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Shoot at Me Once: Shame on You! Shoot at Me Twice: Qualified Immunity. Qualified Immunity Applies Where Police Target Innocent Bystanders*

I. INTRODUCTION

Qualified immunity is a judicially created doctrine that has resulted in expansive protections for lower-level state officials for constitutional violations.¹ Guidance from the Supreme Court of the United States regarding the interpretation of "clearly established rights" has been scarce and vague at best.² As a result, district courts faced with

*I owe my utmost gratitude and appreciation to Professor Jeremy Kidd. Thank you for the countless hours you have spent editing and for challenging my mind to look beyond what is familiar to me. I am in awe of not only what you have taught me, but of who you are. To Professors Longan, Fleissner, and Gadkar-Wilcox, thank you for serving as unofficial advisors on this casenote and offering up your wisdom and guidance for the masses to experience. A final thank you to my loved ones who have supported my passion for this project and encouraged me every step of the way.

1. Qualified immunity is an affirmative defense that cuts off liability for damages caused by a lower-level official's exercise of discretionary authority. Procedurally, the doctrine of immunity had to be proved and justified by the party asserting the doctrine. With the creation of qualified immunity, the burden of proof has shifted from the defendant to the plaintiff, i.e. plaintiffs must prove their own case along with why the doctrine does not apply. See, e.g., *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005).

2. See, e.g., Tyler Finn, *Qualified Immunity Formalism: "Clearly Established Law" and the Right to Record Police Activity*, 119 COLUMBIA L. REV. 445 (2019) (highlighting the difficulty in interpreting Supreme Court direction on qualified immunity and the varying decisions of appellate courts as a result). The Supreme Court of the United States held that for a right to be clearly established:

[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell, supra*, 472 U.S., at

qualified immunity assertions regarding a § 1983 claim take a restrictive approach to the doctrine's analysis often by relying on factually similar cases from binding authorities. Historically, innocent bystanders have had no clearly established right to be free from excessive force where force was applied to subdue the target of the arrest,³ but what if the force is *intentionally* applied to the innocent bystander?

In 2019, the United States Court of Appeals for the Eleventh Circuit determined in *Corbitt v. Vickers*⁴ that officers who target innocent bystanders are entitled to qualified immunity.⁵ Previously, courts evaluated the applicability of qualified immunity where officers exerted force on the subject of the arrest. The decision in *Corbitt v. Vickers* short-circuits legitimate claims against officers who use lethal force on innocent bystanders complying with police commands.⁶ The Eleventh Circuit determined an innocent bystander's right to be free from excessive force is not "clearly established."⁷ An officer can shoot a complying bystander and enjoy the government shield of immunity. In a country facing police shootings and brutality, such protections make room for much more dangerous waves of lethal force application. As a judicially created doctrine contradicting legislative intent, qualified immunity already has an unstable justification. The judicial power to fix all that is wrong with qualified immunity rests with the Supreme Court—thanks to *stare decisis*.⁸

II. FACTUAL BACKGROUND

Christopher Barnett was a criminal suspect wanted by the Coffee County Sheriff's Department and the Georgia Bureau of Investigation. On July 10, 2014, the agencies initiated an operation to capture the

535, n. 12, 105 S.Ct., at 2820, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted).

3. See, e.g., *Schultz v. Braga*, 455 F.3d 470 (4th Cir. 2006).

4. 929 F.3d 1304 (11th Cir. 2019).

5. See *id.*

6. *Id.*

7. *Id.*

8. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018).

This Article explores qualified immunity under the three Supreme Court's justifications: (1) a common law "good faith" derivative, (2) rectifying the putative broadening of § 1983, and (3) fair warning for government officials, similar to the rule of lenity. Baude takes a chisel to the three justifications finding that each crumble under critical analysis, yet notes that the Supreme Court is unlikely to take the most straightforward approach—overturning the doctrine as it lacks legal basis—because of *stare decisis*.

suspect. During the course of the operation, Barnett wandered into the area surrounding Plaintiff Amy Corbitt's yard, and the officers followed in pursuit. Corbitt had never encountered Barnett or known of him before this occurrence. One adult and six minors were in the yard, including multiple children under the age of three. Corbitt and two minors were inside the home. The officers ordered everyone in the yard to get down. Officers handcuffed and held the children and their supervising adult at gunpoint.⁹

The family dog, "Bruce," was present during the operation. At that point, Officer Vickers—deputy sheriff for Coffee County—discharged his firearm at Bruce, but the shot missed. It is undisputed that Bruce did not pose a threat and was not aggressive, and no other officers made an effort to subdue the dog. Bruce retreated under the house after the first shot. After Bruce came out from under the house, Vickers fired at the dog again. While the second shot missed Bruce, the bullet hit a ten-year-old child lying eighteen inches in front of Vickers, who was readily viewable by Vickers. The child, SDC, suffered medical and mental trauma and currently receives ongoing treatment for both. Corbitt, as SDC's parent and guardian, initiated a 42 U.S.C. § 1983¹⁰ action against Vickers in his individual capacity, alleging violations of the Fourth¹¹ and Fourteenth¹² Amendments regarding freedom from excessive force. Vickers asserted qualified immunity as an affirmative defense and filed a 12(b)(6) motion to dismiss.¹³

The district court denied Vickers's motion.¹⁴ To assess SDC's claim, the court analyzed the two factors of an excessive force claim: "(1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable."¹⁵ Because Vickers intentionally stopped SDC's movement and restricted his freedom, SDC was seized.¹⁶ Drawing inferences most favorably to the Plaintiff, a jury could have decided that

9. *Vickers*, 929 F.3d at 1308.

