Note

Sidestepping the Escherian Stairwell: Explicit Establishment as a Method for Circumventing Qualified Immunity's Constitutional Stagnation

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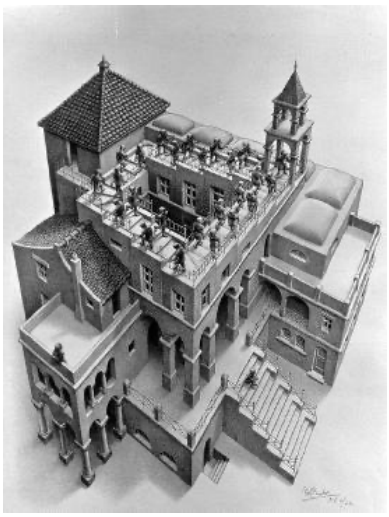

M.C. Escher, *Ascending and Descending*, 1960 (lithograph)

In recent years, the doctrine of qualified immunity (QI) has gained increased prominence in the public consciousness. Prior

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to the murder of George Floyd and the resulting nationwide racial justice protests and uprisings, this Supreme Court–made doctrine—and the ways it shields law enforcement officers from legal accountability—was a relatively esoteric legal topic. Yet by the summer of 2020, Americans were marching in the streets with signs calling for QI's demise, and polling found QI to be disfavored by a margin of two-to-one. This same polling also showed a sharp decline in public confidence that police would use force appropriately, treat minorities equally, or hold their fellow officers accountable. 42 U.S.C. § 1983 is supposed to provide an avenue to hold officers civilly liable for constitutional violations, but QI severely undercuts § 1983's accountability function by shielding officers and other public officials from litigation altogether. So long as QI remains, however, giving courts the most effective tools possible to counter its constitutional harms presents the best chance of providing some semblance of the accountability § 1983 is supposed to provide.

In Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court adopted a two-step, sequential test for courts to gauge QI's applicability to a given set of facts: first, determine if the alleged facts show a constitutional violation. If yes, then second, determine whether prior caselaw had clearly established the constitutional right under the same or similar circumstances. Only if the answer to both questions is "yes" would a plaintiff overcome QI and be allowed to litigate their case. The mandatory sequencing of this procedure was meant to ensure the continued elaboration of constitutional rights by requiring courts to address the constitutional questions before them regardless of whether QI was ultimately granted on the second "clearly established law" prong of the analysis.*

In Pearson v. Callahan*, 555 U.S. 223 (2009), however, the Court retreated from* Saucier*'s intended measures against constitutional stagnation.* Pearson *allowed judges to analyze QI claims based on whichever of the two prongs they chose, with an eye towards judicial efficiency. Even though both* Saucier *and* Pearson *admonished courts not to "skip ahead" to the clearly established law prong of the analysis, federal courts quickly developed a tendency to do just that. This trend has resulted in constitutional issues repeatedly going unanswered, leading to what Fifth Circuit Judge Don Willett has described as "Section 1983 meets Catch-22," whereby "[i]mportant constitutional questions go unanswered precisely because no one's answered them before. Courts*

then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiffs lose."

*In a handful of post-*Pearson *cases, however, circuit courts have granted defendants QI due to a lack of previous clearly established law while simultaneously taking the extra step of explicitly establishing such conduct to be a constitutional violation going forward. This Note reviews the utility of this procedure—which it refers to as "explicit establishment"—as a means of circumventing the Escherian Stairwell. After surveying the history of QI and chronicling the dysfunctionality of the post-*Pearson *QI paradigm, this Note analyzes the few instances where explicit establishment has been employed and advocates for its wider use by federal circuit courts.*

INTRODUCTION

Alexander Baxter was breaking into a house in Nashville, Tennessee, when a neighbor spotted him and called the police.[1] Alerted by the sound of sirens and the sight of a police helicopter, Baxter knew the jig was up.[2] He darted between hiding spots in an attempt to evade the police but was eventually cornered in a basement, hiding between a chimney and a water heater.[3] Two canine unit officers entered the house and released their dog, who found Baxter in his hiding spot.[4] When the officers caught up to the dog, Baxter was sitting down with his arms raised in surrender.[5] Nevertheless, and "without warning,"[6] the officers released the dog to "restrain[]" Baxter, which it did by biting his underarm.[7] The officers then took Baxter into custody.[8]

Baxter sued the officers under 42 U.S.C. § 1983, a Reconstruction Era federal statute imposing civil liability on state or local officials who use their position to violate a citizen's constitutional rights.[9] Baxter alleged the officers violated his constitutional rights by, among other things, using excessive force in releasing the dog on him after he surrendered.[10] Yet the Sixth Circuit, considering the suit on interlocutory appeal, did not address whether the police violated Baxter's constitutional rights.[11] Instead, the court granted the officer-defendants

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1. Baxter v. Bracey, 751 F. App'x 869, 870 (6th Cir. 2018).

2. *Id.*

3. *Id.*; Petition for a Writ of Certiorari at 5, Baxter v. Bracey, 140 S. Ct. 1862 (2020) (No. 18-1287).

4. *Baxter*, 751 F. App'x at 870; Petition for a Writ of Certiorari, *supra* note 3, at 5.

5. Petition for a Writ of Certiorari, *supra* note 3, at 5.

6. *Id.*

7. *Baxter*, 751 F. App'x at 870.

8. *Id.*

9. 42 U.S.C. § 1983. *See generally* Cathy Bissoon et al., *From the KKK to George Floyd: Three Judges Explore Qualified Immunity*, 22 SEDONA CONF. J. 533, 537–38 (2021) (describing the passage of the Civil Rights Act of 1871—now codified as 42 U.S.C. § 1983—in response to widespread white supremacist violence against formerly enslaved people); Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Apr. 20, 2021), https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act [https://perma.cc/5WVJ-WX7M] (discussing the modern relevance of the Civil Rights Act of 1871).

10. 42 U.S.C. 1983 Civil Rights Complaint at 1–2, Baxter v. Harris, No. 3:15-cv-00019, 2018 WL 11467256 (M.D. Tenn. Jan. 19, 2018).

11. *Baxter*, 751 F. App'x at 871.

qualified immunity (QI) from litigation because their use of the dog "did not violate clearly established law."[12] The court considered avoiding the question of constitutional rights especially appropriate because it found Baxter's pro se "briefing of constitutional questions [wa]s woefully inadequate."[13] Although the court cited circuit precedent clearly establishing that releasing a police dog on a suspect lying down in surrender violates the Constitution,[14] it ultimately found contrary precedent more convincing because Baxter hid in an "unfamiliar location."[15] Baxter petitioned the Supreme Court to review the Sixth Circuit's decision,[16] which the Court denied over a sharply worded dissent from Justice Clarence Thomas.[17]

How did the law get to the point where the difference between getting the chance to vindicate one's constitutional rights before a jury and having the courthouse door slammed in one's face turns on whether one was surrendering by sitting, rather than lying down, in an "unfamiliar location"? The answer is the doctrine of QI—specifically, QI as it exists following the Supreme

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12. *Id.* QI protects government officials performing discretionary functions from civil liability unless the official violates a clearly established right that would be known to a reasonable person. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Furthermore, QI creates "an *immunity from suit* rather than a mere defense to liability," giving officials "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original).

13. *Baxter*, 751 F. App'x at 871 (quoting Pearson v. Callahan, 555 U.S. 223, 239 (2009)).

14. *Id.* at 872 (citing Campbell v. City of Springboro, 700 F.3d 779, 787, 789 (6th Cir. 2012)) (finding "ample evidence to suggest that [the officer-defendant] acted contrary to clearly established law" in allowing his police dog to "attack two suspects who were not actively fleeing and who . . . showed no ability to evade police custody" as one of them "was lying face down with his arms at his side" and the other "was drifting off to sleep . . . prior to [the dog] biting her").

15. *Baxter*, 751 F. App'x at 872 (citing Robinette v. Barnes, 854 F.2d 909, 913–14 (6th Cir. 1988)). The court found the "unfamiliar location" element overriding despite the dog having flushed Baxter out of hiding and into a posture of surrender—sitting motionless with his hands up—by the time the officers released the dog. *Id.*; Petition for a Writ of Certiorari, *supra* note 3, at 5.

16. *See* Petition for a Writ of Certiorari, *supra* note 3.

17. Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.").

Court's decision in *Pearson v. Callahan*.[18] *Pearson* allowed courts to do what the Sixth Circuit did in *Baxter*: forego analyzing any constitutional issues and decide cases solely on the basis of whether the law was "clearly established."[19] This, in turn, leads to a persistent issue of "constitutional stagnation,"[20] whereby courts may see the same or similar facts over and over yet never clearly establish the law.[21] Fifth Circuit Judge Don Willett colorfully referred to this legal conundrum as "[a]n Escherian Stairwell" on which "[i]mportant constitutional questions go unanswered precisely because no one's answered them before."[22]

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18. Pearson v. Callahan, 555 U.S. 223, 223–24 (2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)) (reversing the previously mandated procedure, which required courts evaluating claims under 42 U.S.C. § 1983 to address whether a plaintiff sufficiently alleged the violation of a constitutional right before analyzing whether the right was "clearly established").

19. *Id.* at 236 ("The 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."); *supra* notes 11–17 and accompanying text (detailing the *Baxter* Court's analysis under the "clearly established law" test and the resulting preemption of any analysis of whether a violation of constitutional rights occurred).

20. *Pearson*, 555 U.S. at 232 (citing *Saucier*, 533 U.S. at 201); *id.* at 236 ("[T]he *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent."). *See generally*, Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 644–49 (2013) (arguing that *Pearson* has had a "negative effect on the development and clarification of constitutional rights").

21. *See, e.g.*, April Rodriguez, *Lower Courts Agree—It's Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity [https://perma.cc/2SCL-J47M] (pointing to *Baxter*'s outcome as an example of "a never-ending catch-22 [in which a] victim must cite exact legal precedent to win their case, but because judges dismiss so many cases over slight twists of facts without deciding whether the underlying government conduct is unconstitutional, it's increasingly difficult to create any legal precedent"); Sims v. City of Madisonville, 894 F.3d 632, 638 (5th Cir. 2018) ("This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. Continuing to resolve the question at the clearly established step means the law will never get established." (citations omitted)).

22. Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part). The phrase "Escherian Stairwell" refers to the Dutch artist M.C. Escher's famous "impossible staircase" lithographs, such as *Relativity* and *Ascending and Descending*, which portray the "impossible object" of a

This Note advocates for federal courts of appeals to more broadly apply what it refers to as "explicit establishment," a method by which the federal courts of appeals may sidestep the Escherian Stairwell and prevent the ensuing constitutional stagnation. In a typical § 1983 case, if a court grants the defendant QI, the case does not clearly establish anything. If a court uses explicit establishment, it still must grant the defendant QI due to a lack of prior clearly established law; however, it also explicitly states that going forward the law is clearly established, meaning QI will not apply in any sufficiently similar future cases.

Part I of this Note begins by explaining the history of the doctrine of QI and its application in the § 1983 context. In chronological sequence each of the six Sections in this Part will explore a Supreme Court case that contributed some important attribute of QI as it currently exists. Part II then discusses the main problem this Note seeks to address: the dysfunctionality of the current QI paradigm, brought about by the Court's decision in *Pearson*. Each of the four Sections in this Part will explain a particular consequence of the current QI status quo. Part III advocates for the more widespread adoption of explicit establishment by federal courts of appeals. The first Section in this Part will analyze three case studies where post-*Pearson* courts used explicit establishment to address QI claims within a different context, while the remaining three Sections will explore either a benefit or challenge of explicit establishment as a means for addressing the problems with the current QI paradigm. Finally, this Note's Conclusion comments on how QI undermines public faith in law enforcement and, more broadly, the rule of law. By providing courts with a means to restore a modicum of public accountability to these institutions, this Note hopes to improve faith in the law to the extent possible given QI's continued existence.

"[c]ontinuous flight of steps" where the top of each flight connects to the bottom of the next one, creating the visual illusion of an inescapable, never-ending, and physically impossible circuit of stairs. L. S. Penrose & R. Penrose, *Impossible Objects: A Special Type of Visual Illusion*, 49 BRIT. J. PSYCH. 31, 31–33 (1958); Doris Schattschneider, *The Mathematical Side of M. C. Escher*, 57 NOTICES AM. MATHEMATICAL SOC'Y 706, 711 (2010).

