engagement & Cmty. Dev., Stockton Univ., to Robert Dailyda (July 16, 2020), http://www.thefire.org/robert-dailyda-disciplinary-charges-july-22-2020 [https://perma.cc/29TJ-ZKFC].

19. Letter from Adam Steinbaugh, Dir., Individual Rights Def. Program, Found. Individual Rights Educ., to Suzanne Shipley, President, Midwestern State Univ. (June 17, 2020), http://www.thefire.org/fire-letter-to-midwestern-state-university-june-17-2020 [https://perma.cc/GN6V-ER3K].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id*.

widespread calls for his termination, including a #UCFFireHim Twitter campaign.[24] Almost immediately, the university announced it had launched an investigation, and—denouncing Negy by name—posted a statement on UCF's website urging anyone who had experienced bias or discrimination in a UCF faculty member's classroom to come forward, even anonymously.[25] This call for complaints led to an investigation in which—after "notice" that consisted of only a handful of representative examples of the allegations against him—Negy was subjected to more than eight hours of questioning about remarks he allegedly made in the classroom over the course of the preceding fifteen years.[26]

With universities often reluctant to uphold student and faculty rights in the face of public pressure, students and faculty must frequently take their institutions to court in an effort to protect their rights. Although public university students and faculty have both free speech and due process rights, their ability to vindicate those rights has been thwarted in recent years with alarming frequency by the doctrine of qualified immunity.[27]

Radwan v. University of Connecticut Board of Trustees[28] illustrates this point. Noriana Radwan, a member of the University of Connecticut (UConn) women's soccer team, raised her middle finger in a gesture that was ultimately broadcast on ESPNU.[29] Radwan's gesture—made while the team was celebrating their victory—brought a lot of negative publicity to the school.[30] In response, the UConn Athletic Department issued a press release apologizing, stating that "[t]he student-athlete has been indefinitely suspended from all team activities, including participation in UConn's upcoming NCAA tournament games."[31]

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24. Samantha Harris, *The Floridian Inquisition*, QUILLETTE (Aug. 13, 2020), http://quillette.com/2020/08/13/the-floridian-inquisition [https://perma.cc/3456-Q34J].

25. *Id.*

26. *See id.*

27. *See, e.g.*, Walsh v. Hodge, 975 F.3d 475, 485 (5th Cir. 2020) (holding that the defendant administrators were entitled to qualified immunity even though the plaintiff, a professor, "suffered a violation of his procedural due process rights"); Endres v. Ne. Ohio Med. Univ., 938 F.3d 281, 285 (6th Cir. 2019) (holding that although a medical student had alleged facts that "taken as true, establish several violations of his procedural due process rights," an administrator was entitled to qualified immunity); Yeasin v. Durham, 719 F. App'x 844, 854 (10th Cir. 2018) (granting immunity to an administrator who expelled a student based on social media postings); Radwan v. Univ. of Conn. Bd. of Trs., 465 F. Supp. 3d 75, 102–03 (D. Conn. 2020) (granting qualified immunity to administrators who punished a student-athlete for giving the finger following a soccer game), *appeal docketed*, No. 20-2194 (2d Cir. July 7, 2020); Doe v. Baum, No. 16-13174, 2019 U.S. Dist. LEXIS 169625, at *21 (E.D. Mich. Sept. 30, 2019) (granting qualified immunity to administrators who "indisputably" violated a student's due process rights by depriving him of a hearing and the right to cross-examination in a campus sexual misconduct proceeding); Smock v. Bd. of Regents of the Univ. of Mich., No. 18-10407, 2019 U.S. Dist. LEXIS 86537, at *5–*6 (E.D. Mich. May 23, 2019) (granting qualified immunity to administrators who disciplined a professor for her conversations with students, because it was not clearly established that denying sabbatical leave required due process); Shaw v. Burke, No. 2:17-CV-02386-ODW (PLAx), 2018 U.S. Dist. LEXIS 7584, at *34 (C.D. Cal. Jan. 17, 2018) (holding that administrators who violated a student's First Amendment rights by prohibiting him from distributing copies of the U.S. Constitution on Constitution Day were entitled to qualified immunity because of "the range of cases addressing the status of universities as public or non-public fora").

28. 465 F. Supp. 3d 75 (D. Conn. 2020).

29. *Radwan*, 465 F. Supp. 3d at 84–85.

30. *Id.* at 85–87.

31. *Id.* at 85.

Although the department initially presented the suspension as temporary, and Radwan was prepared to return to the team the following semester, members of the UConn Athletic Department ultimately decided to cancel her scholarship and dismiss her from the team altogether.[32] The athletic department told Radwan that her "obscene gesture at the championship game was serious . . . and was an embarrassment to the University and [the] UConn women's soccer program."[33]

Radwan filed suit alleging, among other things, that the university defendants had violated her First Amendment right to free expression by punishing her for "giving the finger."[34] The court recognized that "[r]aising one's middle finger . . . has long been recognized as expressive conduct protected by the First Amendment."[35] The court, however, held that even though Ms. Radwan "ha[d] a viable First Amendment claim, because of qualified immunity, the Defendants' motion for summary judgment . . . w[ould] be granted."[36] In particular, the court found that the application of qualified immunity was appropriate because it was not clearly established whether a Supreme Court decision allowing schools "to prohibit vulgar or lewd speech by a high school student" applied to college students.[37] The court held this despite acknowledging that the Supreme Court in *Bethel School District No. 403 v. Fraser*[38] had primarily been concerned with the need "to protect children," noting that "university students, largely over the age of eighteen, are no longer children."[39]

In *Hunt v. Board of Regents of the University of New Mexico*,[40] the Tenth Circuit granted qualified immunity to administrators at the University of New Mexico who disciplined a medical student, Paul Hunt, for an impassioned, intemperate anti-abortion post he made to his personal Facebook page.[41] Following the November 2012 election of President Barack Obama, Hunt expressed his view that "[t]he Republican Party sucks. But guess what. Your party and your candidates parade their depraved belief in legal child murder around with pride."[42] Hunt went on to compare those who turn a blind eye to abortion with Germans during World War II.[43] He was found to have violated university policies that prohibit "unduly inflammatory statements," including on social media.[44]