10. 42 U.S.C. § 1983 (2012).

11. U.S. CONST. amend. IV.

12. U.S. CONST. amend. XIV.

13. *Vickers*, 929 F.3d at 1308.

14. *Corbitt v. Wooten*, No. 5:16-CV-51, 2017 U.S. Dist. LEXIS 199826, at *18 (S.D. Ga. Dec. 5, 2017), *rev'd and remanded sub nom.* The district court determined that Vickers's assertion of qualified immunity would be better received at the summary judgment stage of the case as opposed to the motion to dismiss phase given the way the record appeared at that moment in the case—the case needed to proceed for factual development. *Id.* Claims brought by other plaintiffs and against other officers were dismissed. *Id.*

15. *Id.* at *5 (quoting *Troupe v. Sarasota Cty.*, Fla., 419 F.3d 1160, (11th Cir. 2005)).

16. *Id.* at *12.

SDC's seizure was effectuated by Vickers's force against Bruce.¹⁷ Because the subjects of the force were not the intended targets, the district court considered and rejected Vickers' claim that force was *per se* necessary, holding that Vickers had presented no evidence to support his claim.¹⁸ Vickers appealed the denial of his motion to dismiss SDC's complaint. The Eleventh Circuit reversed the district court's decision and remanded the case.¹⁹

III. LEGAL BACKGROUND

A. Constitutional Amendments Regarding Seizures

The Fourth Amendment provides, in pertinent part, that: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"²⁰ The Fourth Amendment has a longstanding history of protecting against excessive force during seizures.²¹ The protections are compounded by the guarantees of the Fourteenth Amendment. The Fourteenth Amendment provides, in pertinent part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²²

The protections, together, target excessive force, invasion of personal privacy, and liberty.²³ An individual may bring a civil action for

17. *Id.* at *11.

18. *Id.* at *17–*18. Further, the district court relied on *Schutt v. Lewis*, No. 6:12-cv-1697-Orl-37DAB, 2014 U.S. Dist. LEXIS 110633 (M.D. Fla. 2014) (determining that officer safety is typically the standard in animal shooting cases when evaluating the reasonableness of the officer's conduct). *See* *Cooper v. Rutherford*, 503 F. App'x. 672 (11th Cir. 2012) (analyzing whether an officer's decision to shoot at all was appropriate per the exigencies of the case); *see also* *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (granting qualified immunity for an officer who intended to shoot the subject of the arrest but struck an innocent bystander).

19. *Vickers*, 929 F.3d at 1307.

20. U.S. CONST. amend. IV.

21. *See, e.g., Mercado*, 407 F.3d at 1158 (holding that a police officer who used deadly force in a non-deadly situation has committed a Fourth Amendment violation); *Thornton v. City of Macon*, 132 F.3d 1395 (11th Cir. 1998) (denying summary judgment on qualified immunity assertion because an issue of fact existed regarding the nature of force used).

22. U.S. CONST. amend. XIV.

23. *See, e.g., Graham v. Connor*, 109 S.Ct. 1865 (1989) ("Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other

deprivation of such rights under Section 1983. Section 1983 provides that persons who, under color of state authority, violate an individual's constitutional rights will be liable for the injuries caused therefrom.²⁴

B. Historical Interpretation and Application of Immunity as an Affirmative Defense

1. The Progenitor: Absolute Immunity

Absolute immunity originated in English common law and was partially codified in the United States Constitution.²⁵ The Constitution establishes absolute protection for legislators except in cases of treason, felony, and breach of peace.²⁶ Courts in the United States adapted the doctrine to apply to elite government officials including legislators, judges, the president, prosecutors, and executive officers engaged in adjudicative functions.²⁷ Essentially, the higher the official, the greater the protection needed.²⁸ The impetus of such protection is that elite government officials' duties must not be materially impaired from apprehension of or harassment by the public, given the number and gravitas of decisions made by officials in their official capacity.²⁹ Further, the doctrine has been considered necessary to prevent courts from becoming bogged down with artfully worded insubstantial or frivolous lawsuits.³⁰

2. The Progeny: Qualified Immunity

The doctrine of absolute immunity eventually produced a narrower derivative in qualified immunity, the genesis of which traces back to *Scheuer v. Rhodes*,³¹ which created qualified immunity for lower offices of less prominent duties.³² There, three students of Kent State

'seizure' of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable seizures,' and must be judged by reference to the Fourth Amendment's 'reasonableness' standard.").

24. 42 U.S.C. § 1983.

25. *See Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

26. U.S. CONST. art. I, § 6, cl. 1.

27. *Spalding*, 161 U.S. at 498. The president is entitled to absolute immunity from suits for damages based on actions taken in official presidential capacity. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

28. *Spalding*, 161 U.S. at 498.

29. *See, e.g., id.*

30. *See id.* at 499.

31. 416 U.S. 232 (1974) (overruled on other grounds).

32. *Id.* at 239.

University died after a confrontation with the National Guard, who were immune from liability. The students' estates sought to hold the governor of Ohio and various Ohio National Guard officials accountable for the deaths.³³ The Court recognized two codependent principles which necessitated a milder form of immunity for government officials:

(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.³⁴

Without precisely defining qualified immunity, the Court determined that officials exercising good faith discretion deserve protection from litigation commensurate with the level of discretion afforded to their official capacities.³⁵

This new doctrine was explored more thoroughly in *Butz v. Economou*.³⁶ There, the Court reasoned that an extension of absolute immunity to all federal executive officials erodes basic constitutional protections.³⁷ The Court was concerned that, should officials not be held liable for discretionary functions, the Constitution would provide no redress, and federal officials would not be deterred from committing constitutional wrongs.³⁸ There are many checks on judges, jurors, and prosecutors which allow for constitutional safeguards whilst upholding absolute immunity, while lower officials may not be subjected to such checks.³⁹ The Court determined that lower-level officials' discretion would not be hindered by an awareness of constitutional limits.⁴⁰ Therefore, qualified immunity should be afforded to lower-level officials, however, the plaintiff's complaint must state a substantial claim for relief to survive a motion to dismiss.⁴¹

33. *Id.* at 235.