I. THE HISTORY OF THE ESCHERIAN STAIRWELL

To fully appreciate the potential utility of explicit establishment, it is necessary to understand the context surrounding the present state of qualified immunity jurisprudence. This task is best achieved by highlighting key Supreme Court cases in the historical evolution of QI to provide broader context for how the current QI paradigm came to be. Beginning with 1961's *Monroe v. Pape* and concluding with 2009's *Pearson v. Callahan*, each of these cases provides a key element to the current QI paradigm. By presenting a brief overview of each case, this Part equips the reader with the historical and legal framework to understand the dysfunctionality characterizing post-*Pearson* QI as described in Part II, and the solution of explicit establishment proposed in Part III.

A. *MONROE V. PAPE*: REINVIGORATING § 1983

Prior to the advent of QI, courts tended to interpret § 1983 as "providing 'a broad remedy to citizens deprived of their constitutional liberty.'"[23] The seminal decision for this broad interpretation was the 1961 Supreme Court case *Monroe v. Pape*.[24] There, the Court addressed a case in which Chicago police officers conducted an early morning warrantless raid of James and Flossie Monroe's home, rousing them from bed and forcing them to stand naked in their own living room as the officers ransacked their residence.[25] The officers then detained Mr. Monroe, denying him access to an attorney, his family, or a hearing before a judicial officer.[26] The Monroes responded by pursuing a then-novel strategy of suing the officers under § 1983.[27]

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23. Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S.U. L. REV. 283, 289 (2019) (quoting Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333, 1345 (2010)).

24. *Id.*

25. Monroe v. Pape, 365 U.S. 167, 169 (1961); Monroe v. Pape, 272 F.2d 365, 365 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961).

26. *Id.*

27. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 3 (2023). At the time, assault and battery claims brought by Black people against white police officers were considered "destined to fail" in state court. *Id.* at 2. Section 1983 offered litigants access to federal court, where they were "more likely to obtain a fair and impartial trial." *Id.* at 3.

The Monroes' suit "breathed new life" into the statute when the Supreme Court interpreted § 1983 as creating a federal cause of action for holding state officers liable for constitutional violations.[28] Although the *Monroe* Court acknowledged the defendant-officers' arguments that the law only imposed liability on the federal government and not state governments,[29] the Court instead found that the history of the Civil Rights Act of 1871[30] showed otherwise. The law, the Court found, was broadly intended to provide a legal remedy for parties whose constitutional rights had been deprived by a state official's abuse of power.[31] A further dive into both legislative history and caselaw led the Court to conclude the phrase "under color of [law]" in § 1983[32] encompassed the acts of the defendant-officers even when they themselves carried out illegal acts.[33] Furthermore, the Court concluded these acts gave rise to a federal cause of action notwithstanding overlapping state remedies.[34] In the face of such an expansive interpretation of § 1983, the defendant-officers did not make claims to any immunity, nor did the Court consider any such issue de novo.[35] Rather, the Court read the law plainly in applying it to the facts at bar.[36] The Court

28. *Id.* at 3, 9–10 (explaining that prior to *Monroe*, § 1983 had been rarely used); *Monroe*, 365 U.S. at 187 (finding that "the complaint states a cause of action" against the individual defendants).

29. *Monroe*, 365 U.S. at 170.

30. 42 U.S.C. § 1983. The Civil Rights Act of 1871, which the *Monroe* Court refers to simply as the Civil Rights Act, is also known as the Ku Klux Klan Act. Mosvick, *supra* note 9; *see also* Bissoon et al., *supra* note 9, at 538.

31. *Monroe*, 365 U.S. at 170–72.

32. 42 U.S.C. § 1983 (imposing civil liability upon anyone who deprives a person of their rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia").

33. *Monroe*, 365 U.S. at 172–87 (cataloging the legislative history of § 1983 and Court precedent interpreting the phrase "under color of law" to encompass actions of state officials even where they are not taken pursuant to state law).

34. *Id.* at 183 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.").

35. *See* Carlos, *supra* note 23, at 290 ("The officers in *Monroe* made no assertion of immunity, and the question of immunity for the officers was not undertaken.").

36. *See, e.g.*, *Monroe*, 365 U.S. at 183 ("Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in

remanded the case for trial in federal district court, which ultimately concluded with a jury awarding the Monroes $13,000 in damages.[37]

The *Monroe* Court's broad interpretation of § 1983 led to an "explosion" of civil rights lawsuits, with § 1983 claims increasing from hundreds per year in the 1960s to more than 20,000 annually by the late 1970s,[38] and sparking debate about the appropriate scope of the right to sue government officials.[39]

B. *PIERSON V. RAY*: COMMON LAW IMMUNITY

Just six years after its decision in *Monroe*, the Court decided *Pierson v. Ray*. This decision muddied the waters of *Monroe*'s straightforward precedent by creating a good-faith common law defense for officers "out of thin air,"[40] ostensibly to accommodate the ambiguous and tenuous realities of police work.

Pierson involved the arrest of a multiracial group of clergy Freedom Riders by Jackson, Mississippi police officers for attempting to desegregate an interstate bus terminal in violation of state law.[41] Despite being generally regarded as the leader of a Court whose "liberal decisions were aimed at the south" and its system of segregation,[42] Chief Justice Earl Warren's majority opinion gave great deference to the Jackson officers. The Court acknowledged that although there was not a common law "absolute and unqualified immunity" for police officers, "the prevailing view" was that the existence of probable cause was sufficient to overcome liability for false arrest.[43] The Court instead reasoned "[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

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general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates.").

37. SCHWARTZ, *supra* note 27, at 10.

38. *Id.*

39. *Id.* at 10–12 (discussing critics' concerns that the right to sue government would be abused and that frivolous claims would flood federal courts).

40. *Id.* at 73–74.

41. Pierson v. Ray, 386 U.S. 547, 548–49 (1967).

42. Nina Totenberg, *Earl Warren's Legacy*, NPR (June 30, 2008), https://www.npr.org/2008/06/30/92043809/earl-warrens-legacy [https://perma.cc/F4D5-BM5S].

43. *Pierson*, 386 U.S. at 555.

if he does," including in instances where officers acted reasonably in accordance with a law later held to be unconstitutional.[44]

Noting *Monroe* neither presented nor decided any claims of immunity,[45] the *Pierson* Court instead relied on the common law of tort liability.[46] Ultimately, the Court extended precedent to hold that good faith and probable cause defenses, which lower courts had previously found applicable in false arrest and imprisonment claims, could also be applied in the § 1983 context.[47] Thus, *Pierson* provided officers with a common law shield, grounded in both the subjective metric of good faith and the objective factual standard of probable cause,[48] against *Monroe*'s broad interpretation of § 1983.

C. *SCHEUER V. RHODES*: ENTER QUALIFIED IMMUNITY

As the 1970s saw the more liberal Warren Court morph into the increasingly conservative Burger Court,[49] the Court began to lay the foundations for QI as the more recognizable and explicit defense for government officials that exists today.[50] In *Scheuer v. Rhodes*, the Court considered a § 1983 case filed by the estates

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44. *Id.* ("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." (footnote omitted)).

45. *Id.* at 556.

46. *Id.* ("[Section] 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961))).

47. *Id.* at 557. That said, it should be acknowledged the Court clarified "[t]his holding does not, however, mean that the count based [on § 1983] should be dismissed." *Id.* Rather, the jury's "verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial." *Id.* at 557–58.

48. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 124 (4th ed. 2022) ("The probable cause test, then, is an objective one . . . the facts must be such as would warrant a belief by a 'prudent man.'" (quoting Henry v. United States, 361 U.S. 98, 102 (1959))).

49. Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES (June 26, 1995), https://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html [https://perma.cc/XR8D-FXV4] (describing a Court that "grew steadily more conservative with subsequent appointments" during Justice Burger's tenure).

50. This trend only increased as the Burger Court became the Rehnquist Court and then the Roberts Court, with more conservative justices steadily replacing those who had been on the bench when *Monroe* was decided. SCHWARTZ, *supra* note 27, at 12.

of three students killed by the Ohio National Guard in the Kent State shootings of antiwar demonstrators.[51] The *Scheuer* Court pointed to *Monroe* as illustrating no absolute immunity for government officials arose from either the Fourteenth Amendment or the Civil Rights statutes.[52] This straightforward proposition was complicated, however, by the Court's more opaque subsequent decision in *Pierson*. The *Scheuer* Court was faced with *Pierson*'s competing findings that legislative history gave "no clear indication" that Congress intended to abolish officers' common-law immunities,[53] but also that the common law did not give officers "an absolute and unqualified immunity."[54]

Ultimately, the Court reconciled these conflicting propositions by applying a context-dependent immunity. In scenarios such as the civil disorder of the Kent State protests, the Court posited that officers must make split-second decisions in the face of confusion, lack of information, and rapidly changing circumstances because of "the risk that action deferred will be futile or constitute virtual abdication of office."[55] Under such circumstances, the Court concluded that "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief . . . affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[56] Thus, through the unusual avenue of the Ohio National Guard and the unique circumstances of the Kent State shootings, the Court reconciled *Monroe* and *Pierson* by applying a "qualified," good-faith immunity to executive branch officers, including law enforcement.[57]

D. *HARLOW V. FITZGERALD*: ENTER CLEARLY ESTABLISHED LAW

In *Harlow v. Fitzgerald*, the Supreme Court considered the issue of immunity available to presidential aides and advisers in litigation based upon their official acts.[58] Although the facts of

51. Scheuer v. Rhodes 416 U.S. 232, 234 (1974).

52. *Id.* at 243 ("[G]overnment officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [§ 1983's] terms.").

53. *Id.* (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

54. *Id.* at 245 (quoting *Pierson*, 386 U.S. at 555).

55. *Id.* at 246.

56. *Id.* at 247–48.

57. *Id.* at 247; *see also* Carlos, *supra* note 23, at 294–95.

58. Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982).

Harlow lay far afield from the typical QI case involving state or local law enforcement,[59] the case was crucial in laying out the general framework of QI analysis. The *Harlow* Court found QI to be the best compromise between protecting constitutional rights from official abuse and the danger that fears of litigation would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[60] The Court ultimately balanced these concerns by holding "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."[61]

Harlow thus made three key changes to the QI doctrine introduced in *Scheuer*. First, it divorced QI analysis from the question of an officer's subjective good faith.[62] Instead, the crucial question in QI analysis going forward would be whether an officer had violated clearly established law,[63] the second key change. This standard would be based in the more objective firmament of binding caselaw.[64] The question of clearly established law would become the battleground for many of the problems associated with QI, as the Court's subsequent decisions would require showings tailored to increasingly specific fact patterns for plaintiffs to prove the law was clearly established.[65] Finally, *Harlow* found "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 has subsequently interpreted this language to understand QI as

59. *See* Nixon v. Fitzgerald, 457 U.S. 731, 733–41 (1982) (providing a more detailed recitation of the facts giving rise to the suit at issue in *Harlow*).

60. *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

61. *Id.* at 818.

62. SCHWARTZ, *supra* note 27, at 75 (citing *Harlow*, 457 U.S. at 814) (discussing the *Harlow* Court's finding that disputes over an officer's good faith would create an undue burden on officers to participate in discovery and jury trial).

63. *Id.* This also means that, post-*Harlow*, officers may be entitled to QI even if they act in bad faith so long as they do not violate clearly established law. *Id.* at 74.

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

65. SCHWARTZ, *supra* note 27, at 75–76.

66. *Harlow*, 457 U.S. at 817–18.

"an *immunity from suit* rather than a mere defense to liability,"[67] further insulating QI beneficiaries from mechanisms of accountability. Following *Harlow*, then, government officials would not only be immune from liability but also immune from the processes of litigation unless plaintiffs could make increasingly specific showings of clearly established law.

E. *SAUCIER V. KATZ*: A SENSIBLE SEQUENCED ORDER

In *Saucier v. Katz*, the Court took the clearly established law inquiry created in *Harlow* and integrated it into a standardized QI test. Elliot Katz, an animal rights activist, attempted to protest a speech by Vice President Al Gore by unfurling a banner, but two military police officers promptly dragged him away and arrested him.[68] Katz then sued the officers under the analogue of § 1983 applied to federal officials.[69]

In analyzing Katz's claim, the Court developed a strictly sequenced two-step test for determining the applicability of QI to a given set of facts. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This *must* be the initial inquiry."[70] If the answer is yes, then "the *next, sequential* step is to ask whether the right was clearly established."[71] Hearkening back to *Harlow*, however, the Court cautioned that clearly established law must be narrowly tailored to the specifics of the case, rather than based on broad constitutional principles.[72] For the law to be considered clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable

67. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original) (interpreting the *Harlow* decision to find that a district court's denial of QI is essentially unreviewable).

68. Saucier v. Katz, 533 U.S. 194, 197–98 (2001).

69. *Id.* at 198–99; *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a cause of action for damages against federal agents for violations of Fourth Amendment rights carried out under color of their authority).

70. *Saucier*, 533 U.S. at 201 (emphasis added).