Hunt brought a suit alleging, among other things, that the university violated his First Amendment rights by disciplining him for his Facebook post.[45] The Tenth Circuit upheld the district court's grant of summary judgment to the university defendants on

32. *Id.* at 88–89.
33. *Id.* at 89 (alteration in original).
34. *Id.* at 94, 108.
35. *Id.* at 108.
36. *Id.*
37. *Id.* at 113.
38. 478 U.S. 675 (1986).
39. *Radwan*, 465 F. Supp. 3d at 113.
40. 792 F. App'x 595 (10th Cir. 2019).
41. *Hunt*, 792 F. App'x at 606.
42. *Id.* at 598.
43. *See id.*
44. *Id.*
45. *See id.* at 597.

qualified immunity grounds, holding that the law surrounding off-campus, online speech was not clearly established at the time Hunt was punished.[46]

Hunt and *Radwan* are just two cases in which students or faculty members with strong First Amendment claims against public university administrators were left without recourse because of qualified immunity. This Essay seeks to shed light on the threats to student and faculty rights that are prevalent at public institutions of higher education. It demonstrates how qualified immunity, in its current form, has prevented the development of constitutional law in this area and served as a barrier to recovery for students and faculty. This Essay also explores how the doctrine could be reformed to better promote justice not only for students and faculty but also for anyone deprived of their constitutional rights by public officials.

To that end, this Essay proceeds in three parts. Section I briefly reviews the Court's path to the current qualified immunity framework set forth in *Pearson v. Callahan*,[47] as well as *Pearson*'s effect on the development of constitutional law. Section II discusses the history and application of qualified immunity on university campuses. Finally, Section III proposes how the qualified immunity doctrine could be reformed so that public officials can do their jobs free from the constant fear of liability while still being held accountable for serious constitutional violations.

I. QUALIFIED IMMUNITY THROUGH THE YEARS

Under current Supreme Court case law, public officials are entitled to qualified immunity unless they violate a constitutional right so clearly established that any reasonable official would have known they were violating it.[48] This has not always been the case. As Justice Thomas pointed out in his *Baxter* dissent, the text of Section 1983[49]—the federal law establishing a cause of action against state officials for violating constitutional rights—"ma[kes] no mention of defenses or immunities."[50] It was not until the 1950s—*eighty* years after the law that was codified as Section 1983 was passed—that courts began to discuss the possibility of immunity under certain circumstances.[51] While courts initially limited qualified immunity to circumstances "based on specific analogies to the common law,"[52] the scope of qualified immunity has expanded over the years.

Notably, prior to the Supreme Court's 1982 decision in *Harlow v. Fitzgerald*,[53] qualified immunity required "good faith"—that is, qualified immunity could be defeated *either* by a showing that "an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional

46. *Id.* at 606.

47. 555 U.S. 223 (2009).

48. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

49. 42 U.S.C. § 1983 (2018).

50. Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari) (alteration in original) (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part)).

51. *Id.* at 1863.

52. *Id.*

53. 457 U.S. 800 (1982).

rights of the [plaintiff],'" *or* by a showing that an official "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[54]

In the context of Section 1983 actions, the qualified immunity defense was first recognized by the Supreme Court in *Pierson v. Ray*,[55] where the Court referred to it as "the defense of good faith and probable cause."[56] The Court explained,

> A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied.[57]

In *Wood v. Strickland*,[58] the Supreme Court held that public school board officials should be immune from liability for "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances."[59] To be entitled to this good-faith immunity, the Court held that "[t]he official himself must be acting sincerely and with a belief that he is doing right," but also must not be violating "settled, indisputable law."[60] Put differently,

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[61]

Wood made clear that a public school official could be held liable for violating constitutional rights that were not clearly established, if the violation was undertaken in bad faith.

Less than a decade later, in *Harlow*, however, the Court eliminated the good-faith requirement, reasoning that the substantial costs associated with litigation of an officer's subjective good faith would be "disruptive of effective government."[62] As one commentator explains, "the Court recognized that the focus on the official's good faith created a factual issue that often required the officer to submit to trial," and "qualified immunity was to be regarded as an 'immunity from trial' rather than simply an immunity from liability."[63] This was not previously the case. In *Wood,* for example, the Supreme

54. *Harlow*, 457 U.S. at 815 (alteration in original) (emphasis omitted) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

55. 386 U.S. 547 (1967).

56. *Pierson*, 386 U.S. at 557.

57. *Id.* at 555 (footnote omitted).

58. 420 U.S. 308 (1975).

59. *Wood*, 420 U.S. at 321.

60. *Id.*

61. *Id.* at 322.

62. Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982).

63. James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1626 (2011).

Court described qualified immunity as "the immunity protecting various types of governmental officials from liability for damages under § 1983."[64]

Therefore, *Harlow* actually represented a shift from the view that qualified immunity's main purpose was to protect public officials from *liability* to the view that its purpose was to protect them from the burdens of discovery and litigation altogether. While the Court had previously expressed the view that "insubstantial lawsuits" against government officials should not proceed to trial,[65] the *Harlow* Court seemed to conflate "insubstantial lawsuits" with *any* lawsuit where a plaintiff might ultimately not prevail at trial. The Court held that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[66] The Court instead established the standard that still governs today: "[G]overnment 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."[67]

Under the objective standard set forth in *Harlow*, a court must make two determinations when performing a qualified immunity analysis: whether a constitutional right was violated and whether that constitutional right was clearly established.[68] In *Saucier v. Katz*,[69] the Supreme Court held that courts evaluating claims of qualified immunity must first answer the question of whether a constitutional right was violated before determining whether that right was clearly established.[70] "This two-step procedure, the *Saucier* Court reasoned, is necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation."[71]