34. *Id.* at 240.

35. *Id.* at 247–48.

36. 438 U.S. 478 (1978).

37. *Id.* at 505.

38. *Id.*

39. *Id.* at 512. Regarding the judicial checks set in place, jurors are carefully screened prior to selection via *voir dire*; advocates will have their arguments openly contested by adversaries during the judicial process; witnesses are subject to cross-examination under the penalty of perjury; and judges' decisions are subject to appeal and scrutiny of appellate courts. *Id.*

40. *Id.* at 506–07.

41. *Id.* at 507.

In *Harlow v. Fitzgerald*,⁴² qualified immunity was solidified as an affirmative defense for state agents, effectively limiting absolute immunity.⁴³ The Court reasoned that because damages may be the only realistic avenue for constitutional vindication,⁴⁴ qualified immunity "must be pleaded by a defendant official" as an affirmative defense.⁴⁵ Previously, an officer claiming qualified immunity (sometimes called the "good faith defense") had to meet both an objective test and a subjective test.⁴⁶ The objective test "involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'"⁴⁷ The subjective test "refers to 'permissible intentions' [of the defendant official]."⁴⁸ If either element was not satisfied, the defense failed.⁴⁹ The Court in *Harlow* noted that some courts consider a defendant official's subjective good faith to be a fact necessitating resolution by a jury and thus cannot be resolved on summary judgment.⁵⁰ The Court stripped away the subjective element, creating a new objective-only standard where "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."⁵¹

The Eleventh Circuit, in *Mercado v. City of Orlando*,⁵² focused on how plaintiffs can prove their rights were clearly established⁵³ when the offense occurred.⁵⁴ The court outlined three categories an individual

42. 457 U.S. 800 (1982).

43. *See id.*

44. *Id.* at 809.

45. *Id.* at 815.

46. *Id.*

47. *Id.* (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).

48. *Id.* (quoting *Strickland*, 420 U.S. at 322).

49. *Id.*

50. *Id.* at 816; *see also*, David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989). The Federal Rules of Civil Procedure, per Rule 56, do not typically allow resolution via summary judgment where there is a dispute of facts. Pre-*Harlow*, the burden of proof and pleading qualified immunity was the defendant's, and subjective intent must have been proven. Accordingly, trials had to proceed to determine the "fact" of the defendant's subjective intent. When the Court in *Harlow* eliminated the subjective element, qualified immunity issues were able to be decided before trial, most often at summary judgment. *Id.* at 67–68.

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

52. 407 F.3d 1152 (11th Cir. 2005).

53. The wording used is consistently "established" not "defined." *See id.*

54. *Id.* at 1158–59.

may use to make such a determination.⁵⁵ The first category includes materially similar cases.⁵⁶ In this category, cases cited by the plaintiff need to contain materially analogous facts and must have been decided before the government agent in the present case was required to exercise discretion, thus giving the agent proper notice that the conduct is unreasonable.⁵⁷ The second category requires the plaintiff to demonstrate that a clearly established and broader principle should control the facts of the case.⁵⁸ If there is no prior case on point, the "[g]eneral statements of the law contained within the Constitution, statute, or caselaw may sometimes provide "fair warning" of unlawful conduct."⁵⁹ If the general statements of law clearly apply to the scenario before the court, the officers would have been considered to have notice before using excessive force.⁶⁰

The third category is an exception to the other two.⁶¹ There, an agent must demonstrate that the "case fits within [an] exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary."⁶² By the standards of the third category, every reasonable officer would conclude that conduct exhibited in the case was unreasonable without the need for case law.⁶³ This type of conduct pertains to force that is "wholly unnecessary to any legitimate law enforcement purpose."⁶⁴

C. *Modern Trend*

To defeat qualified immunity under the modern approach, the plaintiff must demonstrate two elements that courts may analyze in

55. *Id.* 1159.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (quoting *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003)).

60. *Id.* (noting that although "excessive force" is established as unconstitutional, the concept itself is too broad and requires more specific delineation for officers to regulate their conduct accordingly). The court noted that the "reasoning, though not the holding" of prior cases can also send 'the same message to reasonable officers' in novel factual situations." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 743 (2002)).

61. *Id.*

62. *Id.*

63. *Id.* at 1160.

64. *Id.* at 1159 (quoting *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002)). *See Lee*, 284 F.3d 1188 (determining there was a Fourth Amendment violation for slamming a handcuffed arrestee's head against a vehicle); *see also Priester v. City of Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000) (denying qualified immunity where a police dog was allowed to attack an arrestee lying on the ground).

any order, given the circumstances of the case.⁶⁵ First, the plaintiff "must establish that the defendant violated a constitutional right."⁶⁶ Second, the plaintiff must demonstrate that the right was clearly established.⁶⁷ A "clearly established" right has its contours defined so that a reasonable official understands he is violating the right.⁶⁸ The point is to give officials fair warning that their conduct was unconstitutional.⁶⁹ Officers' awareness of an existence of a right does not mean officers knew their conduct violated that right; it must be sufficiently clear that the official's actions on the scene infringed on the right.⁷⁰ Unless the plaintiff can establish a clear prior analogue, "qualified immunity almost always protects the defendant."⁷¹

In applying this approach, other circuits have dealt with cases where officers targeted the subject of the arrest, but innocent bystanders were hurt as a result.⁷² Overall, the modern trend applies qualified immunity where officers used their discretionary authority to secure a delicate scene for their own protection and for the protection of the public.⁷³

IV. COURT'S RATIONALE

A. *Majority*

In *Corbitt v. Vickers*, the Eleventh Circuit was tasked with determining whether an officer's application of force to an unintended innocent bystander during an arrest operation violated the bystander's clearly established Fourth Amendment right.⁷⁴ Because the case was before the court on a denial of a motion to dismiss, the court relied on

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

66. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199–1200 (11th Cir. 2007).