71. *Id.* (emphasis added).

72. *Id.* ("This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition .").

official would understand that what he is doing violates that right."[73]

Going through the sequential analysis, the *Saucier* Court found on the first prong that Fourth Amendment caselaw had long recognized threatened or actual physical coercion is often necessary for officers to effectuate valid arrests.[74] With regard to the second prong, the Court determined neither Katz nor the Court of Appeals had identified a case providing clearly established law prohibiting the officers' conduct under the unique circumstances of protecting the Vice President.[75] The Court thus granted the officers QI.[76] By following its newly-created mandatory sequencing in doing so, however, the Court adequately analyzed the Fourth Amendment issue at hand and ensured constitutional law was still developed, even when a lack of clearly established law was sufficient grounds to grant defendants QI.

F. *PEARSON V. CALLAHAN*: ABANDONING *SAUCIER*'S SENSIBILITY

Eight years later, however, the Court backed away from its mandatory sequencing test. In *Pearson v. Callahan*, the Court emphasized that the mandatory two-step sequence in *Saucier* had been adopted "to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation. 'The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of

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73. *Id.* at 202 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). In other words, the clearly established law inquiry—which *Harlow* did not define in detail—had come to require that a "prior court decision must include facts that are so similar to the facts in the present case that *every* reasonable officer would know that what he was doing was wrong." SCHWARTZ, *supra* note 27, at 75–76*; see also id.* at 76–77 (listing cases illustrating how the "hairsplitting" of the clearly established law analysis "can be extreme"). Notably, in *Ashcroft v. al-Kidd*, the Supreme Court subtly raised the standard of clearly established law from conduct "*a* reasonable official" would understand to be unconstitutional to conduct "*every* reasonable official" would understand as such, significantly ratcheting up the bar for clearly established law. Blum et al., *supra* note 20, at 654–55 (emphasis added); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

74. *Saucier*, 533 U.S. at 208 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

75. *Id.* at 209.

76. *Id.*

the case.'"[77] Notwithstanding this acknowledgment, however, the Court nevertheless "conclude[d] that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory."[78] Instead, judges would be permitted discretion in deciding which of the two prongs of the QI analysis to address first based on the circumstances of a given case.[79] Since both prongs—the constitutional violation prong and the applicable clearly established law prong—are necessary for plaintiff to overcome QI, however, this has effectively meant if a court finds no clearly established law then it can end its QI analysis there without addressing the constitutional question.[80]

Indeed, the Court proceeded to decide *Pearson* itself on only the clearly established law prong. The case considered whether QI shielded officers of the Central Utah Narcotics Task Force when they relied on the consent-once-removed doctrine in conducting a warrantless search and arrest.[81] The Court found consent-once-removed "had gained acceptance in the lower courts" at the time of the incident in question.[82] As a result, "[t]he officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled" on the doctrine's validity.[83] Using its new self-appointed discretion, the *Pearson* Court did not analyze the constitutionality of the consent-once-removed doctrine, but instead granted QI based solely on the conclusion that consent-once-removed was not contrary to clearly established law.[84] In other words, the Court ignored its own

77. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citation omitted) (quoting *Saucier*, 533 U.S. at 201).

78. *Id.* at 236.

79. *Id.* ("The 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.").

80. *See* SCHWARTZ, *supra* note 27, at 78 ("[I]n . . . *Pearson v. Callahan*, the Court reversed itself and held that lower courts could grant qualified immunity without first ruling on the constitutionality of a defendant's behavior.").

81. *Pearson*, 555 U.S. at 229. The consent-once-removed doctrine "permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view." *Id.*

82. *Id.* at 244.

83. *Id.*

84. *Id.* at 245 ("Because the unlawfulness of the officers' conduct in this case was not clearly established, petitioners are entitled to qualified immunity.").

warning and instead "simply skip[ped] ahead" to the question of clearly established law, without "support[ing] the Constitution's 'elaboration from case to case.'"[85]

With the historical grounding of the present QI paradigm's lineage and the origins of the various constituent parts of QI fully established, Part II of this Note discusses the present state of the QI doctrine to explain the detrimental practical and constitutional effects of QI as it exists post-*Pearson*. These effects include the principal problem this Note seeks to address—QI's effect on constitutional law—as well as the illogical judicial reasoning QI requires, much to the frustration and discontent of intermediate federal appellate judges.

II. THE PROBLEMATIC POST-PEARSON PARADIGM

This second Part delves into the main legal problem addressed by this Note: by allowing courts to bypass a case's constitutional merits, the post-*Pearson* qualified immunity paradigm hinders the development of constitutional law and traps plaintiffs on the Escherian Stairwell,[86] preventing further development of clearly established law. Furthermore, the "hairsplitting" nature of the clearly established law analysis and its demand for highly specific facts also creates situations where a court's constitutional findings and its body of clearly established law diverge.[87] While Part I provided the historical context of this problem, this Part provides a legal analysis of the current state of affairs. This in turn sets the stage for this Note's proposed solution of explicit establishment, which will be further explored in Part III.[88]

A. SKIPPING AHEAD TO CONSTITUTIONAL STAGNATION

Initially, the Supreme Court hoped the new discretion *Pearson* had given judges to approach the QI analysis as they see fit would benefit courts and litigants through increased judicial

85. *Id.* at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

86. *See supra* notes 20–22 and accompanying text.

87. *See* SCHWARTZ, *supra* note 27, at 76 (describing cases in which lower courts have granted QI to officers despite their egregious behavior).

88. *See infra* Part III.

efficiency.[89] In theory, *Pearson*'s break from *Saucier*'s sequential mandate was intended to give courts the flexibility to apply both prongs only when necessary. The *Pearson* Court argued that under "the rigid *Saucier* procedure," both courts and parties wasted resources on addressing difficult constitutional questions that may have no impact on the outcome of a case determined purely by the clearly established law analysis.[90] The Court emphasized that such instances "disserve the purpose of qualified immunity" by subjecting parties to additional litigation costs and delays "when the suit otherwise could be disposed of more readily."[91] Among the Justices, this was an uncontroversial opinion; indeed, the *Pearson* Court noted opinions opposing *Saucier*'s "rigid order of battle"[92] had been either written or joined by Justices Stephen Breyer, Ruth Bader Ginsburg, Antonin Scalia, John Paul Stevens, and Chief Justice William Rehnquist.[93] *Pearson* itself was a unanimous decision, with Justice Samuel Alito writing for a unified Court.[94] It thus seemed as though *Pearson* was a universally welcomed reform to *Saucier* that would give judges greater flexibility in tailoring their analysis to the given case before them.

Despite the unanimity of this decision, however, the cracks in *Pearson*'s application soon began to show. Even though both the *Saucier* and *Pearson* opinions admonished courts not to "simply . . . skip ahead" to the clearly established law prong,[95] the Supreme Court and the federal circuit courts both developed a tendency to do precisely that once unbound from *Saucier*'s mandatory sequencing.[96] The *Pearson* Court had reassured skeptics that any misgivings about the new procedure were unwarranted because courts still retained the discretion to employ

89. *Pearson*, 555 U.S. at 242 ("Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking [sic] that will best facilitate the fair and efficient disposition of each case.").

90. *Id.* at 236–37.

91. *Id.* at 237 (alteration omitted).

92. *Id.* at 234 (quoting Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008)).

93. *Id.* at 235.

94. *Pearson, et al. v. Callahan*, OYEZ, https://www.oyez.org/cases/2008/07-751 [https://perma.cc/6RQ6-799V].

95. *Pearson*, 555 U.S. at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

96. Blum et al., *supra* note 20, at 644–49 (describing the Supreme Court's recent tendency to bypass the merits prong of the QI test).

the old *Saucier* methodology when necessary.[97] In reality, however, courts quickly became "willing[] to ignore the merits question, leaving the constitutional issue for another day" and "leaving unsettled constitutional issues raised in the context of qualified immunity."[98] In many ways this should have been entirely predictable, given the doctrine of constitutional avoidance mandates courts not to address constitutional questions—even when properly presented—if there exists some other grounds upon which to dispose of the case.[99] Foreseeably, then, it has generally been the case that the post-*Pearson* retreat from *Saucier*'s mandatory sequencing procedure has led to constitutional stagnation—irrespective of the *Pearson* Court's assurances to the contrary.[100]

Indeed, empirical studies have found data that support the existence of a trend of constitutional stagnation in the wake of the *Pearson* decision. One study concluded that post-*Pearson*, circuit courts quadrupled the percentage of claims in which they "avoided a constitutional determination" by granting QI based solely on a lack of clearly established law.[101] This study considered increased avoidance to be a positive development, touting it as allowing courts to "control the content of the body of constitutional law" by granting them discretion over which cases should serve to promulgate constitutional precedent and which cases

97. *Pearson*, 555 U.S. at 242 ("Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.").

98. Blum et al., *supra* note 20, at 644, 647.

99. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *see also Pearson*, 555 U.S. at 241 ("Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance.").

100. *Pearson*, 555 U.S. at 242–43 ("Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity."). While it is certainly true that the development of constitutional law is not dependent on QI cases, this is less true for the development of *clearly established* law—an inherently QI-linked standard.

101. Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 490–98 (2011) (describing the results of this study).

should be resolved on non-constitutional grounds.[102] That said, given its proximity to *Pearson*'s decision—being published only two years later—the study's author was careful to suggest a need for further academic study of *Pearson*'s consequences, including the possibility that it might lead to "insufficient constitutional articulation."[103]

Accordingly, a second empirical study published six years post-*Pearson* reached a more skeptical conclusion. It found that in the period between *Pearson*'s decision and this second study's publication, circuit courts clearly established previously unestablished constitutional violations in only eight percent of cases; and in cases where courts did opt to decide the constitutional merits, they held no right had been violated ninety-five percent of the time.[104] Drawing from this data, the study concluded "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. The substantive consequences are obvious."[105] Following *Pearson*, constitutional law has become increasingly stagnant.

B. STEPPING ONTO THE ESCHERIAN STAIRWELL

The "obvious" substantive consequences of the post-*Pearson* QI constitutional stagnation are that the law gets stuck on the Escherian Stairwell.[106] Judge Willett compellingly describes the problem in his *Zadeh v. Robinson* concurrence as

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law

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102. *Id.* at 501.

103. *Id.* at 502.

104. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 35–36 (2015) ("In only one in twenty instances (5.0% or 53 claims) in which qualified immunity was granted did the court recognize a constitutional violation that was not clearly established but that, because of the court's decision, would be in future cases.").

105. *Id.* at 6.

106. *See supra* notes 19–22 and accompanying text for a description of the Escherian Stairwell phenomenon; *see also supra* Part I for a discussion of the history and caselaw laying the groundwork for the Escherian Stairwell.

> = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[107]

This catch-22 means, in practical effect, "the same defendant could continue committing exactly the same misconduct indefinitely—and never be held accountable."[108]

Indeed, this exact scenario has happened. In *Sims v. City of Madisonville*, the Fifth Circuit noted "[t]his is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. Continuing to resolve the question at the clearly established step means the law will never get established."[109] Thus, the Escherian Stairwell is not merely hypothetical. Rather, it is a demonstrable phenomenon resulting in the same facts appearing before courts over and over—the exact opposite of the judicial efficiency and conservation of resources *Pearson* touted as a benefit of abandoning *Saucier* sequencing.[110]

The Supreme Court has explicitly recognized and acknowledged these problems.[111] Nevertheless, it has thus far appeared uninterested in restoring the doctrinal cover of the mandatory sequencing requirement *Saucier* had previously provided to lower courts.[112] Instead, in the very same breath with which it highlighted the problems of the post-*Pearson* QI paradigm, the

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107. Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part).

108. Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/PA%20901_1.pdf [https://perma.cc/GKQ5-4WPX].

109. Sims v. City of Madisonville, 894 F.3d 632, 638 (5th Cir. 2018) (citations omitted).

110. *See supra* notes 89–90. Additionally, and beyond the precise focus of this Note, the interlocutory nature of QI appeals—ostensibly intended to reduce the time and cost of the usual finality rule—can lead to instances where cases repeatedly work their way up and down the appellate system, ultimately delaying justice and causing more time and expense for the parties and the courts. SCHWARTZ, *supra* note 27, at 80–82 (describing how interlocutory appeals led a plaintiff through over eight years of litigation before settling on the eve of trial—despite the district court, the court of appeals, the en banc court of appeals, and the Supreme Court all finding the officer-defendants had no entitlement to QI).

111. Camreta v. Greene, 563 U.S. 692, 706 (2011) ("[W]e have long recognized that this day [when a court addresses the constitutional claim raised by a plaintiff in a QI case] may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo.").