In *Pearson*, however, the Court reconsidered whether the *Saucier* order of operations should be mandatory. The Court noted that lower court judges "have not been reticent in their criticism of *Saucier*'s 'rigid order of battle,'" and that *Saucier* has "defied consistent application by the lower courts."[72] The Court ruled, therefore, that "a mandatory, two-step rule for resolving all qualified immunity claims should not be retained."[73]

Instead, the Court held, "[t]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[74] Since the Supreme Court's decision in *Pearson*, lower courts have had discretion over which prong to analyze first. Many choose to begin with the second prong, leading to a number of decisions where qualified

64. *Wood*, 420 U.S. at 316.
65. Butz v. Economou, 438 U.S. 478, 507 (1978).
66. *Harlow*, 457 U.S. at 817–18.
67. *Id.* at 818.
68. *See id.* at 814–18.
69. 533 U.S. 194 (2001).
70. *See Saucier*, 533 U.S. at 207–08.
71. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting *Saucier*, 533 U.S. at 201).
72. *Id*. at 234–35.
73. *Id.* at 234.
74. *Id.* at 236.

immunity is granted without a decision about whether a constitutional violation occurred.[75] An analysis performed in the first two years after the *Pearson* decision found that, in cases where qualified immunity was granted, courts skipped over the constitutional analysis and proceeded directly to the "clearly established" question approximately one-third (31.4%) of the time.[76]

Professors Aaron Nielson and Christopher Walker analyzed more than eight hundred published and unpublished post-*Pearson* qualified immunity decisions from 2009 through 2012 to evaluate whether *Pearson* critics' fears of "constitutional stagnation" were warranted.[77] Nielson and Walker evaluated 1,460 constitutional claims brought in a total of 844 opinions.[78] They found that courts decided the constitutional question first in "about half of the claims considered (45.5% or 665 claims)," and that "[r]oughly a quarter of the time (26.7% or 390 claims) courts did not choose to exercise their discretion, opting instead to just declare that the right was not clearly established."[79] Courts denied qualified immunity on the remaining 405 claims.[80] This means that of the 1,055 claims on which qualified immunity was granted, courts did not reach the constitutional question more than one-third of the time (36.9% or 390 claims). This result is a similar but slightly higher finding than what the earlier analysis discovered in their study several years earlier.[81]

II. QUALIFIED IMMUNITY ON CAMPUS

Cases that do not reach the constitutional question are of major concern to civil liberties advocates because they prevent the law from becoming clearly established, paving the way for future constitutional violations to go unredressed. Judge Don Willett of the U.S. Court of Appeals for the Fifth Circuit recently summarized that concern quite eloquently:

> Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful . . . .
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> . . . .
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> . . . Forgoing a knotty constitutional inquiry makes for easier sledding. But the inexorable result is "constitutional stagnation"—fewer courts establishing law at all, much less clearly doing so. . . .
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> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go

75. *See, e.g.*, Eves v. LePage, 927 F.3d 575 (1st Cir. 2019); Haley v. City of Bos., 657 F.3d 39 (1st Cir. 2011); Christensen v. Park City Mun. Corp., 554 F.3d 1271 (10th Cir. 2009).

76. Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011).

77. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 1–2 (2015).

78. *Id.* at 32–33.

79. *Id.* at 34.

80. *See id.*

81. *See* Sampsell-Jones & Yauch, *supra* note 76, at 629.

> unanswered precisely because those questions are yet unanswered. . . . Heads defendants win, tails plaintiffs lose.[82]

Two recent cases from the Tenth Circuit illustrate the risk of constitutional stagnation in the context of students' First Amendment rights. In a January 2018 decision, *Yeasin v. Durham*,[83] the Tenth Circuit granted qualified immunity to a University of Kansas administrator who expelled a student for tweets he posted about his ex-girlfriend.[84] The University of Kansas imposed a no-contact order on the student, Navid Yeasin, after a local court issued a protection order to Yeasin's ex-girlfriend.[85]

Yeasin's ex-girlfriend alleged that he had physically restrained her during an argument and had threatened to commit suicide or spread rumors about her if she broke up with him.[86] Although Yeasin did not contact his ex-girlfriend following the no-contact order, he did post several tweets to his account that—while not identifying her by name—appeared to refer to her disparagingly.[87] Tammara Durham, the university's Vice Provost for Student Affairs, found that Yeasin's tweets violated the university's sexual harassment policy.[88] This finding, along with the finding that he had physically restrained his ex-girlfriend during an argument, informed Durham's ultimate decision to expel Yeasin.[89]

Yeasin filed suit, alleging that his expulsion violated his First Amendment rights.[90] He cited decades of Supreme Court precedent about the First Amendment rights of college students.[91] The court distinguished each case and found that "[a]t the intersection of university speech and social media, First Amendment doctrine is unsettled."[92] As a result, the court held that "even if Yeasin could show that Dr. Durham violated his First Amendment rights, . . . he has failed to show a violation of clearly established law. We don't decide whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university."[93]

Nearly two years later, on November 14, 2019, the Tenth Circuit decided *Hunt*. As discussed earlier, *Hunt* involved a medical student's First Amendment challenge to the University of New Mexico's decision to punish him for a Facebook post the university deemed unprofessional.[94] As in *Yeasin*, the Tenth Circuit skipped the constitutional analysis, justifying its choice in part because "[o]ff-campus, online speech by university

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82. Zadeh v. Robinson, 902 F.3d 483, 498–99 (5th Cir. 2018) (Willett, J., concurring dubitante) (emphasis omitted) (footnote omitted).

83. 719 F. App'x 844 (10th Cir. 2018).

84. *See Yeasin*, 719 F. App'x at 845.

85. *Id.* at 845–46.

86. *Id.* at 845.

87. *See id.* at 846 (quoting tweets such as, "#lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch" and "Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. #psycho #lolwhat").

88. *Id.* at 848.