67. *Id.*

68. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

69. *Vaughan*, 343 F.3d at 1332.

70. *Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011).

71. *See Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (quoting *Priester*, 208 F.3d at 926).

72. *See Croom v. Balkwill*, 645 F.3d 1240 (11th Cir. 2011); *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011); *United States v. Maddox*, 388 F.3d 1356 (10th Cir. 2004).

73. *See Croom*, 645 F.3d 1240 (granting qualified immunity where officers placed the premises' occupants on the ground for several minutes to ensure no danger was present to the officers or the public); *Bletz*, 641 F.3d 743 (determining that while officers were allowed to temporarily detain innocent bystanders to execute a search warrant, a reasonable jury could find a Fourth Amendment violation where the bystanders were detained for an hour following a shooting); *Maddox*, 388 F.3d 1356 (holding the officers' seizure of innocent bystanders as reasonable to secure the area and protect officers against potential dangers).

74. *See generally Vickers*, 929 F.3d 1304.

the allegations in the complaint taken in a light most favorable to the plaintiff.⁷⁵ Typically, an issue of qualified immunity is decided at the summary judgment phase; however, it is proper to grant an officer's motion to dismiss where the "complaint fails to allege the violation of a clearly established constitutional right."⁷⁶ For immunity to apply, its application must balance holding officials accountable in the irresponsible exercise of their power with "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."⁷⁷ This balance protects "all but the plainly incompetent [officials or officials] who knowingly violate the law."⁷⁸

The court first had to determine whether the plaintiff's constitutional rights were violated and whether the plaintiff's rights were clearly established at the time of the alleged violation.⁷⁹ The court relied on the categories outlined in *Mercado* to explain the three ways a plaintiff may show that the right was clearly established at the time of the defendant's conduct.⁸⁰ Further, to establish an excessive force violation, a plaintiff must prove "(1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable."⁸¹ Regarding the Fourth Amendment,⁸² the court examined whether SDC was seized when Vickers applied force while acknowledging that SDC's role did not fit neatly into the traditional categories of analysis.⁸³ SDC was not the target of an arrest, per the Fourth Amendment, nor an arrestee or pretrial detainee, per the Fourteenth Amendment.⁸⁴

75. *Vickers*, 929 F.3d at 1311.

76. *Id.* (quoting *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002)). The court also outlined the history of qualified immunity law to highlight both the purpose and development of the defense as it pertained to this case. *Id.* The court reiterated qualified immunity's history as protection for government officials performing discretionary functions. *Id.*

77. *Id.* (quoting *Pearson*, 555 U.S. at 231).

78. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

79. *Id.*

80. *Id.* at 1312.

81. *Id.* at 1315 (quoting *Troupe*, 419 F.3d at 1166). The majority opinion here seems to conflate whether there was a violation of rights with whether the right was clearly established. It appears the opinion says no analogous case exists to indicate whether the right was clearly established—where specific analogous facts are largely irrelevant. Alternatively, the appropriate question for analyzing controlling facts is whether the right was violated.

82. The court determined that the Fourteenth Amendment claim did not apply in this case as SDC was not a pretrial detainee. *See id.* at 1313.

83. *Id.* at 1313.

84. *Id.*

Best described as an "innocent bystander," SDC may still be considered "seized" in light of the Fourth Amendment.⁸⁵ Police restraint on a person's individual freedom to walk away is enough to be considered a seizure.⁸⁶ The court featured several cases as examples of courts determining that innocent bystanders were seized,⁸⁷ including *Croom v. Balkwill*,⁸⁸ *United States v. Maddox*,⁸⁹ and *Bletz v. Gribble*.⁹⁰ SDC was an innocent bystander playing in the yard when the subject of the arrest wandered into the area. Everyone in the yard had been ordered to the ground and instructed not to move before Vickers fired his two shots, one of which hit SDC. This constituted a show of authority by officers which restricted SDC's freedom of movement.⁹¹ Therefore, SDC was seized in terms of the Fourth Amendment—but not the Fourteenth—when Vickers fired the two shots.⁹²

The court next had to consider the other prong of the test—whether the force used to effectuate the seizure was unreasonable—to determine whether SDC's established Fourth Amendment right was violated.⁹³ Implementing the *Mercado* framework, the court determined the case did not fit into the first category (materially similar cases), because there were no factually similar cases from the Supreme Court, from the Eleventh Circuit, or from the Georgia Supreme Court.⁹⁴

85. *Id.* The Fourth Amendment also governs seizures which do not result in formal arrest or jail. See U.S. CONST. amend. IV.

86. *Vickers*, 929 F.3d at 1313.

87. *Id.* at 1314.

88. 645 F.3d 1240.

89. 388 F.3d 1356.

90. 641 F.3d 743.

91. *Vickers*, 929 F.3d at 1313.