112. *Id.* at 705–07 (discussing the Court's position that lower courts should have discretion to address immunity only).

Court then continued to admonish lower courts to "think hard, and then think hard again, before turning small cases into large ones" by making them about constitutional questions.[113]

C. REBALANCING CONSTITUTIONAL RIGHTS AND CLEARLY ESTABLISHED LAW

The clearly established law standard not only leads to the same or substantially similar factual claims repeatedly clogging the courts, but it can also result in outcomes defying both practical and constitutional commonsense. For instance, in *Frasier v. Evans*, Denver police officers attempted to intimidate Levi Frasier into surrendering a video recording of the officers' physical altercation with an arrestee and another bystander.[114] When Frasier finally produced his tablet computer containing the recording—after being surrounded by the officers and threatened with jail if he did not comply—an officer grabbed the device from his hands and searched for the video over his objections that the officers did not have a warrant.[115] The district court denied the officers QI based on the fact that they had been trained on bystanders' First Amendment right to record police conduct.[116] In other words, the officers knew full well their actions violated Frasier's rights.

On appeal, however, the Tenth Circuit found that the district court erred in denying the officers QI for two reasons. First, because QI is analyzed under an objective standard, "what the officer defendants subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law question."[117] And, second, because caselaw is "the only valid interpretive source" for clearly established law, "whatever training the officers received concerning the nature of Mr. Frasier's First

113. *Id.* at 707.

114. Frasier v. Evans, 992 F.3d 1003, 1009–11 (10th Cir. 2021).

115. *Id.* at 1011 ("Mr. Frasier told Officer Evans that he could not search his computer without a warrant, but Officer Evans held onto it for thirty to forty-five seconds.").

116. *Id.* at 1011–12 ("The [district] court reasoned that 'if an official can be held accountable for what he is *presumed* to know' because it is clearly established law, 'it is neither illogical nor unfair to hold him accountable for what he admits he *actually* knows.'" (quoting Frasier v. Evans, No. 15-CV-01759-REB-KLM, 2018 WL 6102828, at *2 (D. Colo. Nov. 21, 2018), *rev'd and remanded*, 992 F.3d 1003 (10th Cir. 2021)).

117. *Id.* at 1015.

Amendment rights was irrelevant to the clearly-established-law inquiry."[118] The Tenth Circuit therefore concluded that the officers were entitled to QI because they did not violate Frasier's *clearly established* First Amendment rights, even if they *subjectively knew* their conduct violated his rights based on their training.[119] Thus, a dearth of clearly established binding precedent from either the Tenth Circuit or the Supreme Court on bystanders' right to record the police allowed the officers in *Frasier* to benefit from QI even though they were well aware that their actions violated the Constitution—hardly a sensical outcome.

Beyond the merely counterintuitive consequences in individual cases, however, the judiciary's myopic fixation on precisely analogous caselaw as the sole source for clearly established law has even darker systemic implications. As then-Judge Neil Gorsuch pointed out in *Browder v. City of Albuquerque*, the Escherian Stairwell's circular nature leads the most egregious violations to result in the least amount of clearly established law:

> In deciding the "clearly established law" question this court employs a "sliding scale" under which "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.[120]

Despite then-Judge Gorsuch's assertion that "a sliding scale" exists to prevent the worst conduct from being the most insulated, blatant constitutional violations have indeed been granted QI—and thus failed to clearly establish the law—due to courts requiring a high degree of specificity.[121] This Note has already shown how this occurred in *Baxter*, where officers who

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118. *Id.*

119. *Id.* at 1019 ("If the officers did not violate Mr. Frasier's clearly established First Amendment rights . . . then the officers are entitled to qualified immunity. This is so, even if the officers subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights.").

120. Browder v. City of Albuquerque, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (citations omitted) (quoting Shroff v. Spellman, 604 F.3d 1179, 1189–90 (10th Cir. 2010)).

121. *Cf.* Schweikert, *supra* note 108 ("[C]ivil rights claims . . . are typically very fact- and context-specific.").

ordered a police dog to attack a subdued suspect were granted QI because the suspect was sitting, rather than lying down, in surrender.[122] Likewise, in *Latits v. Phillips*, a police officer conducting a traffic stop drew his gun and pointed it at Laszlo Latits's head "at point-blank range," causing him to flee the scene and kicking off a vehicular pursuit.[123] Throughout the chase, officers repeatedly rammed Latits's car with their police cars—in violation of both department policy and a direct order[124]—until he eventually lost control of his vehicle and spun off the road.[125] As officers approached on foot, Latits reversed his vehicle.[126] Despite no one being in the vehicle's path, one officer fired his gun seven times, striking Latits with three bullets.[127] He died at the hospital within hours.[128]

The Sixth Circuit concluded on appeal that Latits "did not present an imminent or ongoing danger and therefore that the shooting was . . . . objectively unreasonable and in violation of Latits's constitutional rights."[129] Nevertheless, the court found the officer who killed Latits did not violate clearly established law and was entitled to QI.[130] It reached this conclusion because prior caselaw had clearly established a constitutional violation only where officers shot a driver attempting to flee.[131] In *Latits*, by contrast, the officer fatally shot Latits at the conclusion of a car chase, which the court considered "an important factual

122. *See supra* notes 2–21 and accompanying text; *see also* SCHWARTZ, *supra* note 27, at 76–77 (describing *Baxter* and other cases in which "extreme" factual "hairsplitting" resulted in courts granting QI).

123. Latits v. Phillips, 878 F.3d 541, 544 (6th Cir. 2017).

124. *Id.* at 549.

125. *Id.* at 545–46.

126. *Id.* at 546.

127. *Id.*

128. *Id.*

129. *Id.* at 552.

130. *Id.* at 553 ("At the time of the [officer's] actions . . . it cannot be said that existing precedent made it clear to reasonable officials that what [he] did violated the Fourth Amendment. Thus, this case fails to satisfy the 'clearly established' prong of the qualified immunity doctrine.").

131. *Id.* ("Those cases involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight. Here, [the officer] shot Latits *after* Latits led three police officers on a car chase for several minutes . . . . [A]lthough we now hold that [the officer]s conduct fell outside the bounds of the Fourth Amendment, controlling authority at the time of the events had not clearly established the rights we identify today." (citation omitted)).

distinction that sets this case apart."[132] Thus, the *Latits* court applied a highly specific standard for clearly established law, even in a case about a deadly police shooting the court had found to be both unconstitutional and objectively unreasonable. Notwithstanding then-Judge Gorsuch's "sliding scale" theory, the egregious facts of this case still resulted in a grant of QI to law enforcement.[133]

Although the decisions highlighted in this Section stem less from courts skipping the constitutional analysis and more from the clearly established law prong's "hairsplitting" specificity test, this too is an area where explicit establishment may offer an antidote to some of the more patently absurd QI outcomes.[134] The high level of specificity required by the clearly established law analysis has dictated grants of QI in cases like *Frasier* and *Latits* "not because what the officers did was acceptable, but because there wasn't a prior case in which that precise conduct had been held unconstitutional."[135] These decisions thus disprove then-Judge Gorsuch's "sliding scale" theory articulated in *Browder*.[136]

This is where explicit establishment can play a role. Had the courts utilized explicit establishment in these cases, they could have modulated their respective circuits' caselaw to account for similar circumstances in the future by clearly establishing the law going forward, notwithstanding their obligation to grant QI in the instant cases. In *Frasier*, the court "assume[d]" Frasier did indeed possess a First Amendment right to record the officers performing their duties in public yet granted QI due to the lack of clearly established law.[137] Explicit establishment could have allowed the court to put power behind a right it assumed to exist and clearly established that right going forward, permitting future Tenth Circuit plaintiffs in Frasier's shoes to prevail. Similarly, had the *Latits* court taken the extra step of employing

132. *Id.*

133. Of course, *Browder* and *Latits* were decided by different circuits and thus the former held no more than persuasive value to the panel deciding the latter.

134. *See infra* Part III.

135. SCHWARTZ, *supra* note 27, at 76.

136. *See* Browder v. City of Albuquerque, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (suggesting that the more egregious a constitutional violation, the less specificity is required to find clearly established law).

137. Frasier v. Evans, 992 F.3d 1003, 1023 (10th Cir. 2021).

explicit establishment, it could have backed up its "conclu[sion] that [the officer]'s use of deadly force was objectively unreasonable and in violation of Latits's constitutional rights"[138] by clearly establishing the violation going forward. Within the conceit of the QI framework, this would put other officers within the Sixth Circuit on notice and hopefully deter such "objectively unreasonable" uses of deadly force in the future, potentially even saving lives.[139] In short, explicit establishment would have allowed the *Frasier* and *Latits* courts to bring their respective circuits' clearly established law off the Escherian Stairwell and into alignment with their constitutional findings.

D. INTERMEDIATE JUDICIAL DISCONTENT

The circuit-level caselaw on QI is confusing and contradictory. Moreover, the Supreme Court has been generally hostile to QI reform. This has led multiple federal appellate judges to publicly voice their opposition to QI, including a cross-ideological cavalcade of Supreme Court Justices[140]—notwithstanding the

138. Latits v. Phillips, 878 F.3d 541, 552 (6th Cir. 2017).

139. It is arguable the *Latits* court did use explicit establishment in stating that "although we *now hold* that Phillips's conduct fell outside the bounds of the Fourth Amendment, controlling authority at the time of the events had not clearly established *the rights we identify today*," and "[t]his case *establishes important constitutional parameters*." *Id.* at 553 (emphasis added). If it did, though, it is much less clear than in other instances of explicit establishment, making its use both less explicit and, accordingly, less clearly established. *See infra* Part III.A; *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" (alterations in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))); *supra* note 73 (describing how the Supreme Court's decision in *al-Kidd* subtly raised the standard of clearly established law).

140. *E.g.*, Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards."); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring) ("Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make. . . . Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an

Court's reticence as an institution to act to address QI in any fundamental manner.[141] Federal appeals court judges from across the ideological spectrum have also vocally critiqued QI to the extent possible while acknowledging being bound by Supreme Court precedent. For instance, in addition to Judge Willett's Escherian Stairwell concurrence,[142] Judge James A. Wynn Jr. of the Fourth Circuit has gone so far as to write an extraordinary op-ed in the *Washington Post* openly criticizing QI as a "mistake."[143] And, more recently, Judge Guido Calabresi of the Second Circuit declared "the doctrine of qualified immunity—misbegotten and misguided—should go," calling on Congress and the Supreme Court to take action, and cataloging no fewer than fourteen Supreme Court Justices and federal appellate judges who have "come to recognize [that] qualified immunity cannot withstand scrutiny."[144] Thus, an increasingly frustrated federal judiciary—constrained by the Supreme Court's binding

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appropriate case, we should reconsider our qualified immunity jurisprudence." (citation omitted)); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.").

141. *See, e.g.*, Jordan S. Rubin, *High Court Won't Hear Law Enforcer Qualified Immunity Cases (3)*, BLOOMBERG L. (June 15, 2020), https://news.bloomberglaw.com/us-law-week/justices-wont-take-up-law-enforcer-qualified-immunity-doctrine [https://perma.cc/4RCL-FNRC] ("The rejection, Monday, of [eight QI] cases all at once, with only a one-case dissent from Justice Clarence Thomas—after they'd spurned three others on May 18—shows the justices have virtually no desire to revisit the issue any time soon, putting the ball in Congress' court to pass legislation dealing with the issue if it so chooses.").

142. *See* Zadeh v. Robinson, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willett, J., concurring in part).

143. James A. Wynn Jr., Opinion, *As a Judge, I Have to Follow the Supreme Court. It Should Fix This Mistake.*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake [https://perma.cc/3AXC-P4EV] ("The judge-made law of qualified immunity subverts the Civil Rights Act of 1871, which Congress intended to provide remedies for constitutional violations perpetrated by state officers. Eliminating the defense of qualified immunity would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system.").

144. McKinney v. City of Middletown, 49 F.4th 730, 756 & n.9 (2d Cir. 2022) (Calabresi, J., dissenting) (collecting opinions critical of QI from judges and Justices sitting on the Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits and the Supreme Court, including appointees of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Donald Trump).

inaction—is practically boiling over for some way to address the issues presented by QI.

In the absence of an unlikely radical overhaul of QI from either Congress or the Supreme Court,[145] explicit establishment—a tool that by its very nature empowers circuit court judges—gives frustrated federal circuit court judges the ability to take some action aimed at reigning in QI's perversities. Utilizing explicit establishment, these judges can more readily bring their respective circuits' bodies of clearly established law in line with their constitutional determinations. In short, explicit establishment provides federal circuit court judges—who are otherwise constrained by the Supreme Court's binding caselaw—a tool for mitigating QI's legal and practical harms.