89. *See id.* at 847–48.

90. *Id.* at 849.

91. *Id.* at 851.

92. *Id.* at 852.

93. *Id.* at 850.

94. Hunt v. Bd. of Regents, 792 F. App'x 595, 598–99 (10th Cir. 2019).

students, particularly those in professional schools, involves an emerging area of constitutional law."[95]

Had the court performed a constitutional analysis of Navid Yeasin's First Amendment claim stemming from his punishment for off-campus, online speech, the law in the Tenth Circuit might no longer have been "emerging" on that point. The Tenth Circuit's explanation, combined with its pattern of avoiding the constitutional question in cases involving students' online free speech rights, begs the question of how this area of law might ever move from emerging to established.[96]

By contrast, a pair of 2019 cases from the Southern District of Iowa illustrate how a court's choice to evaluate the constitutional prong first can advance the development of constitutional law. The choice to engage with the constitutional prong protects future students and faculty from deprivations of their rights. In the first of the two cases, *Business Leaders in Christ v. University of Iowa*,[97] a religious student group was derecognized by the university after refusing to allow an openly gay student to serve in the organization's executive leadership.[98] The university claimed that the group, Business Leaders in Christ (BLinC), had violated the university's human rights policy, which prohibited discrimination on the basis of, among other things, sexual orientation.[99] BLinC claimed that it did not turn the student down for a leadership position because of his sexual orientation, but rather because he could not agree to live by the group's religious beliefs about sexual behavior (when the student interviewed for the leadership position, he was asked whether he was willing to forgo same-sex relationships, and he said he was not).[100]

Ultimately, BLinC filed suit alleging the university and the administrators involved in the decisionmaking had violated, among other things, their right to free speech and expressive association.[101] The court held that the university's process for recognizing student organizations had created a limited public forum, in which restrictions on access must be both reasonable and viewpoint neutral.[102] BLinC argued that while the human rights policy might be facially viewpoint neutral, the university enforced it in a viewpoint-discriminatory way.[103] Specifically, BLinC pointed to a number of other recognized student groups whose membership or leadership criteria violated the terms of the human rights policy.[104]

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95. *Id.* at 601.

96. Had the Tenth Circuit performed the constitutional analysis in *Yeasin*, it would not necessarily have affected its decision in *Hunt*, since Hunt's Facebook post predated the *Yeasin* decision. However, the two cases illustrate how repeatedly avoiding the same constitutional question—which is within a court's discretion after *Pearson*—can lead to constitutional stagnation. A student bringing a similar First Amendment claim in the Tenth Circuit today, even stemming from events that occurred after *Yeasin* and *Hunt*, would still not have clearly established law to reference. *See Hunt*, 792 F. App'x 595; *Yeasin*, 719 F. App'x 844.

97. 360 F. Supp. 3d 885 (S.D. Iowa 2019), *aff'd in part, rev'd in part*, 991 F.3d 969 (8th Cir. 2021).

98. *Bus. Leaders in Christ*, 360 F. Supp. 3d at 891–92.

99. *Id.* at 890–92.

100. *Id.* at 891–92.

101. *See id.* at 894–95.

102. *Id.* at 895–96.

103. *See id.* at 898.

104. *See id.* at 899.

A group called Love Works, for example, required leaders to sign a "gay-affirming statement of Christian faith," while membership in the Chinese Students and Scholars Association was limited to "enrolled Chinese Students and Scholars."[105] The university acknowledged that some of these organizations were recognized despite their nonadherence to the human rights policy "for reasons which support the [u]niversity's educational mission"—for example, they "provide safe spaces for minorities [who] have historically been the victims of discrimination."[106]

The court held that this disparate application of the human rights policy "violated Plaintiff's constitutional rights to free speech, expressive association, and free exercise of religion."[107] However, the court determined that those rights were not clearly established in this particular context and granted qualified immunity to the individual defendants.[108] The court first determined that "the key issue is whether it was clearly established that such disparate application of a nondiscrimination policy violates a student group's free speech and free exercise rights."[109] Reviewing applicable case law, the court held that the previous cases "fail to offer clear conclusions as to the selective application of a nondiscrimination policy" and that the individual defendants were entitled to qualified immunity.[110]

Seven months later, the Southern District of Iowa decided another case involving the rights of religious student organizations at the University of Iowa: *InterVarsity Christian Fellowship/USA v. University of Iowa*.[111] In June 2018—months after the same court had granted BLinC an injunction preventing the University of Iowa from derecognizing it—University of Iowa administrators informed InterVarsity Christian Fellowship (InterVarsity) "that language in its constitution requiring its leaders to be Christian violated the Human Rights Policy."[112]

Like BLinC before it, InterVarsity filed suit challenging the university's actions under the First Amendment.[113] The court held,

> Nothing about this case warrants a different outcome than that reached in the *BLinC Case*. The University purports to apply the Human Rights Policy to [organizations] such that they may not speak about religion, gender, homosexuality, creed, and numerous other protected characteristics through their membership and leadership criteria. But whereas InterVarsity may not require or even encourage its leaders to subscribe to its faith, other [organizations] are free to limit membership and leadership based on the Human Rights Policy's protected characteristics.[114]

Relying on its decision in *Business Leaders in Christ*, the court also held that the individual defendants were not entitled to qualified immunity:

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105. *Id.* at 890.
106. *Id.* at 890–91.
107. *Id.* at 906.
108. *Id.* at 906–09.
109. *Id.* at 907.
110. *Id.* at 908–09.
111. 408 F. Supp. 3d 960 (S.D. Iowa 2019).
112. *InterVarsity Christian Fellowship/USA*, 408 F. Supp. 3d at 973.
113. *See id.* at 973–74.
114. *Id.* at 980.