92. *Id.* at 1314. The court regarded the example cases as factually similar to the actions of Vickers. *Id.*

93. *Id.* at 1315.

94. *Id.* The court once again appears to conflate two Fourth Amendment tests by conflating the *Mercado* framework with unreasonableness. *Id.* at 1314–15. The court states that SDC's right to be free from excessive force was clearly established. *Id.* at 1314. Then, under the next prong of the opinion—titled "Were Clearly Established Rights Violated?"—the court proceeds to discuss whether Vickers's conduct was unreasonable apropos (i.e. a violation of) SDC's "clearly established" rights. *Id.* at 1315. The unreasonableness analysis takes place against the *Mercado* backdrop. *Id.* at 1315–22. The court rejects the first two *Mercado* categories as guidance for unreasonable conduct by stating "Corbitt has failed to demonstrate a clearly established Fourth Amendment violation, either by the first method (a materially similar, binding case), or the second method (the violation is a matter of obvious clarity from such a binding case)." *Id.* at 1320–21. The court rejects the third *Mercado* category stating, "the circumstances alleged in this case do not so obviously violate the Fourth Amendment such that it would be

The second category, concerning clearly established broader principles, failed as well.⁹⁵ Although the district court sorted the case under the second category, the Eleventh Circuit contended that the justifying principle—that officers may not use excessive force—was too broad.⁹⁶ The controlling principle must be specific and particularized per the exigencies of the case.⁹⁷ When performing a discretionary duty, it can be difficult for an officer to determine the line between legal and illegal. Thus, a clearly delineated rule, as opposed to a generalized rule, allows officials to navigate the law with sufficient definiteness.⁹⁸

SDC was not the intended target of the arrest or the intended target of Vickers's shots, resulting in a case of first impressions before the court.⁹⁹ There is no clearly established broader principle stating that lethal force intended for one innocent bystander violates the Fourth Amendment rights of another innocent bystander injured as a result of the force.¹⁰⁰ Further, the Supreme Court in *Brower v. County of Inyo*¹⁰¹ said that a Fourth Amendment violation depends on the "intentional action on the part of the officer."¹⁰²

The court, reciting *Brower*, noted that if an unoccupied, parked police car slips its brakes, rolls down a hill, and pins a passerby, the officer has likely committed a tort via his car but has not committed a Fourth Amendment violation.¹⁰³ There is still no Fourth Amendment violation if the passerby ends up being a wanted serial killer as opposed to an innocent citizen. Without drawing too fine a line, the Court in *Brower* stated that the officer must intend to apply means of force used to effect the injury.¹⁰⁴ The Supreme Court concluded that "it [was] enough for a

apparent to every reasonable officer that his actions were in violation of the Fourth Amendment." *Id.* at 1322.

95. *Id.* at 1316–17.

96. *Id.* at 1315. See *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

97. *Vickers*, 929 F.3d at 1316.

98. *Id.*

99. *Id.*

100. *Id.* at 1316–17.

101. 489 U.S. 593 (1989).

102. *Vickers*, 929 F.3d at 1317 (emphasis in original). The majority opinion does not state what type of intent is necessary.

103. *Id.*

104. *Id.* (quoting *Brower*, 489 U.S. at 596–99).

In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.

Brower, 489 U.S. at 598–99.

seizure that a person be stopped by the very instrumentality set in motion or put in place to achieve that result."¹⁰⁵ In examining the lower courts that have interpreted *Brower*, the Eleventh Circuit concluded the force would have to be intentionally applied to the target, as opposed to accidentally applied, to constitute a Fourth Amendment violation.¹⁰⁶ No case contends that a bystander suffers a Fourth Amendment violation when an officer shoots at another object and hits the bystander.¹⁰⁷

Other Circuits—including the First, Second, Fourth, and Tenth—have declined to extend Fourth Amendment protections to innocent bystanders.¹⁰⁸ Further, these circuits rarely consider bystanders to be seized.¹⁰⁹ Here, the Eleventh Circuit cited to *Schultz v. Braga*,¹¹⁰ in which the Fourth Circuit found no Fourth Amendment violation when an agent intended to shoot one individual and accidentally hit a bystander,¹¹¹ and contrasted that with the present case where the target was a dog.¹¹² Because there were no factually similar cases—which may otherwise give rise to clearly established broader principles—cited by the plaintiff, the present case did not fall within the second *Mercado* category.¹¹³

The Eleventh Circuit also refused to find that no reasonable officer would have fired at the dog, which would have invoked the third *Mercado* category.¹¹⁴ Citing summarily to broadly analogous cases,¹¹⁵

105. *Id.*

106. *Vickers*, 929 F.3d at 1318.

107. *Id.*

108. *Id.* at 1319.

109. *Id.* at 1320.

110. 455 F.3d 470 (4th Cir. 2006). In *Schultz*, the Federal Bureau of Investigation (FBI) was looking for a man who had robbed a bank at gunpoint. A friend of the suspect—an armed and dangerous drug addict—was cooperating with the FBI to apprehend the suspect, tipping the agents off about when and where to find the suspect. FBI agents apprehended what they thought was the correct vehicle—by happenstance, the vehicle and its occupants just happened to have the same descriptions as those given to the FBI. Agent Stowe approached the passenger side of the vehicle pointing his gun at the passenger believed to be the suspect. After noticing the car was locked, Agent Stowe ordered the passenger to unlock the car. Agent Braga approached as the passenger reached to unlock the door and shot the passenger through the windshield, believing him to have been reaching for a weapon. The Fourth Circuit found no Fourth Amendment violation for the driver of the vehicle impacted by glass fragments from Agent Braga's shot. *Id.* at 472–74, 483.