The problems with the post-*Pearson* QI paradigm are thus readily apparent in the constitutional stagnation, repetitious appeals, counterintuitive outcomes, and judicial frustration that occasionally erupts into open defiance. Moreover, outrageous and often gruesome cases—some involving assaults or even deaths at the hands of police—are regularly decided in officers' favor on the basis of overly technical factual or legal distinctions, sometimes denying justice even in circumstances where a court finds objectively unreasonable conduct by a government agent has violated a plaintiff's constitutional rights.[146] Yet, barring a drastic political change and assuming the Supreme Court's inaction continues for the foreseeable future, no solution to QI's problems appears forthcoming. The critical mass of federal appeals court judges disgruntled with QI,[147] combined with their role as the lowest level judges capable of clearly establishing federal law,[148] makes them the perfect actors to equip with a tool that

145. *See infra* notes 239–43, 246–50 and accompanying text.

146. *See, e.g.*, Latits v. Phillips 878 F.3d 541, 552–56 (6th Cir. 2022) (granting a police officer QI even after concluding that his deadly shooting of the victim was both unconstitutional and objectively unreasonable).

147. *See supra* notes 142–44 and accompanying text.

148. District of Columbia v. Wesby, 583 U.S. 48, 63 (2018) ("To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' which means it is dictated by 'controlling authority' or 'a robust "consensus of cases of persuasive authority."'" (citations omitted)); *see Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "horizontal precedent" as "[a] precedent established at an earlier sitting of the same court"); *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "horizontal stare decisis" as "[t]he doctrine that a court, esp. an

sidesteps the Escherian Stairwell and expands the scope of clearly established law. Part III of this Note proposes explicit establishment as just such a tool.

III. THE POTENTIAL OF EXPLICIT ESTABLISHMENT

Having laid out the history and described the problems with qualified immunity, especially in its post-*Pearson* incarnation, this third and final Part now turns to this Note's proposed solution of explicit establishment. This Part begins by presenting three of the few, if not only, post-*Pearson* instances in which federal courts of appeals utilized explicit establishment to sidestep the Escherian Stairwell and promote the development of clearly established constitutional law even while granting QI. Drawing on these illustrative examples, this Part then discusses the practical hurdle to wider adoption of explicit establishment, before segueing into why this Note targets federal courts of appeals judges as the audience of its advocacy. Finally, this Part will explain why explicit establishment is comparatively the most pragmatic tool currently available for sidestepping the Escherian Stairwell and addressing some of the most problematic aspects of QI.

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appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself"); *Court Role and Structure*, U.S. CTS., https://www
.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/HR9A-VCLA] (explaining that "13 courts of appeals sit below the Supreme Court" and that "[t]he 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals" whose "task is to determine whether or not the law was applied correctly in the trial court"); *see, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741–42 (2002) (finding that "in light of *binding Eleventh Circuit precedent*, . . . the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" (emphasis added) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))); Hughes v. City of North Olmstead, 93 F.3d 238, 243 (6th Cir. 1996) ("In this case, it is clear that there was a generally established right to privacy and free association at the time of the police investigation. However, at that time, those rights were not so clearly established by the Supreme Court *or this Circuit* that police department officials would have realized their actions were violating the law. Thus, in the absence of more fact-specific authority . . . the department officials named as defendants in the suit should have been granted qualified immunity." (emphasis added)). *But see* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 69–72 (2016) (suggesting that the Supreme Court has begun to equivocate on the federal courts of appeals' ability to clearly establish law in the absence of binding Supreme Court authority).

A. *SAUERS*, *RIVERA*, AND *SAMPSON*: THREE EXPLICIT ESTABLISHMENT CASE STUDIES

Explicit establishment is a fairly novel tactic, with this Author being able to identify only a few pertinent examples since the Supreme Court decided *Pearson* in 2009. While this Note largely focuses on the impact of QI and explicit establishment on police accountability, these illustrative cases highlight the applicability of both to a wide variety of cases involving government officials. As such, this Section explores each case in turn and discusses each court's use of explicit establishment—that is, clearly establishing the law going forward, even in a case where QI is granted due to a lack of prior clearly established law on point—as a case study. Each case's specific context and set of circumstances shows explicit establishment's versatility across a variety of QI scenarios.

1. *Sauers v. Borough of Nesquehoning*: Explicit Establishment in the Police Context

Sauers presents more of the archetypical QI case involving a § 1983 case resulting from a police officer's actions. A police officer was driving southbound through Pennsylvania on U.S. Route 209 when he observed a vehicle in the northbound lane commit a summary traffic violation.[149] The officer turned around and began to pursue the vehicle.[150] Despite radioing ahead to police in the next borough to pull the vehicle over when it reached their jurisdiction, the officer nevertheless decided to continue after the vehicle himself.[151] This unnecessary pursuit escalated into a chase reaching speeds exceeding 100 miles per hour in which "[s]everal members of the public observed [the officer] driving recklessly."[152] Rounding a curve, the officer lost control of his vehicle and spun into the opposite lane, crashing into

149. Sauers v. Borough of Nesquehoning, 905 F.3d 711, 715 (3d Cir. 2018). In Pennsylvania, summary offenses are minor crimes heard and decided before district judges, and many Motor Vehicle Code violations, including speeding and running a red light, are considered summary offenses. *Traffic and Non-Traffic Citations*, CUMBERLAND CNTY., PA., https://www.cumberlandcountypa.gov/1979/Traffic-and-Non-Traffic-Citations [https://perma.cc/8M6N-GVJH].

150. *Sauers*, 905 F.3d at 715.

151. *Id.*

152. *Id.*

Michael Sauers's car, seriously injuring Sauers and killing his wife.[153]

Sauers, individually and as administrator of his wife's estate, sued the officer under § 1983, claiming the officer's actions constituted a state-created danger.[154] The district court found Sauers adequately pled his state-created danger claim and that the claim was clearly established because "any reasonable officer would have known" a high-speed chase under the circumstances presented a state-created danger.[155] The officer appealed to the Third Circuit, specifically challenging the district court's clearly established law determination.[156]

The Third Circuit, for its part, agreed with the district court that Sauers's state-created danger theory established a valid substantive due process claim; however, it found that at the time of the crash, the state of the law was ambiguous enough that an officer may have thought they incurred liability for actions during a police chase "only when they had an intent to harm."[157] As such, the court concluded it was not clearly established at the time of the incident that the defendant's actions could violate the substantive due process rights of Sauers and his late wife.[158]

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153. *Id.*

154. *Id.*

155. *Id.* at 715–16. The officer also pled guilty to a separate criminal charge of vehicular homicide. *Id.* at 715.

156. *Id.* at 716.

157. *Id.* at 718.

158. *Id.* at 718–20 ("An officer on patrol in May 2014 could have reasonably understood, based on prevailing law, that he could pursue a potential traffic offender, even recklessly, without being subjected to constitutional liability. The Supreme Court, in *County of Sacramento v. Lewis*, had adopted an intent-to-harm standard in a police pursuit case involving a high-speed chase of dangerously fleeing suspects. In the years between that decision and the events at issue here, the courts of appeals were inconsistent in whether to apply the intent-to-harm standard in police-pursuit cases only when an exigency necessitated a chase, or whether to apply that standard in all police-pursuit cases, regardless of any exigencies." (citations omitted)). The Court further relied on *Lewis* to explain that "conduct falling between intentional conduct and negligent conduct was 'a matter for closer calls' that could, given the right circumstances, be actionable under the Fourteenth Amendment," but by "May 2014, the courts of appeals had not coalesced around what those circumstances might be in the police-pursuit context." *Id.* at. 720 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998)); *see also id.* at 720–22 (explaining various interpretations and applications of *Lewis* by the Eighth, Ninth, and Tenth Circuits and their basis for the court's conclusion the law was not clearly established). Judge

Thus, despite acknowledging the officer's recklessness and the validity of Sauers's resulting state-created danger claim, the court found the officer entitled to QI based on its clearly established law analysis.[159]

So far, this unfortunately seems like fairly standard fare for a QI case: a constitutional violation occurred, but a lack of clearly established law prevents the plaintiff from vindicating his rights. Where *Sauers* differs from typical QI cases, however, is in the opinion's final section. Stating explicitly its "hope . . . to establish the law clearly now,"[160] the court took the unusual step of writing "our opinion today should resolve any ambiguity in that regard within this Circuit. Police officers now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to the full body of our state-created danger case law."[161] Thus, despite granting the officer-defendant QI, the *Sauers* court made clear that going forward, the law on the matter would be considered clearly established based on its present decision:

> [W]hen there is no compelling justification for an officer to engage in a high-speed pursuit and an officer has time to consider whether to engage in such inherently risky behavior, constitutional liability can arise when the officer proceeds to operate his vehicle in a manner that demonstrates a conscious disregard of a great risk of serious harm.[162]

To date, *Sauers*'s explicit establishment has been applied as binding precedent in an Eastern District of Pennsylvania case and a District of New Jersey case.[163] It has also been

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Thomas Vanaskie dissented as to the clearly established law analysis but concurred in the remainder of the opinion. *Id.* at 724 (Vanaskie, J., concurring in part and dissenting in part).

159. *Id.* at 723 (majority opinion).

160. *Id.* at 715.

161. *Id.* at 723.

162. *Id.*

163. Wilson v. Doe, No. 19-CV-5015, 2020 WL 1701709, at *6 (E.D. Pa. Apr. 8, 2020) (quoting, *inter alia*, the language cited *supra* note 162 to demonstrate *Sauers* "changed the standard for police pursuit cases in non-emergency contexts"); D.W. v. N.J. Div. of Child Prot. & Permanency, No. 21-15789, 2023 WL 3626266, at *8 (D.N.J. May 24, 2023) ("*Sauers* [is] controlling precedent in this jurisdiction and serve[s] to establish the 'state-created danger' doctrine as a basis to state a substantive due process claim against state actors who place an individual in a danger of the state's design.").

acknowledged as valid authority by judges in both the Fourth[164] and Seventh[165] Circuits, as well as in an Eastern District of Pennsylvania case where the incident occurred before *Sauers* was decided.[166] *Sauers* has thus created binding Third Circuit caselaw by way of explicit establishment.

2. *Rivera v. Monko*: Explicit Establishment in the Corrections Context

Like *Sauers*, *Rivera* applied explicit establishment to a QI claim in a § 1983 suit against a law enforcement officer. Where *Rivera* differs, however, is in the factual context and the constitutional right at issue. In addition to police QI cases such as *Sauers*, which often involve in-the-field "split-second" circumstances, *Rivera* shows explicit establishment can also be applied in the relatively more controlled setting of a correctional facility, and to rights more bureaucratic in nature than the life-and-limb scenarios often associated with police QI cases.

Michael Rivera was an inmate at State Correctional Institution (SCI)-Dallas when he filed a lawsuit against corrections officers who had beaten him while he was handcuffed.[167] As part of that litigation, he was temporarily transferred to SCI-Retreat in July 2017 in order to represent himself in his trial against the

164. Dean *ex rel.* Harkness v. McKinney, 976 F.3d 407, 419 (4th Cir. 2020) (Richardson, J., dissenting) ("After granting qualified immunity, the Third Circuit stated that its decision would establish the law for similar cases within that circuit. But *Sauers* cannot provide clearly established law here, as *Sauers* came two years after this crash." (citing *Sauers*, 905 F.3d at 723)).

165. Flores v. City of South Bend, 997 F.3d 725, 730, 734 (7th Cir. 2021) (citing *Sauers*'s finding of deliberate indifference "because the officer had time to phone other officers along the violator's route and ask them to effect the traffic stop" and "the traffic violation was too minor to warrant the dramatic chase" in support of its conclusion that the complaint plausibly alleged deliberate indifference against an officer for his conduct behind the wheel); *see also* Estate of Stinson v. Milwaukee County, No. 21-CV-1046-JPS-JPS, 2022 WL 10585785, at *8 (E.D. Wis. Oct. 18, 2022) (noting *Flores*'s reliance on *Sauers*).

166. Clark v. Merrell, No. 19-1579, 2021 WL 288791, at *4 n.5 (E.D. Pa. Jan. 28, 2021) (acknowledging the clearly established circuit law in *Sauers* but noting because "*Sauers* was decided more than a year after" the police pursuit at issue, the standard it established did not apply to the case at bar).

167. Complaint at 2–4, Rivera v. O'Haire, No. 1:15-CV-01659 (M.D. Pa. July 11, 2017), ECF No. 1-1. By the time Rivera filed *Rivera v. Monko*, he had apparently been transferred to SCI-Fayette. Rivera v. Monko, 37 F.4th 909, 913 (3d Cir. 2022).