> In the *BLinC Case*, the Court found the individual defendants were entitled to qualified immunity. The Court reasoned that the University's compelling interests in the Human Rights Policy, along with the university setting, potentially complicated the case, and [existing case law] did not offer clear conclusions as to the selective application of a nondiscrimination policy. But what the individual defendants in the *BLinC Case* did not have when BLinC's constitutional rights were violated in 2017, and what the individual Defendants in this case *did* have by June 2018, was an order that squarely applied [existing case law] to a case involving the selective application of the Human Rights Policy to a religious group's leadership requirements.[115]

In light of its *Business Leaders in Christ* decision, the court held that the law was clearly established. When it came to derecognizing InterVarsity for requiring its leaders to share the group's religious beliefs, no "reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application of the Human Rights Policy that the Court found constitutionally infirm in the preliminary injunction order."[116]

These two cases illustrate how performing the constitutional analysis first can ensure that constitutional law develops such that administrators are not indefinitely unaccountable for constitutional violations simply because of qualified immunity. As Professors Nielson and Walker observed in their 2015 article about post-*Pearson* qualified immunity decisions, "because of *Pearson*, when courts are confronted with claims that may constitute violations of not yet clearly established constitutional rights, they sometimes decline to clarify constitutional doctrine."[117] They also observed that the "substantive consequences" of this practice are "obvious."[118]

A return to *Saucier*'s rigid battle order would still not address the other major concern with the qualified immunity doctrine: public officials frequently get away with what seems, to the untrained eye, like flagrant constitutional violations simply because there is no case law directly on point.

As discussed earlier, the *Harlow* standard requires that a court grant qualified immunity so long as a state actor "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[119] As legal commentator Ilya Somin put it, courts have been "defining 'reasonability' down for a long time now" and taking such a narrow, fact-specific view of what is "clearly established" that they shield administrators from liability for egregiously unconstitutional conduct.[120]

Courts have long emphasized that in performing a qualified immunity analysis, the constitutional right in question must be defined "at an appropriate level of generality."[121]

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115. *Id.* at 992 (citation omitted).

116. *Id.* at 993.

117. Nielson & Walker, *supra* note 77, at 6.

118. *Id.*

119. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

120. Ilya Somin, *Supreme Court Rejects Qualified Immunity Defense for the First Time in Years*, VOLOKH CONSPIRACY (Nov. 2, 2020, 10:21 PM), http://reason.com/volokh/2020/11/02/supreme-court-rejects-qualified-immunity-defense-for-the-first-time-in-years [https://perma.cc/EAD2-9WFY].

121. Brady v. Dill, 187 F.3d 104, 115 (1st Cir. 1999).

If the right is defined too generally—i.e., the right to free speech—no one would ever be granted qualified immunity.[122] On the other hand, if the right is defined too narrowly, then state officials will be granted qualified immunity even for deliberate and egregious constitutional violations.

In many recent qualified immunity cases involving public universities, courts have erred on the side of defining the constitutional right too narrowly, allowing administrators to remain unaccountable for constitutional violations. The *Hunt* decision exemplifies this scenario. As discussed earlier, *Hunt* involved a University of New Mexico medical student who was disciplined for an intemperate Facebook post about abortion.[123] In analyzing whether Hunt's right to free speech was clearly established in this situation, the court took about as narrow a view as possible of the constitutional right at issue.

The court held that existing case law would not "have sent sufficiently clear signals to reasonable medical school administrators that sanctioning a student's off-campus, online speech for the purpose of instilling professional norms is unconstitutional."[124] While there may not have been precedent about the off-campus, online speech of professional students, there were decades of Supreme Court precedent clearly establishing both that college students enjoy robust free speech rights and that speech on political issues (such as abortion) is entitled to the highest level of protection.

In *Healy v. James*,[125] the Supreme Court held that, unlike in K–12 schools, there is no reason that "First Amendment protections should apply with less force on college campuses than in the community at large."[126] In *Papish v. Board of Curators of the University of Missouri*,[127] the Court held that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[128] Additionally, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[129] the Court warned of the unique danger of the "chilling of individual thought and expression . . . in the [u]niversity setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[130]

Likewise, the Court has clearly established that core political speech is where "the importance of First Amendment protections is 'at its zenith.'"[131] Hunt's post was clearly political speech as it was directed specifically at people who "support the Democratic

122. *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation.").

123. *See supra* notes 40–46 and accompanying text.

124. Hunt v. Bd. of Regents, 792 F. App'x 595, 605 (10th Cir. 2019).

125. 408 U.S. 169 (1972).

126. *Healy*, 408 U.S. at 180.

127. 410 U.S. 667 (1973).

128. *Papish*, 410 U.S. at 670.

129. 515 U.S. 819 (1995).

130. *Rosenberger*, 515 U.S. at 835.

131. Meyer v. Grant, 486 U.S. 414, 425 (1988).

candidates."[132] He expressed his belief that despite the Republican Party's shortcomings, people should be voting Republican because abortion is a more pressing issue than gay marriage or tax rates.[133] Yet because this precise fact pattern—the off-campus, online speech of a professional student—had not previously been heard by the Tenth Circuit or the Supreme Court, there was no accountability for the administrators who punished Hunt.

In *Radwan*, the district court similarly strained to find qualified immunity despite the fact that stripping a student of her scholarship simply for raising her middle finger seems like such an obviously egregious violation of her free speech rights.[134] The court found that the following things were clearly established:

- "Raising one's middle finger . . . has long been recognized as expressive conduct protected by the First Amendment."[135]
- "'[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment.'"[136]
- Radwan's punishment was not justified under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[137] which held that restrictions on student speech are justified only when necessary "to prevent material disruption in the schools."[138]
- Radwan's punishment was not justified under a Supreme Court decision holding that schools may discipline students for "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[139]

The court held, however, that UConn officials might have reasonably believed that their conduct was permissible under the Supreme Court's decision in *Fraser*, in which the Court held that K–12 schools "have wide discretion to prohibit speech that is . . . vulgar, lewd, indecent or plainly offensive."[140] The court held this despite acknowledging that the Supreme Court's reasoning in *Fraser* rested on the fact that the speech being regulated was the speech of children—speech that the Second Circuit had stated "an adult . . . might have a constitutional right to employ."[141] Indeed, the court even noted that the Second Circuit "has also expressed skepticism that universities and colleges have as much latitude to regulate student speech as K-12 schools do."[142] Despite this, the court held that because the precise fact pattern of the case involved "expressive conduct widely and publicly broadcast on national television, rather than limited to the

132. *See* Hunt v. Bd. of Regents, 792 F. App'x 595, 598 (10th Cir. 2019).