111. *See id.* at 483.

112. *Vickers*, 929 F.3d at 1320.

113. *Id.*

114. *Id.* at 1321.

115. *Id.*

the court held that, while Vickers could have been more careful, his conduct did not rise to the level of a Fourth Amendment violation.¹¹⁶ Vickers's conduct was that of an accidental effect, not a misuse of power.¹¹⁷ The court concluded that the complaint failed to plead facts necessary to show that reasonable officers would have known that the shot violated SDC's Fourth Amendment right.¹¹⁸ Accordingly, Vickers was entitled to qualified immunity.¹¹⁹

B. Dissent

Judge Wilson, dissenting, contended that the case fell into the third category of the *Mercado* framework, because no competent officer would have fired the shot.¹²⁰ The officers ordered everyone in the area, including six children, to the ground and held them at gunpoint. A family pet was present but presented no threat, and there was no suggestion that the pet acted with aggression or hostility toward anyone, including the officers. Vickers, of his own accord, shot at the pet, missed, waited, and shot again.¹²¹ While Vickers missed the dog for the second time, Vickers struck a child who had been "lying within arm's reach of the officer" the whole time.¹²²

Vickers's conduct was "plainly unreasonable" in this context.¹²³ That the pet was nonthreatening is crucial to the conclusion.¹²⁴ The Eleventh Circuit has "consistently denied qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat."¹²⁵ Judge Wilson then pointed to *Sanders v. Duke*,¹²⁶ where the Eleventh Circuit wrote "[w]e have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands."¹²⁷ Further, the dissent believed it was relevant to the decision that SDC was eighteen inches from Vickers, determining no reasonable officer would shoot

116. *Id.*

117. *Id.* at 1321–22.

118. *Id.* at 1322–23.

119. *Id.* at 1323.

120. *Id.* (Wilson, J., dissenting)

121. *Id.* at 1325.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. 766 F.3d 1262 (11th Cir. 2014).

127. *Id.* at 1265.

under those circumstances or even believe it lawful to do so.¹²⁸ Accordingly, the dissent concluded that Vickers should not be entitled to qualified immunity.¹²⁹

V. IMPLICATIONS

The court in *Vickers* highlighted the distinction between an accidental application of force and an intentional application of force which ends up being applied to an unintended target.¹³⁰ The court categorized *Vickers* as an accidental application of force issue.¹³¹ The court reasoned that the shooting did not pertain to the seizure of SDC, but rather the perception of officer safety, given the family pet's proximity to the scene.¹³² The notable comparisons employed by the court included an example of a police car accidentally rolling down a hill and striking and killing an innocent bystander.¹³³ This misapplication of principles regarding intentionally applied force begged the question. To make the analogy apt, the police officer would have had to roll his own vehicle down the hill for the purpose of striking someone.¹³⁴ Other circuits' examples given by the court were inapplicable as well.¹³⁵

In *Vickers*, the situation was docile and under control before the use of force.¹³⁶ Vickers intentionally applied lethal force to a nonlethal situation.¹³⁷ Vickers meant to shoot and did so twice with one child eighteen inches in front of him and several more children in close

128. *Vickers*, 929 F.3d at 1326.

129. *Id.*

130. *See id.*

131. *Id.* at 1320.

132. *Id.* at 1321.

133. *Id.* at 1317. If the innocent bystander principle is taken to its logical extreme, then anyone who is not the subject of the arrest can be the victim of an officer's lethal force with no recourse.

134. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. Headnotes 62 (2016). This Article determines that the Supreme Court is increasingly generous to defendants asserting qualified immunity and that the Court refuses to acknowledge the departure from case law. Kinports further concludes that the precedent of "clearly established law" can only be implemented by the Supreme Court, and thus, each new constitutional suit presented to lower courts suffers a fatality for lack of clearly establishing the law to the respective situation.

135. *See, e.g., Schultz*, 455 F.3d 470.

136. *Vickers*, 929 F.3d at 1308.

137. Vickers admits in his reply brief to the Eleventh Circuit that a non-violent and non-aggressive dog does not need to be subdued and never contends that Bruce was violent. Vickers instead insinuates that the dog's breed necessitated his lethal force. Reply Brief of Appellant at 8, *Vickers*, 929 F.3d 1304 (No. 17-15566-DD).

proximity.¹³⁸ A plain viewing of the facts in *Vickers* situates the case in the third category of the *Mercado* framework, conduct so obviously in violation of the Fourth Amendment's purpose that prior case law is unnecessary.¹³⁹ Balancing accountability with discretionary job functions, it is not unreasonable to expect an officer to know, understand, and appreciate that if everyone is complying—there is no threat of danger—then there is no need to use lethal force, especially on those not the subject of the arrest.¹⁴⁰ The dog's apprehension was not essential, nor even relevant to the arrest operation.¹⁴¹

This case represents a continued shift in how qualified immunity is applied. Historically, the burden has been on the defendant to justify why immunity applies.¹⁴² The modern trend, however, is to shift the burden to the plaintiff to prove why the defense does not apply after the defendant has asserted it.¹⁴³ As initially adopted, absolute immunity is only for high government officials and state sovereigns.¹⁴⁴ Even the term "absolute immunity" is misleading, though, because immunity is not absolute if there are clearly defined scenarios where the official—even presidents and legislators—cannot claim the immunity.¹⁴⁵ By applying immunity except where the plaintiff can show an incredibly specific set of facts—ignoring a warning from the Court in *Brower*¹⁴⁶—the court in *Vickers* places an immense and problematic burden on the plaintiff to defeat qualified immunity, because unique factual scenarios which give rise to a constitutional violation occur *ad infinitum*.¹⁴⁷

138. *Vickers* cites to *Vaughan* in his reply brief to say that force is not accidental if used to seize a suspect. *Id.* at 10. *Vickers* also claims that no authorities allow the evaluation of reasonableness *Id.* at 7 n.2. Contrarily, *Vickers* cites to *Vaughan* once more to contend that if an officer is using force to apprehend a suspect, then the court may evaluate reasonableness *Id.* at 10. These two principles contradict each other. Either SDC was not a suspect (as admitted in the case at hand), or SDC was actually considered a suspect and thus reasonableness should have been evaluated. The two concepts are mutually exclusive.