SCI-Dallas officers.[168] The trial was scheduled to start on a Monday, so on the preceding Friday, Rivera submitted a slip to the lieutenant requesting access to SCI-Retreat's "mini law library" that day and throughout the course of the trial.[169] The lieutenant approved Rivera's request, and that evening, a corrections officer escorted him to the mini law library consisting of two computers for legal research.[170] Unfortunately, Rivera found both computers inoperable.[171] Although the corrections officer who escorted Rivera to the library said he, the lieutenant, and the law librarian would try to fix the computers on Monday, they never did.[172] In fact, the computers remained inoperable throughout Rivera's stay at SCI-Retreat, and both the law librarian and a sergeant denied his request for hard copy materials.[173] As a result, Rivera had no way to access the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or the court's local rules throughout his trial.[174] Consequently, he was unable to properly introduce his declaration and medical records as crucial evidence, resulting in an unfavorable jury verdict that he argued would have been different had he been able to access the Federal Rules of Evidence and properly introduce his key supporting evidence.[175]

Following these events, Rivera filed a § 1983 lawsuit against the SCI-Retreat lieutenant, escorting corrections officer, and law librarian in Pennsylvania state court alleging they denied his constitutional right to access the courts.[176] The defendants removed the case to federal court, where they asserted entitlement to QI.[177] The district court granted the defendants QI based solely on a lack of clearly established law, and Rivera appealed to the Third Circuit.[178]

The Third Circuit, analyzing Rivera's constitutional claim where the district court had not, found his complaint

168. *Rivera*, 37 F.4th at 913.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 914.
177. *Id.*
178. *Id.* at 914, 916.

successfully stated an access-to-courts claim.[179] Rivera had filed a potentially meritorious lawsuit but been unable to introduce crucial evidence because of his inability to access legal materials.[180] Consequently, "his right of access to the courts was terminated before he achieved his remedy."[181] The court found the right to access legal materials is effectively part of prisoners' right to access the courts as "very few lawyers . . . could litigate such an action without being able to refer to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. A *pro se* prisoner is much less likely to be able to do so."[182]

Despite this clear finding that the defendants violated Rivera's constitutional right to access the courts, the court's clearly established law analysis proved to be more muddled. Contrary to its constitutional finding, the Third Circuit concluded "[t]he District Court here found that the right to 'affirmative legal assistance' did not extend past the pleading stage" and thus "the right Rivera alleges [defendants] violated was not 'beyond debate' at the time of his trial."[183] Similarly, the court identified a circuit split between the Seventh and Ninth Circuits as to whether the access-to-courts right extends beyond the pleading stage of litigation, "demonstrat[ing] that no 'robust consensus' exists" among persuasive authorities to sway the court's clearly established law holding.[184] The court reconciled its unequivocal constitutional finding with its contrary clearly established law analysis by explicitly establishing the issue going forward:

> [T]oday we recognize that a prisoner has a valid access-to-courts claim when he alleges that the denial of access to legal materials—before and/or during trial—caused a potentially meritorious claim to fail. . . . Indeed, it would be perverse if the right to access courts faded away after a prisoner successfully got into court by filing a complaint or petition. Once in court, a prisoner's need to access legal materials is just as great—if not greater—than when a prisoner initially filed a

179. *Id.* at 914–17.

180. *Id.* at 915–16.

181. *Id.* at 915.

182. *Id.* at 915; *see also id.* at 916–17 (finding Rivera successfully pled both an actual legal injury and met the required threshold at the motion to dismiss stage of making a plausible non-conclusory factual allegation the defendants' conduct had a sufficient causal link to his legal injury).

183. *Id.* at 921 (quoting Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011)).

184. *Id.* at 921–22.

> complaint. Thus, while qualified immunity unfortunately bars Rivera's claims today, it will not bar such claims in the future.[185]

Considering the relative recency of the *Rivera* decision, it has had limited precedential impact thus far. To date, *Rivera* has been cited as valid authority in a District of Delaware case,[186] a Middle District of Pennsylvania case where the incident occurred before *Rivera* was decided,[187] and a District of New Jersey case to show the plaintiff may have had an access-to-courts claim had he pled so under *Rivera*.[188] It has yet to be cited in any federal courts of appeals for the explicitly established right of access to legal materials. Nevertheless, *Rivera* explicitly establishes the law on this issue for future Third Circuit cases. It also shows explicit establishment has utility beyond the archetypical law enforcement QI case involving police making a "split-second" decision in the field, such as in the more controlled setting of a correctional facility and involving less life-and-limb constitutional claims such as the right of access-to-courts.

3. *Sampson v. County of Los Angeles*: Explicit Establishment Beyond the Law Enforcement Context

Sampson also applied explicit establishment but showed it can be applied to QI analysis beyond the scope of § 1983 cases against law enforcement. In the summer of 2014, Natia Sampson

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185. *Id.* at 922–23.

186. Watson v. Davis, No. 1:21-CV-0031, 2023 WL 3721560, at *4 (D. Del. May 30, 2023) (finding a complaint alleging confiscation of a prisoner's personal copy of *The Prisoner's Guide to Survival*—describing civil procedure and rules of evidence—to prevent his filing of a civil rights claim was sufficient to survive a motion to dismiss).

187. Cramer v. Bohinski, No. 1:22-CV-583, 2023 WL 2385133, at *7 (M.D. Pa. Mar. 6, 2023) (finding that, in light of *Rivera*, "it is now clear under Third Circuit precedent that the right of access to the courts is an on-going rights the [sic] extends throughout the course of litigation," but "given that [plaintiff]'s claims occurred prior to the decision in *Rivera*, we are bound by this [previous] Third Circuit ruling and conclude that [plaintiff]'s right to access the courts during all stages of his civil rights case was not clearly established at the time of the alleged infractions.").

188. Jackson v. Murphy, Civ. No. 22-1630, 2023 WL 4103016, at *4 n.5 (D.N.J. June 21, 2023) ("'[A] prisoner has a valid access-to-courts claim when he alleges that the denial of access to legal materials—before and/or during trial—caused a potentially meritorious claim to fail.' Plaintiff has not alleged any nonfrivolous legal claim that he was unable to pursue without any of his legal materials that were allegedly confiscated and/or destroyed." (alteration in original) (citation omitted) (quoting *Rivera*, 37 F.4th at 922)).

learned her niece's parents had both been incarcerated, resulting in her niece's placement in foster care.[189] Sampson moved from Nevada to California to be her niece's caregiver, and, in November 2014, the Los Angeles County juvenile dependency court ordered Sampson's niece be placed in her care pending her guardianship application.[190] As part of this process, the Los Angeles County Department of Children and Family Services (DCFS) assigned a social worker to Sampson's case.[191] Over the course of several months, the social worker made inappropriate physical contact with and verbal remarks toward Sampson.[192] In February 2015, Sampson reported this harassment to the social worker's supervisor, but the social worker continued to be assigned to her case.[193]

In October 2015, Sampson relied on the social worker's representation to allow her brother, her niece's father, to visit her niece unsupervised.[194] Sampson's brother then abducted his daughter, who was found the next day, "unclothed and hungry."[195] The social worker subsequently visited Sampson to discuss this incident.[196] During this visit, the social worker told Sampson, "I don't know where you get off sending all these complaint emails and making all these calls, but you are going to find out that we at [DCFS] stick together, and cover for each other. No one is going to lose their job behind you and your mess."[197] In November 2015, the social worker was given permission by his supervisor to file unsupported allegations of neglect and abuse against Sampson, eventually leading DCFS to seek removal of the niece from Sampson's care.[198] Following various procedural maneuvers, this resulted in the California Court of Appeal allowing DCFS to temporarily remove the niece from Sampson's custody pending appellate briefing.[199] Finally, in January 2016, the Court of Appeal reviewed DCFS's petition and,

189. Sampson v. County of Los Angeles, 974 F.3d 1012, 1016 (9th Cir. 2020).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 1017.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*

realizing the allegations lacked any foundation, ordered the niece returned to Sampson's custody.[200]

Sampson subsequently filed a § 1983 claim against Los Angeles County, the social worker, and various other DCFS employees.[201] Her complaint alleged, among other things, that the social worker's sexual harassment violated her Fourteenth Amendment equal protection rights.[202] The district court granted the defendants QI on this claim on the basis that there was no clearly established constitutional right not to be sexually harassed by a public official providing social services outside of the contexts of the workplace or school.[203]

Sampson appealed the QI grant on this issue to the Ninth Circuit.[204] On appeal, the Ninth Circuit was forced to affirm the district court's ruling.[205] The court had never previously addressed the specific matter of whether "the Equal Protection Clause protects private individuals who suffer sexual harassment at the hands of public officials providing them with social services. Thus, [the court could not] say that the question raised by Sampson's claim was 'beyond debate' when the conduct as [sic] issue occurred here."[206] Accordingly, the court was forced to grant the social worker QI.[207]

Notably, however, the court explicitly established the issue for future courts in the very same breath it acknowledged its hands were tied in granting QI:

> Although we reluctantly agree that this right was not clearly established at the time of [the social worker]'s conduct, and therefore Defendants are entitled to qualified immunity in the instant case, we hold that the Equal Protection Clause protects the right to be free from sexual harassment at the hands of public officials providing social services.[208]

Not only did the court tie its "reluctant" affirmance to explicit establishment of the issue going forward, but it also openly

200. *Id.*

201. *Id.*

202. *Id.* at 1017–18.

203. *Id.* at 1018, 1023 (noting that the district court also found that Sampson had not articulated a protected interest that could serve as a basis for her substantive due process claim).

204. *Id.* at 1018.

205. *Id.* at 1023.

206. *Id.* at 1024 (quoting Taylor v. Barkes, 575 U.S. 822, 825 (2015)).

207. *Id.* at 1023.

208. *Id.*

stated it was doing so "[t]o 'promote the development of constitutional precedent in an area where [the court's] guidance is sorely needed.'"[209] The court felt compelled to perform the constitutional analysis to support its explicit establishment in light of what it called "the Supreme Court's impossibly high bar" for overcoming QI.[210] In so doing, the *Sampson* court determined to "make it abundantly clear moving forward—if it was not already—that State public officials violate our Constitution's promise of equal protection when they sexually harass the people they serve."[211] Thus, despite both the outcome of its clearly established law analysis and the doctrine of constitutional avoidance,[212] the *Sampson* court clearly turned to explicit establishment out of frustration with both the current QI doctrine and the Supreme Court's stubborn refusal to fix it.

Sampson shows the utility of explicit establishment beyond the context of QI cases involving law enforcement such as *Sauers* and *Rivera*. Indeed, district courts in the Western District of

209. *Id.* (quoting Mattos v. Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (en banc)).

210. *Id.* at 1024; *see also id.* at 1025 ("Unfortunately, the Supreme Court's exceedingly narrow interpretation of what constitutes a 'clearly established' right precludes us from holding what is otherwise obvious to us—that the right of private individuals to be free from sexual harassment at the hands of public officials outside of the workplace and school contexts was clearly established under the Equal Protection Clause at the time of Defendants' conduct.").

211. *Id.* at 1025. Indeed, Judge Andrew Hurwitz's separate opinion highlighted the absurdity of QI's clearly established law requirement considering the facts at bar:

> Giving the Supreme Court's mandate a most narrow (and unrealistic) reading leads to a bizarre conclusion: [the social worker] knew that he could not sexually harass others in his workplace if, and only if, they were employed by the County; but he was unaware (or confused or unsure) whether he could subject a client of his office to the same treatment. Although we clearly establish this right 'going forward,' there is no need to wait. The time is now. For this reason, I respectfully dissent from [the section of the opinion granting the social worker QI as to Sampson's Equal Protection claim].

Id. at 1030 (Hurwitz, J., concurring in part and dissenting in part).

212. *See supra* notes 95–100 and accompanying text.

Washington[213] and the District of Arizona[214] have cited *Sampson* as clearly establishing sexual harassment by public officials providing social services violates the Equal Protection Clause, and it has also been cited as a persuasive example in at least one out-of-circuit district court.[215] Interestingly, another out-of-circuit district court has cited *Sampson*'s language showing a prior lack of clearly established law to argue there is no robust consensus among the circuit courts on this issue.[216] Still, there is no question that *Sampson* has been treated as binding precedent within its own circuit.[217] Academic literature also highlights *Sampson*'s use of explicit establishment,[218] making it something of a posterchild for the broader adoption of explicit establishment.

The case studies of *Sauers*, *Rivera*, and *Sampson* show the power of explicit establishment to sidestep the Escherian Stairwell by clearly establishing and developing the law even in instances where the state of the law mandates granting QI. They

213. McLaran v. Rakevich, No. 3:20-cv-05395-JRC, 2021 WL 825378, at *5 (W.D. Wash. Mar. 4, 2021) ("The Ninth Circuit has recently held that sexual harassment by public officials providing social services violates Equal Protection because by definition, sexual harassment is 'motivated by gender.'" (quoting *Sampson*, 974 F.3d at 1023)).