133. *Id.*

134. See *supra* notes 28–37 and accompanying text for a discussion of *Radwan v. University of Connecticut Board of Trustees*, 465 F. Supp. 3d 75 (D. Conn. 2020).

135. *Radwan*, 465 F. Supp. 3d at 108.

136. *Id.* at 110 (quoting Levin v. Harleston, 966 F.2d 85, 88 (2d Cir. 1992)).

137. 393 U.S. 503 (1969).

138. *Radwan*, 465 F. Supp. 3d at 111 (quoting Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 112 (2d Cir. 2012)).

139. *Id.* at 112 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988)).

140. *Id.* at 113 (quoting Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 325 (2d Cir. 2006)).

141. *Id.* (quoting Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008)).

142. *Id.*

university setting," qualified immunity was appropriate.[143] As of this writing, the case is on appeal to the Second Circuit.[144]

Qualified immunity has also prevented students and faculty from recovering for violations of their due process rights. In *Endres v. Northeast Ohio Medical University*,[145] the Sixth Circuit granted qualified immunity to administrators who dismissed a medical student for allegedly cheating despite strong evidence that the fidgeting observed during the course of his exam was actually a result of his ADHD.[146] The student, Julian Endres, alleged that the university denied him a fair process, including by its "fail[ure] to inform Endres of the key evidence against him."[147]

Although Endres was permitted to address the hearing committee, he was not permitted to be in the room while a medical school administrator, Sandra Emerick, presented the case against him.[148] The court found that while "[t]hat alone establishes a due process violation," there were additional areas of concern as well.[149] Specifically, Emerick—who was named as an individual defendant in the case—presented a statistical analysis purporting to show that the chances that Endres and the student whose answers he supposedly viewed would have six identical wrong answers was infinitesimal.[150] However, this statistical analysis was not included in the case file Endres was given to review before it was presented to the hearing committee.[151] According to the court, this lack of access to key evidence denied Endres the right to "'an explanation of the evidence' against him."[152]

Nevertheless, the court granted qualified immunity to Emerick.[153] The court reasoned that although Supreme Court precedent establishes "that a student facing a serious sanction for disciplinary misconduct is entitled to a fair hearing," qualified immunity was nonetheless warranted because "no case from the Supreme Court or this court has held that cheating is a disciplinary matter warranting more robust procedures under the Due Process Clause."[154]

In *Walsh v. Hodge*,[155] the Fifth Circuit held that administrators at the University of North Texas had violated a professor's due process rights "by not affording him the right to confront and cross-examine" his accuser in a sexual harassment case "when the entire hearing boiled down to an issue of credibility."[156] The court held, however, that the

143. *Id.*

144. Radwan v. Univ. of Conn. Bd. of Trs., 465 F. Supp. 3d 75 (D. Conn. 2020), *appeal docketed*, No. 20-2194 (2d Cir. July 7, 2020).

145. 938 F.3d 281 (6th Cir. 2019).

146. *Endres*, 938 F.3d at 285.

147. *Id.* at 301.

148. *Id.* at 288.

149. *Id.* at 301.

150. *Id.*

151. *See id.* at 290–91.

152. *Id.* at 301 (quoting Doe v. Univ. of Cincinnati, 872 F.3d 393, 399–400 (6th Cir. 2017)).

153. *Id.* at 302.

154. *Id.* at 302.

155. 975 F.3d 475 (5th Cir. 2020).

156. *Walsh*, 975 F.3d at 483–84.

defendant administrators were entitled to qualified immunity and overturned the district court's immunity denial:

> Walsh is correct that we have clearly established that due process for a terminated professor includes "a meaningful opportunity to be heard in his own defense." However, none of our case law speaks directly to the procedures necessary to protect a professor's interest in avoiding career-destruction after being accused of sexual harassment.[157]

In denying qualified immunity, the lower court relied on a 1986 Fifth Circuit decision holding that "[w]hen an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity."[158] The Fifth Circuit rejected that reasoning, however, stating it was dicta and that the court had not elaborated on what might be a "reasonable substitute" for cross-examination[159]—as if the complete lack of confrontation offered to Walsh might somehow meet that standard.

The cases this Section discussed are just some of many decisions in the public university setting in which courts protect administrators who seem to have flagrantly violated the constitutional rights of students and faculty. So, what can be done? Is there a better way to balance the need for public officials to function without the constant fear of liability with the need to redress what often seems like deliberate violations of constitutional rights?

III. A RETURN TO GOOD FAITH?

While this Essay focuses specifically on qualified immunity in the public university setting, the concerns expressed in Section II are illustrative of more widespread concerns about the impact of qualified immunity on the ability to redress violations of constitutional rights. There have been an increasing number of calls from the public to abolish qualified immunity altogether,[160] particularly in light of national outrage over police shootings of unarmed Black men.[161] Although the full abolition of qualified

157. *Id.* at 486.

158. *Id.* (alteration in original) (quoting Wells v. Dall. Indep. Sch. Dist., 793 F.2d 679, 683 (5th Cir. 1986)).

159. *Id.* at 487.