139. *Vickers*, 929 F.3d at 1325.

140. *Vickers* notes in his Appellant brief that the appropriate action would be to subdue the dog with a taser or pepper spray, then confirms later that he chose to use his gun instead of either of those two options. Brief for Appellant at 11, *Vickers*, 929 F.3d 1304 (No. 17-15566-DD).

141. *Vickers*, 929 F.3d at 1308.

142. See *Scheuer*, 416 U.S. at 239; see also *Butz*, 438 U.S. 478.

143. See *Vickers*, 929 F.3d at 1311.

144. See *Spalding*, 161 U.S. 483.

145. See, e.g., U.S. CONST. art. I, § 6, cl. 1.

146. *Brower*, 489 U.S. at 598–99.

147. Corbitt's attorney contends that police are not going to be aware of highly specified fact patterns. The police are "in the trenches, not studying case law." Telephone

Qualified immunity now approximates or surpasses absolute immunity.¹⁴⁸

The court in *Vickers* also shifts the burden of proof. When applying immunity to judges, prosecutors, jurors, and the like, the party asserting the defense had to explain why the defense applied and why public policy to hold officials accountable should not outweigh the defense.¹⁴⁹ The new shift in burden of proof contradicts judicial standards of having a party justify its own argument to the court.¹⁵⁰

Critiquing the expansion of qualified immunity and the shifting of burdens is not to say that police officers should have no form of institutionalized protections, but details matter. Courts should return to the founding principles of American jurisprudence and make the parties justify their own claims.¹⁵¹ Often, defendants have more access to their own evidence than the plaintiff.¹⁵² Here, the Plaintiff was required to not only prove her own case, but to disprove applicability of qualified immunity via the complaint.¹⁵³ Even first-year law students are repeatedly told that the burden of an "affirmative defense" rests on the defendant. While burden-shifting may not solve all of the qualified immunity problems and issues of police violence, this control mechanism will help achieve a result more consistent with constitutional protections and legislative intent—a form of "imperfect justice."¹⁵⁴

Interview with Ashleigh Madison, Plaintiff's Attorney, Southeast Law, LLC (Oct. 1, 2019). Therefore, the police need broader principles than the court is mandating here. *Id.* With complete insulation, law enforcement lacks its own form of law enforcement by stripping the checks and balances of the system. Rogue officers insulated from recourse provide an entirely new problem that § 1983 was designed to rectify. *Id.*

148. Jacob Sullum, *A License for Outrageous Police Conduct*, REASON.COM (Sept. 25, 2019, 12:15 AM), <https://reason.com/2019/09/25/a-license-for-outrageous-police-conduct/> (article highlighting several case examples where the court's decision to apply qualified immunity shocks the conscience).

149. *Butz*, 428 U.S. at 506.

150. This is true for parties asserting affirmative defenses in both civil and criminal cases. A question ripe for analysis is whether the judiciary is pursuing the same goal the purpose of qualified immunity aims to achieve if the burden of proof is on the person filing the original claim, not the person asserting the defense.

151. Interview with Sujata Gadkar-Wilcox, Associate Professor of Legal Studies, Quinnipiac University (Oct. 24, 2019).

152. *Id.*

153. See *Vickers*, 929 F.3d 1304. See also *Wooten*, 2017 U.S. Dist. LEXIS 199826. The district court recommended that the record proceed for factual development, much of which was to be presented by *Vickers* to provide a clear understanding of the case's exigencies concerning Bruce. *Id.*

154. Interview with Sujata Gadkar-Wilcox, Associate Professor of Legal Studies, Quinnipiac University (Oct. 24, 2019). For a more in-depth discussion of imperfect justice,

Extending qualified immunity jurisprudence along its current vector—exempting all officials exercising discretion from personal liability under the Constitution—eliminates the Constitutional protections and provides citizens with no redress for violations thereof.¹⁵⁵ Such an extension and interpretation is in direct violation of Congressional intent, legislated through § 1983.¹⁵⁶ Congress created § 1983 as a vehicle for litigating constitutional infringements at the hands of state agents so citizens would have recourse for their injuries.¹⁵⁷ By finding a multitude of avenues to expand the reach of qualified immunity, courts are acting against congressional intent and effectively nullifying the Fourth Amendment protections guaranteed by the Constitution and by Congress.¹⁵⁸

One avenue where this extension has already played out is the *Feres* doctrine.¹⁵⁹ While combat officials are exempt through absolute immunity, the *Feres* doctrine extends the liability shield to noncombat officials like military doctors.¹⁶⁰ The *Feres* doctrine extends the same justifications for shielding officials as qualified immunity: preventing frivolous suits, inconvenience, and interference with discretion.¹⁶¹ Immunity for combat officials makes sense because of the immediacy and gravitas of wartime discretion. Noncombat military officials do not have the immediacy and gravitas of war, meaning no reasonable justification to extend the shield to noncombat officials exists—unless the *Feres* doctrine and qualified immunity are just about not wanting to pay the money.¹⁶² Military doctors ought to be deterred from engaging

see Amartya Sen, *THE IDEA OF JUSTICE* (Allen Lane & Harvard Univ. Press, 2009) (critiquing the transcendental theory of justice proposed by John Rawls in favor of a comparative analysis on the merits of practical realities).