214. Fountain v. Arizona, No. CV-21-00356-PHX-JJT, 2022 WL 1003170, at *4 (D. Ariz. Apr. 4, 2022) ("[I]t is clearly established by the Ninth Circuit that '[s]exual harassment violates the Equal Protection Clause because, by definition, it is "motivated by gender."'" (alteration in original) (quoting *Sampson*, 974 F.3d at 1023)).

215. Doe v. Beaumont Indep. Sch. Dist., 615 F. Supp. 3d 471, 494 & n.15 (E.D. Tex. 2022) (using *McLaran*, citing *Sampson*, to show the Ninth Circuit allows "claims of sexual abuse or harassment . . . under the Fourteenth Amendment's Equal Protection Clause when: (i) a person acts under color of law; (ii) for the purpose of his own sexual gratification.").

216. Pike v. Budd, No. 1:22-cv-00360-LEW, 2023 WL 3997267, at *11 (D. Me. June 14, 2023) ("*Sampson* reflects that the unconstitutionality of harassment perpetrated by state action against someone other than a state employee or public school student is not clearly established by a robust circuit consensus even for state actors who engage in such conduct while they are otherwise engaged in the performance of their state-authorized duties.").

217. *See supra* notes 213–14 and accompanying text.

218. *See* Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of* Butz v. Economou*: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 DICK. L. REV. 719, 751–52, 751 n.189 (2022) (comparing *Sampson*'s explicit establishment to the Ninth Circuit's decision not to clearly establish the law for future cases in *Jessop v. City of Fresno*, 936 F.3d 937, 940 (9th Cir. 2019)).

also show that explicit establishment is versatile enough to be employed in a variety of QI contexts, such as those involving conduct by police in the field, corrections officers in an institutional setting, and even non-law enforcement government officials. One could even say that explicit establishment has been successfully beta tested and is ready to be widely deployed.

B. THE PRACTICAL HURDLE TO BROADER DISSEMINATION OF EXPLICIT ESTABLISHMENT

While the trio of *Sauers*, *Rivera*, and *Sampson* does much to illustrate the strengths of explicit establishment, these cases also belie the greatest hurdle to its dissemination. In cases where explicit establishment is an appropriate tool, the plaintiff has definitionally failed to overcome QI.[219] This reduces further avenues of litigation (and, therefore, any remaining chance for the individual plaintiff to achieve a favorable outcome) on the claim to petitioning the court of appeals for rehearing or appealing to the Supreme Court.

As such, plaintiffs' attorneys have little incentive to waste valuable resources such as research capacity, briefing space, and argument time advocating for judges to implement explicit establishment. Indeed, to do so may be against their own clients'

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219. *See, e.g.*, Sauers v. Borough of Nesquehoning, 905 F.3d 711, 715 (3d Cir. 2018) ("Because we conclude that it was not clearly established at the time of the crash that [the officer]'s conduct, as alleged in the complaint, could give rise to constitutional liability under the Fourteenth Amendment, we will vacate the District Court's denial of qualified immunity. We hope, however, to establish the law clearly now."); Rivera v. Monko, 37 F.4th 909, 913 (3d Cir. 2022) ("Precedent forces us to agree with the District Court: existing Supreme Court and Third Circuit Court of Appeals law had not clearly established a prisoner's right to access the courts after he or she filed a complaint. Going forward, however, there should be no doubt that such a right exists. . . . Under the facts alleged here, the defendants violated this right, even though they may not have been aware at the time that they did so. Thus, while qualified immunity bars Rivera's claim in this case, it would not bar similarly situated prisoners' claims in the future."); Sampson v. County of Los Angeles, 974 F.3d 1012, 1016 (9th Cir. 2020) ("We reluctantly affirm, however, the district court's grant of qualified immunity to Defendants on Sampson's equal protection claim because the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time of Defendants' conduct in this case. Nevertheless, moving forward, we explicitly hold that public officials, including social workers, violate the Equal Protection Clause of the Fourteenth Amendment when they sexually harass private individuals while providing them social services.").

individual interests by decoupling the broader development of constitutional law through QI analysis from the context of the specific § 1983 claim at bar. In other words, explicit establishment helps the development of the law and any future similarly situated plaintiffs, but not the present client. Considering this, under most circumstances attorneys should not—and perhaps even ethically or responsibly could not—advocate for courts to use explicit establishment.

This is not to say there is no role for plaintiffs' attorneys to play in the promotion of explicit establishment. Crucially, once a court has used explicit establishment to clearly establish the law in a case, attorneys can help further legitimize that case's precedential authority by citing it in their own briefs. This in turn will lead to more judicial citations to those cases, resulting in a virtuous cycle further entrenching explicitly established holdings into the legal firmament of binding authority[220] and thus further normalizing the judicial practice of explicit establishment. Nevertheless, for reasons that will be elaborated upon in the next Section, this Note has identified federal circuit court judges in particular as the actors with the greatest potential to utilize explicit establishment to make direct, systemic impacts on QI jurisprudence.

C. THE SYSTEMIC POTENTIAL OF EXPLICIT ESTABLISHMENT

This Note targets federal courts of appeals judges as the actors within the legal system best positioned to implement explicit establishment to effectuate systemic impacts. Federal district courts, on the one hand, are charged with merely applying the law to the facts of the case at bar.[221] The Supreme Court, on the other hand, creates precedent that binds all other federal

220. *See* Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 493, 495 (explaining judges "examine the legal authorities cited by the parties, which substantially include precedents, and render the decision that is dictated by those authorities" and "[a]n opinion's citations are the operationalization of the practice of stare decisis"); *see also supra* notes 163–66, 186–88, 213–16, 218 and accompanying text (showing how citations to *Sauers*, *Rivera*, and *Sampson* both within and outside their circuits, as well as in legal academia, have broadened their impact through recognition as valid sources of clearly established law).

221. U.S. CTS., *supra* note 148 (describing the role of district courts as "resolv[ing] disputes by determining the facts and applying legal principles to decide who is right").

courts,[222] seemingly making it the court with the broadest potential for systemic impacts. Despite a cross-ideological collection of individual Justices who have expressed interest in reforming QI, however, the Court as an institution has shied away from addressing the problems of the very doctrine it created.[223] Thus, the judicial actors in the federal system who (1) have the precedent-making authority to create clearly established law,[224] and (2) have expressed a broad willingness to challenge or reform the problematic aspects of QI[225] are judges on the federal courts of appeals. While it has been suggested the Supreme Court may be beginning to question the ability of the federal courts of appeals to clearly establish law in the QI context,[226] to date the federal circuits are still able to clearly establish law within their respective jurisdictions—including by way of explicit establishment.[227] This makes federal circuit judges the best-equipped and most likely actors to utilize explicit establishment in a way that results in systemic change to QI jurisprudence.

Indeed, the federal circuits are in many ways better positioned to make systemic change through explicit establishment than even the Supreme Court. While any individual Supreme Court case has more capacity to make a broad systemic impact by itself since each Supreme Court decision is binding on every circuit,[228] explicit establishment is a judicial procedure rather than a point of law. As such, although the Supreme Court could utilize explicit establishment to broader effect in clearly establishing any given individual issue of law, its far lower case volume gives it fewer opportunities and a narrower range of legal

222. *Legal Research: A Guide to Case Law*, LIBR. OF CONG., https://guides.loc.gov/case-law [https://perma.cc/GZ36-QENS] (describing the Supreme Court as "[o]ne court that creates binding precedent on all courts below").

223. *See supra* notes 140–41 and accompanying text.

224. LIBR. OF CONG., *supra* note 222; *supra* note 148 and accompanying text; *see also* Frasier v. Evans, 992 F.3d 1003, 1015 (10th Cir. 2021) ("[J]udicial decisions are the only valid interpretive source of the content of clearly established law.").

225. *See supra* notes 142–44 and accompanying text.

226. Kinports, *supra* note 148.

227. *See, e.g.*, *supra* notes 163, 186, 213–14 and accompanying text (showing *Sauers*, *Rivera*, and *Sampson* have created clearly established law that has been treated as binding precedent by in-circuit district courts).

228. LIBR. OF CONG., *supra* note 222.

issues to address using explicit establishment.[229] Moreover, since *Pearson* was decided, its precedent has been used as a tool by the Court to overrule QI denials more expediently by summary reversal—i.e., without reaching the merits or "making much if any law."[230]

By contrast, the federal courts of appeals have numerically far more opportunity to utilize explicit establishment to shape the law in a far broader substantive array of QI contexts than the Supreme Court, giving them greater systemic potential to apply explicit establishment across a variety of legal issues.[231] This is especially so as most QI cases on appeal end up granting or affirming QI for the defense—a necessary condition for the application of explicit establishment. Even in those instances when district courts deny QI, they are reversed on appeal at about twice the rate as when they grant QI,[232] with QI appeals tending to favor officers by an almost sixty-to-forty margin.[233]

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229. John G. Roberts, Jr., *2022 Year-End Report on the Federal Judiciary*, SUP. CT. 5 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/NWD7-2Z2J] (noting in its 2021 Term, the Supreme Court heard oral argument in seventy cases, disposing of sixty-three of them in fifty-eight signed opinions, while also issuing seven per curiam decisions in argued cases; whereas the federal courts of appeals handled 22,181 appeals on their civil dockets alone in fiscal year 2022—over 300 times as many cases as the Supreme Court's total docket for its 2021 Term).

230. Scott Michelman, Taylor v. Barkes*: Summary Reversal is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015), https://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend [https://perma.cc/XL6T-N9Y3].

231. *Supra* note 229 and accompanying text.

232. Alexander A. Reinert, *Unpacking a Decade of Appellate Decisions on Qualified Immunity*, LAWFARE (Mar. 18, 2021), https://www.lawfareblog.com/unpacking-decade-appellate-decisions-qualified-immunity [https://perma.cc/Z27B-BVXN].

233. Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://perma.cc/LW2F-EL42]. The statistics are even worse before the Supreme Court: of the thirty QI appeals to reach the Court between 1982 and 2020, QI was granted or upheld in fully ninety percent of cases. Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, A.B.A. J. (Feb. 1, 2021), https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity [https://perma.cc/H994-J5WX] ("From 1982 [when *Harlow v. Fitzgerald* announced the two-prong analysis of modern QI] to 2020, the court dealt with qualified immunity in 30 cases. The plaintiffs prevailed in only two: *Hope v. Pelzer* (2002) and *Groh v.*

Given the much higher caseload before the federal courts of appeals compared to the Supreme Court,[234] this undoubtedly translates to more circuit court cases upholding or applying QI in absolute terms, providing judges on the federal courts of appeals far more opportunities to employ explicit establishment in cases that, statistically, have little chance of being heard before the Supreme Court.[235]

Given federal courts of appeals judges are more broadly willing to challenge or reform QI,[236] have more opportunity to utilize explicit establishment on a wider variety of legal issues,[237] and have already done so[238]—albeit on a limited scale—they present the greatest systemic potential for disseminating and adopting explicit establishment to curtail the constitutional stagnation of the Escherian Stairwell. As such, this Note aims to sow the idea of explicit establishment and advocate for its more widespread adoption among federal circuit court judges.

D. THE COMPARATIVE ADVANTAGE OF EXPLICIT ESTABLISHMENT

Explicit establishment is not the only possible means of addressing some of the problems posed by QI, nor should it be the only one pursued. Indeed, the battle to reform or abolish QI can and should be fought on multiple fronts by various means and methods. Explicit establishment does, however, present the most pragmatic and realistic approach to QI reform and, therefore, the most likely method for achieving the most possible progress given the current legal and political landscape surrounding QI. As this Section will show, many other proposed methods of QI reform are either politically implausible to the point of

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Ramirez (2004). Thus, the court's ruling in *Taylor v. Riojas* for the plaintiff and denying qualified immunity is notable in itself.").

234. *Supra* note 229 and accompanying text.

235. Ralph Mayrell & John Elwood, *The Statistics of Relists over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022), https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same [https://perma.cc/G8K5-5A88] ("[T]he justices grant only the tiniest percentage of petitions—about 1% of all petitions and about 4% of petitions filed by paying petitioners.").

236. *See supra* Part II.D.

237. *See supra* note 229 and accompanying text.

238. *See supra* Part III.A.

impossibility or, among those that have been implemented, have had little to no impact. This leaves explicit establishment with significant comparative advantage over other avenues of reform, making it the best tool realistically available for mitigating the harms of current QI jurisprudence.