160. *See, e.g.*, Brad Polumbo, *There's Never Been a Better Time To Abolish Qualified Immunity*, DISPATCH (Jun. 8, 2020), http://thedispatch.com/p/theres-never-been-a-better-time-to [https://perma.cc/8C9F-CDDQ]; Mukund Rathi, *Abolish Qualified Immunity*, JACOBIN (July 2020), http://www.jacobinmag.com/2020/07/qualified-immunity-police-violence-shase-howse-supreme-court[https://perma.cc/P39C-PDR3]; Jacob Sullum, *Abolish 'Qualified Immunity' and Quit Protecting Abusive Police*, CHI. SUN-TIMES (Jun. 9, 2020, 4:00 PM), https://chicago.suntimes.com/columnists/2020/6/9/21285663/police-abuse-qualified-immunity-supreme-court-rulings-jacob-sullum [https://perma.cc/5JS8-8VBP]; The Editorial Board, *Qualified Immunity Makes a Mockery of Justice. Abolish It*, ORANGE COUNTY REGISTER (Aug. 5, 2020), http://www.ocregister.com/2020/08/05/qualified-immunity-makes-a-mockery-of-justice-abolish-it [https://perma.cc/DL3L-KJN9].

161. *See, e.g.*, Brakkton Booker, Bill Chappell, David Schaper, Danielle Kurtzleben & Joseph Shapiro, *Violence Erupts as Outrage Over George Floyd's Death Spills into a New Week*, NPR (June 1, 2020, 1:30 AM), http://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue [https://perma.cc/E7A7-M8U7]; Susan Phillips, Hannah Chinn & Emily Scott, *West Philly Rally Resumes Protest Against Police Killing of Walter Wallace Jr.*, WHYY (Oct. 31, 2020), http://whyy.org/articles/west-

immunity would likely overcorrect for the harms sought to be remedied, these calls are important because they represent the first time the qualified immunity doctrine has received significant attention outside of legal briefs and journals. While the prescription may be overly broad, the widespread attention to this issue suggests that the timing is right for a reconsideration of the nature and scope of qualified immunity.

Over the years, legal commentators have offered numerous suggestions for reforming qualified immunity in ways short of abolishing the doctrine altogether. Professor James Pfander, for example, suggests allowing immunity-free claims for nominal damages against state officials in their personal capacities.[162] This remedy allows constitutional rights to be vindicated with more regularity while avoiding the threat to "the financial security of well-meaning public officials" that underlies the qualified immunity doctrine.[163] As Pfander acknowledges, however, this may not be a meaningful remedy for individuals who have suffered substantial losses as the result of constitutional violations,[164] such as students who are expelled from school without due process or faculty who lose their jobs for the exercise of their free speech rights.

One thing that does seem clear is that the current, objective-only "clearly established" analysis paints with too broad a brush. As University of Georgia Law School Professor Michael Wells observed:

> A key feature of the [qualified immunity] doctrine is that the Court refuses to balance interests on a case-by-case basis—for example, by evaluating in each case the precise degree of official wrongfulness, the nature and importance of the constitutional rights at stake, and other considerations presented by that particular case.[165]

To address this, Wells calls for "judicial recognition of a limited number of categories in which the defense is unavailable because the benefits of immunity are significantly outweighed by its costs."[166] He also suggests that the Court "eliminate small but tactically important glosses on the *Harlow* formulation."[167] Such glosses include the Court's holding in *Ashcroft v. al-Kidd*[168] that qualified immunity must attach "unless clearly established law places the 'statutory or constitutional question beyond

philly-rally-resumes-protest-against-police-killing-of-walter-wallace-jr [https://perma.cc/4B5E-76A2]; Matt Smith, *Protesters Take to Streets in Kenosha After Jacob Blake Shooting Decision*, WISN (Jan. 5, 2021), http://www.wisn.com/article/protesters-take-to-streets-in-kenosha-after-jacob-blake-shooting-decision/35134852 [https://perma.cc/3YWU-9QVB].

162. Pfander, *supra* note 63, at 1607.

163. *Id.* at 1612.

164. *Id.* at 1632 ("As a practical matter, individuals who have suffered substantial physical, psychological, or dignitary injuries as the result of allegedly unconstitutional conduct will find the pursuit of nominal damages unattractive.").

165. Michael Wells, *Qualified Immunity After Zigler v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 385 (2018).

166. *Id.* at 387.

167. *Id.* at 397.

168. 563 U.S. 731 (2011).

debate,'"[169] and its statement in *Reichle v. Howards*[170] that immunity is appropriate unless "'every' reasonable officer would understand that the act [i]s unconstitutional."[171]

These are reasonable suggestions for ways to reform qualified immunity to preserve its original function while improving aggrieved individuals' ability to recover from public officials who violated their rights. Ultimately, however, this Essay argues that there are two primary actions the Supreme Court must take to restore a more reasonable balance between the interests of aggrieved plaintiffs and public officials in constitutional tort litigation.

The first is to find a middle ground between *Saucier* and *Pearson*. The law must provide courts the discretion they need to avoid wasting judicial resources on performing constitutional analyses in cases where it is patently unnecessary. At the same time, the law must also protect against the constitutional stagnation that allows public officials to repeatedly engage in conduct that may be unconstitutional simply because the law never develops.

The *Pearson* Court's concern about preserving judicial resources is certainly not misplaced: there is a high volume of Section 1983 litigation, and in cases where the constitutional claim is obviously weak, there is a strong argument for allowing a court to skip a full analysis in the interest of judicial efficiency. For example, in *Harris v. Morris*,[172] the Sixth Circuit skipped the constitutional analysis in a case involving a pro se plaintiff in a lawsuit stemming from a grade dispute.[173] Among other things, the plaintiff alleged that the university had denied him due process by not permitting him to file a grievance challenging his grade.[174]

The court, noting that neither the Supreme Court nor the Sixth Circuit has held that a student has a protected liberty or property interest in his grades, held that the plaintiff had not pled a violation of a right that was clearly established and granted qualified immunity.[175] This example of a court choosing not to perform a constitutional analysis when it is obvious that the law is not clearly established is a good illustration of why lower courts were frustrated by *Saucier*'s rigidity and wanted greater discretion to avoid unnecessary constitutional analyses.