155. Baude, *supra* note 8, at 81 (contending that the Court modifies the doctrine to the point where it is seemingly unstable and can be manipulated at any time). See, e.g., *Pearson*, 555 U.S. at 223 (2009); *Saucier v. Katz*, 533 U.S. 194 (2001); *Harlow*, 457 U.S. at 818–19. The Article further emphasizes that the Court gives special treatment to qualified immunity on its docket. Baude, *supra* note 8, at 82.

156. 42 U.S.C. § 1983.

157. *Id.*

158. U.S. CONST. amend. IV; 42 U.S.C. § 1983.

159. See *Feres v. United States*, 340 U.S. 135 (1950).

160. *Id.*

161. Leo Shane III, *Supreme Court rejects bid to overturn prohibition on military malpractice cases*, MILITARY TIMES, (May 20, 2019) <https://www.militarytimes.com/news/pentagon-congress/2019/05/20/supreme-court-rejects-bid-to-overturn-prohibition-on-military-malpractice-cases/>.

162. Brenda Breslauer, *U.S. service members can't sue military doctors. A terminally ill Green Beret is fighting to change that.*, NBC NEWS, <https://www.nbcnews.com/health/health-care/u-s-soldiers-can-t-sue-military-doctors->

in medical practice. In a scathing dissent concerning the Supreme Court's decision to not hear another servicemember's case, Justice Thomas—with whom Justice Ginsburg agreed—wrote that "[s]uch unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."¹⁶³

Further, the balance between allowing officials to perform their discretionary duties and holding officials accountable will be upset if the trend is not reversed.¹⁶⁴ Officials would not be deterred from committing constitutional wrongs. Deterrence has already weakened as officers need not justify their actions via the qualified immunity defense, but rather, the plaintiff must justify her own case, and prove the defense wrong.¹⁶⁵ Furthermore, as noted in *Butz*, there would be no statutory compensation for victims either as "the Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused."¹⁶⁶ The doctrinal shift of immunity as a whole adulterates the protections once applied to elite government officials.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers

terminally-ill-n1070516 (last visited Nov. 13, 2019). Department of Defense officials—testifying on Capital Hill in May—justified the immunity by arguing that servicemembers already have their insurance paid for by the federal government, thus they are already compensated. Retired Major General John D. Altenburg said military readiness would be disrupted by litigation, and extra medical tests would be too expensive and distracting for servicemembers. *Id.*

163. *Daniel v. United States*, 139 S. Ct. 1713 (2019) (ordering denial of petition for *certiorari*) (Thomas, J. dissenting). Recently, Sgt. 1st Class Richard Stayskal challenged the *Feres* doctrine after military doctors failed to detect his cancer for months prior to diagnosis by a civilian doctor—the cancer was fatal by the time it was discovered. Breslauer, *supra* note 162.

164. State agents have responsibility to society. The agents are empowered to take action because society believes such action is beneficial. Alternatively, the more discretion state agents are given, the more opportunities there are to abuse such discretion. Therefore, restraints on a state agent's discretionary authority are necessary to curtail opportunities for abusive temptation.

165. *See, e.g., Lech v. Jackson*, 791 Fed. Appx. 771 (10th Cir. 2019) (determining that homeowners are not entitled to compensation under the Takings Clause where police blow up the homeowner's residence for public safety preservation).

166. *Butz*, 438 U.S. at 505.

of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.¹⁶⁷

Ultimately, the judicially invented doctrine of qualified immunity has mutated throughout the iterations of courts, resulting in a metamorphosis from a narrow and limited protection founded in the Constitution to a shield protecting behavior of those who have been known to frequently abuse their power in the most vulnerable moments.¹⁶⁸ The assumption that all behavior is okay until a victim of a constitutional violation proves otherwise is a pertinent factor of the police brutality in society.¹⁶⁹ By over-institutionalizing and expanding police protections beyond reasonable means, an underwritten, systematic approval of police brutality begins to form.¹⁷⁰ Creation of such a powerful, and dangerous, doctrine may be considered judicial legislation, now engraved in jurisprudence under a guise of *stare decisis*.¹⁷¹

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167. *United States v. Lee*, 106 U.S. 196, 220 (1882).

168. *See Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018) (denying qualified immunity for an officer who forced a minor to masturbate in front of police as part of the investigation).

169. *See, e.g.*, "Woman shot and killed by police officer in her own home" CNN, <https://www.youtube.com/watch?v=zzYizoixDnw>.

170. *See, e.g.*, Roberto Kant De Lima, BUREAUCRATIC RATIONALITY IN BRAZIL AND IN THE UNITED STATES: CRIMINAL JUSTICE SYSTEMS IN COMPARATIVE PERSPECTIVE. IN: Roberto Da Matta & David Hess, *THE BRAZILIAN PUZZLE: CULTURE ON THE BORDERLANDS OF THE WESTERN WORLD* 241–269 (Columbia Univ. Press, 1st ed. 1995). The case study of Rio de Janeiro demonstrates a larger history of the institutionalization of police violence due to a lack of accountability. *Id.* The efficacy of control mechanisms—such as legislation, standards of conduct, internal oversight, and the judiciary—is tethered to the relationship between police and citizens. *Id.* New controls or improvements on current mechanisms recalibrate the relationship and promotes consanguinity. *Id.*

171. *See Baude, supra* note 8, at 45.