No other judicial solution presents a better avenue for QI reform. The Supreme Court has been generally unwilling to address the problems of the doctrine it created. Despite many individual Justices acknowledging the problems QI presents and some even calling for reform,[239] as an institution the Court has generally denied QI petitions for certiorari—sometimes en masse[240]—while siding with defendants in ninety percent of the QI cases it does grant.[241] Although the Court has openly acknowledged the problems with QI in some of its opinions, it has done so while simultaneously refusing to address them in those very same cases.[242] Indeed, the Supreme Court's QI caselaw has not only been one-sided, but its QI decisions have generally acted as a one-way rachet tightening the body of precedent against plaintiffs.[243]

Meanwhile, suing in state court generally does not present plaintiffs any comparative advantages over suing in federal court. This is because most states provide legal immunities mirroring QI at the federal level to such an extent that they "might trigger the original understanding of § 1983" and "therefore be heard in federal court anyway."[244] In fact, state court litigation has significant drawbacks compared to suing under § 1983 in a federal forum. For instance, the widespread political movement for tort reform has limited tools available to plaintiffs in state courts by, among other things, capping noneconomic and

239. *See supra* note 111 and accompanying text; *see also supra* note 140.

240. *See, e.g.*, Rubin, *supra* note 141 (noting the Court's rejection of eight QI cases at once, mere weeks after rejecting three others on one day).

241. *See* Chemerinsky, *supra* note 233.

242. *See supra* notes 111–13 and accompanying text.

243. *See, e.g.*, *supra* note 73 (describing how the Supreme Court's decision in *al-Kidd* subtly raised the standard of clearly established law to require that "*every* reasonable official" would understand the conduct in question as being unconstitutional).

244. Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE U. L. REV. 939, 987 (2014).

punitive damages and limiting attorney's fees.[245] Thus, even with the significant hurdle of QI, attempting to vindicate one's rights under the federal Constitution in a § 1983 action will still present plaintiffs with a better chance of meaningful recovery in most cases than attempting to do so under their state constitution in state courts.

As for legislative solutions, there is little potential for reform at the state level and even less from Congress. In the waning days of the 116th Congress, Libertarian Representative Justin Amash introduced the Ending Qualified Immunity Act in the House and Democratic Senator Ed Markey introduced it in the Senate; however, both the House and Senate bills died in committee.[246] Democratic Representative Ayanna Pressley and Senator Markey reintroduced the bill at the beginning of the 117th Congress, but for a second Congress in a row, it died a slow, languishing death in committee.[247] Representative Pressley and Senator Markey have again reintroduced the bill in the current 118th Congress, but as of this writing the bill has yet again been referred to committee with no further action,[248] suggesting it is due to meet the same fate once again. While the George Floyd Justice in Policing Act had greater legislative success, passing a floor vote in the House in both the 116th and 117th Congress,[249] negotiations with Senators eventually broke down over, among other things, the issue of QI reform.[250] Thus, for the foreseeable

245. JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 596–97 (5th ed. 2021) (describing various state legislation capping damages); 50 STATE STATUTORY SURVEYS: CIVIL LAWS: TORTS, Westlaw (database updated Apr. 2022) (compiling state tort reform statutes). By contrast, federal statute gives courts the discretionary authority to award fee shifting in favor of prevailing parties in § 1983 actions. 42 U.S.C. § 1988(b)–(c).

246. *See* H.R. 7085, 116th Cong. (2020); S. 4142, 116th Cong. (2020).

247. *See* H.R. 1470, 117th Cong. (2021); S. 492, 117th Cong. (2021).

248. *See* H.R. 2847, 118th Cong. (2023); S. 1196, 118th Cong. (2023).

249. *See* H.R. 7120, 116th Cong. (2020); H.R. 1280, 117th Cong. (2021).

250. Juana Summers, *Congressional Negotiators Have Failed to Reach a Deal on Police Reform*, NPR (Sept. 22, 2021), https://www.npr.org/2021/09/22/1039718450/congressional-negotiators-have-failed-to-reach-a-deal-on-police-reform [https://perma.cc/TV3S-CC4S] ("But the negotiators, which included [New Jersey Democratic Sen. Cory] Booker, [South Carolina Republican Sen. Tim] Scott and Democratic Rep. Karen Bass of California, were unable to reach an agreement on a number of issues, including how to address the legal doctrine known as 'qualified immunity,' which shields police officers from civil lawsuits.").

future, any federal legislative solutions seem to be mired in congressional dysfunction and unlikely to pass into law.

At the state level, legislative reformers have ostensibly had more—albeit still modest—success in addressing QI. On June 19, 2020, Colorado signed into law a bill removing QI as a civil defense under state law.[251] Colorado's effort was shortly followed by similar laws in Connecticut[252] and New Mexico.[253] Unfortunately, all three of these efforts contained significant caveats and loopholes leaving at least some semblance of QI intact.[254] Furthermore, aside from the passage of Colorado, Connecticut, and New Mexico's laws, political forces opposing such reform have killed similar state legislative reform efforts in seventy percent of the United States,[255] largely cutting off state legislatures as a potential source for further legislation or innovation on QI.

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251. S.B. 20-217, 72d Gen. Assemb. (Colo. 2020).

252. Press Release, The Office of Governor Ned Lamont, Governor Lamont Signs Policing Reform Legislation (July 31, 2020), https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/07-2020/Governor-Lamont-Signs-Policing-Reform-Legislation [https://perma.cc/FC74-XT25].

253. Press Release, Office of the Governor – Michelle Lujan Grisham, Gov. Lujan Grisham Ratifies Civil Rights Act (Apr. 7, 2021), https://www.governor.state.nm.us/2021/04/07/gov-lujan-grisham-ratifies-civil-rights-act [https://perma.cc/5T2M-X3ZQ].

254. Matt Ford, *Are States Really Abolishing Qualified Immunity for Cops? Not Exactly.*, NEW REPUBLIC (Apr. 13, 2021), https://newrepublic.com/article/162026/new-mexico-ended-qualified-immunity [https://perma.cc/EKF8-AJX9] ("The Colorado law only applies to 'peace officers,' for example . . . . [T]he Connecticut law is riddled with loopholes, including a broad good-faith exemption and a clause that requires the state to pay out damages instead of the officer who was sued."); Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill.*, WASH. POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/S9ZS-BD5L] ("In New Mexico, changes were made so quietly that many advocates didn't know that the ability to sue individual officers had been taken out as they testified for the bill. . . . [T]he New Mexico Civil Rights Act, had been fundamentally altered days before to drop a provision allowing people to sue officers in state court. And new language was inserted that explicitly prohibited an accuser from naming an officer in a state civil rights lawsuit.").

255. Kindy, *supra* note 254 ("In the months after George Floyd's murder, state legislators across the country tried to undo a legal doctrine that makes it virtually impossible to sue police officers for violating a person's civil rights. . . . But then, in state after state, the bills withered, were withdrawn, or were altered beyond recognition. At least 35 state qualified-immunity bills have died

Meanwhile, legal academics have produced no shortage of literature proposing remedies to the problems of QI. Indeed, since *Pearson* created the current QI paradigm in early 2009, a cursory Westlaw search shows over 1,300 law review articles mentioning QI have been published.[256] Despite this extensive breadth of QI scholarship, a decent amount of which proposes various solutions to the problems posed by QI, few provide solutions as pragmatic as explicit establishment. For instance, proposals have variously advocated for a wholesale return to a common law approach to § 1983 cases,[257] suggested Congress take legislative action,[258] called for a return to the pre-*Pearson* paradigm of sequential analysis under *Saucier*,[259] introduced the idea of a "liability rule for constitutional torts,"[260] and proposed "[l]imiting the scope of the relevant legal rule" in QI cases "to binding precedent" in the interest of providing greater "clarity and coherence to qualified immunity jurisprudence."[261] Largely due to the twin problems of congressional dysfunction and Supreme Court inaction, however, these proposals are unlikely to be implemented.

Finally, explicit establishment is readily implementable. Unlike many other reform proposals, it has already been successfully utilized[262] and does not require the passage of new legislation or a groundbreaking Supreme Court decision to implement. All explicit establishment requires is for it to be utilized more broadly by federal circuit court judges. In short, explicit

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in the past 18 months . . . . The efforts failed amid multifaceted lobbying campaigns by police officers and their unions targeting legislators.").

256. *Search Results*, WESTLAW PRECISION, https://1.next.westlaw.com [https://perma.cc/54FC-DGVS] (search "'qualified immunity'" in the search bar, then choose "Secondary Sources" under "Content types"; then filter by "Law Reviews & Journals" in the "Publication Type" subcategory under "Filters"; then filter by "Date," selecting "All dates after" and inputting "01/21/2009" under "Filters").

257. Wurman, *supra* note 244, at 971.

258. Carlos, *supra* note 23, at 323.

259. John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 137 (2009).

260. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 270 (2013).

261. Teressa Ravenell, *The Law Governing Their Conduct*, 64 HOW. L.J. 349, 374 (2021).

262. *See supra* Part III.A.

establishment is a preexisting, ready-to-go, off-the-shelf QI reform measure.

That said, explicit establishment is of course not beyond critique. Some aspects may raise skeptical eyebrows. For instance, one might understandably wonder where courts of appeals judges gain the authority to clearly establish the law in future cases without doing so in the case at bar, or whether law clearly established by way of explicit establishment will command the same precedential authority as law that is clearly established by the more standard denial of QI on account of its present novelty. Given the small number of explicit establishment cases this Author could find, there is little data with which to address these questions at scale. The treatment of *Sauers*, *Rivera*, and *Sampson* as binding precedent clearly establishing the law in their respective jurisdictions[263] suggests, however, a positive outlook for explicit establishment. Ultimately, broader proliferation and normalization of explicit establishment as a judicial tool and further entrenchment of explicitly established cases into QI caselaw[264] will be the true test of its viability as a method of QI reform.

Given the impediments to institutions such as the Supreme Court, Congress, state legislatures, or state courts addressing the issues of QI on a systemic scale—and barring a drastic political or judicial change that puts an abrupt end to the doctrine—explicit establishment presents the greatest comparative advantage over other avenues for reforming QI as it currently exists. Thus, in encouraging federal courts of appeals judges to utilize explicit establishment more widely, this Note presents the most pragmatic tool for QI reform to the actors best positioned to address the problems of the post-*Pearson* QI paradigm.

CONCLUSION

Qualified immunity is a jumbled mess of Supreme Court-made doctrine that too often denies plaintiffs justice and undermines public faith in law enforcement and the rule of law. A Pew Research Center poll found Americans disfavored QI by a

263. *See supra* notes 163–66, 186–88, 213–18 and accompanying text (showing how citations to *Sauers*, *Rivera*, and *Sampson* both within and outside their circuits, as well as in legal academia, have broadened their impact through recognition as valid sources of clearly established law).

264. *See supra* note 220 and accompanying text.

margin of two-to-one, coupled with a sharp decline in public confidence police would use force appropriately, treat minorities equally, or hold fellow officers accountable.[265] "The antidote to this crisis [of public confidence in law enforcement], of course, is robust, predictable accountability . . . exactly the sort of accountability that Section 1983 is supposed to provide, but which qualified immunity severely undercuts."[266]

QI undercuts § 1983's accountability function on a microscale by protecting individual officers from personal accountability. Since *Pearson*, however, this impact has been amplified to the macroscale. By systemically allowing courts to skip over their constitutional analysis and dismiss § 1983 claims based solely on lack of clearly established law, *Pearson* has prevented the elaboration of constitutional law and allowed its development to stagnate. Instead, § 1983 plaintiffs—regular people whose rights have been violated by agents of the state—are far too often left to languish on the Escherian Stairwell, where the lack of prior clearly established law sees their cases dismissed, preventing them from either achieving justice for themselves or clearly establishing the law for the benefit of future plaintiffs. This cycle rinses and repeats, while defendants commit the same or substantially similar abuses over and over ad infinitum.

So long as both Congress and the Supreme Court are unwilling or unable to reform QI—as, unfortunately, appears likely for the foreseeable future—the best chance for restoring some degree of § 1983's accountability function is to equip federal appellate courts with the best available tools to limit QI's perversities. This Note has argued the most pragmatic, effective, and readily available tool to courts is to explicitly state the violative nature of an officer's conduct. While this may not prevent the officer from invoking QI in the case at bar, it stems the bleeding by explicitly establishing the issue for all future cases. In other words, this explicit establishment allows federal courts of appeals to sidestep the Escherian Stairwell and restore some modicum of "robust, predictable accountability"[267] for law enforcement and,

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265. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct [https://perma.cc/YR73-2SB7].

266. Schweikert, *supra* note 108, at 13.

267. *Id.*

more broadly, the rule of law in the American constitutional order.