Nonetheless, cases like *Yeasin* and *Hunt* illustrate the fact that granting courts too much discretion to avoid the constitutional analysis can cause important areas of constitutional law—such as students' off-campus, online First Amendment rights—to remain underdeveloped. A middle ground would involve the Supreme Court clarifying that *Harlow*'s constitutional prong should ordinarily be the first one analyzed, except under enumerated circumstances. Such circumstances could include situations in which a higher court is about to rule on the question, where the constitutional claim is

169. Wells, *supra* note 165, at 397.

170. 566 U.S. 658 (2012).

171. Wells, *supra* note 165, at 397 (citing Reichle v. Howards, 566 U.S. 658, 664 (2012)).

172. No. 17-1373, 2017 U.S. App. LEXIS 21425 (6th Cir. 2017).

173. *See Harris*, 2017 U.S. App. LEXIS 21425, at *7.

174. *Id.* at *1–2.

175. *Id.* at *7.

particularly novel, or where the question is "so fact dependent that the result will be confusion rather than clarity."[176]

The second, and perhaps more important, step would be to restore the good-faith requirement inherent in the qualified immunity defense prior to the Court's *Harlow* decision.[177] *Harlow* represented a dramatic shift in the conception of qualified immunity from something intended to shield government officials from liability to something intended to shield them from the burdens of litigation altogether. It also created a situation where officials could be shielded from immunity even when it seemed obvious that they were acting with malicious intent. For example, college administrators routinely apply so-called "free speech zone" policies to prevent student groups with disfavored viewpoints from holding events on campus.[178] Moreover, in campus disciplinary proceedings, administrators regularly engage in conduct that is difficult to ascribe to anything other than a bad-faith motive, such as suppressing exculpatory evidence.[179]

While it is true that the good-faith inquiry will be more fact intensive and will likely mean that more qualified immunity claims are decided at later stages of litigation, it is a necessary trade-off. When public officials are able to escape accountability for obviously bad-faith conduct simply because there has not been a factually similar case in their jurisdiction, the public understandably loses confidence in the courts' ability to redress constitutional violations. America has experienced this loss of confidence in the court system, as seen by the widespread calls to abolish qualified immunity.

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176. Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J., concurring).

177. *See supra* notes 53–54 and accompanying text.

178. *See, e.g.*, Press Release, Found. for Individual Rights in Educ., FIRE Files Lawsuit on Behalf of Illinois Student Detained by Police for 'Shut Down Capitalism' Flyers (Jan. 11, 2018), http://www.thefire.org/fire-files-lawsuit-on-behalf-of-illinois-student-detained-by-police-for-shut-down-capitalism-flyers [https://perma.cc/N59P-5R3Q]; Press Release, Found. for Individual Rights in Educ., Students File Lawsuit Challenging 'Free Speech Zone' After Repeated Censorship of Pro-Gun 'Empty Holster' Protest (Nov. 5, 2009), http://www.thefire.org/students-file-lawsuit-challenging-free-speech-zone-after-repeated-censorship-of-pro-gun-empty-holster-protest [https://perma.cc/8US5-EN6C]; Press Release, Found. for Individual Rights in Educ., Western Illinois University's 'Zombie' Free Speech Zone Resurrected To Shut Down Satirical 'Pot' Brownies Event (Sept. 5, 2019), http://www.thefire.org/western-illinois-universitys-zombie-free-speech-zone-resurrected-to-shut-down-satirical-pot-brownies-event [https://perma.cc/CS3K-WXEG].

179. *See, e.g.*, Doe v. Purdue Univ., 464 F. Supp. 3d 989, 995 (N.D. Ind. 2020) ("During the [investigative] interview, Defendants Wright and Rooze were uninterested in any exculpatory evidence. . . . Defendants Wright and Rooze also refused to provide the Plaintiff with exculpatory evidence such as the audio recordings of the interviews with Jane Roe and other witnesses."); Doe v. Univ. of Conn., No. 3:20cv92 (MPS), 2020 U.S. Dist. LEXIS 11170, at *8 (D. Conn. Jan. 23, 2020) (explaining that hearing officers "refused to hear testimony from four of the five witnesses the Plaintiff attempted to present," including witnesses who "were prepared to offer testimony that would tend to undermine Jane Roe's credibility"); Doe v. Univ. of Miss., 361 F. Supp. 3d 597, 607 (S.D. Miss. 2019) (involving a student's allegation that a university Title IX coordinator had excluded critical exculpatory evidence from her report, including the complainant's statements to police as well as "relevant and exculpatory text messages"); Doe v. Ohio St. Univ., 311 F. Supp. 3d 881, 891 (S.D. Ohio 2018) (finding that an administrator present at a hearing may have known that the accuser gave false testimony but did nothing to correct it); Sahm v. Miami Univ., 110 F. Supp. 3d 774, 775 (S.D. Ohio 2015) (involving a student's allegation that an administrator had discouraged a witness with exculpatory information from testifying at his disciplinary hearing).

CONCLUSION

The qualified immunity doctrine has, justifiably, come under significant criticism, leading many to call for its abolition.[180] Yet the doctrine is of some utility, both in protecting the ability of public officials to do their jobs free from the constant fear of financial ruin and in preserving judicial efficiency by allowing courts to dispense with patently unmeritorious claims against public officials in a timely way.

Still, as the cases involving administrators at public colleges and universities demonstrate, qualified immunity in its current form creates too high a barrier for individuals seeking to recover damages from public officials who violate constitutional rights. The doctrine also allows public officials to get away with intentional, bad-faith constitutional violations so long as there is not a factually identical case in the same jurisdiction. By limiting the circumstances under which courts can bypass the constitutional analysis and by allowing public officials to be held responsible for bad-faith violations of constitutional rights—even in cases where the law is not clearly established—the Supreme Court could ensure that well-meaning state actors are able to perform their jobs free from the fear of financial ruin, while also ensuring that those whose rights have been callously violated can obtain the justice they deserve.

180. *See supra* note 160 and accompanying text.