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Unincorporating Qualified Immunity

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Unincorporating Qualified Immunity

Teressa Ravenell[*]

Scholars, judges, activists, and policymakers alike have criticized the doctrine of qualified immunity, which emerged in Pierson v. Ray *to shield government actors from monetary liability in a wide range of suits filed under 42 U.S.C. § 1983, derived from the Civil Rights Act of 1871. These criticisms have ranged from the practical to the principled, but they largely ignore the question of statutory interpretation: is it valid to read § 1983, which makes no mention of any defense or immunity, as incorporating a qualified defense for government officials who acted in good faith and with probable cause? The Court in* Pierson *found that this defense existed in the common law at the time the Civil Rights Act was passed, and it extrapolated from there that legislators would have barred the good-faith, probable-cause defense explicitly, had they wanted to prevent its successful assertion. This Article will analyze how the Court reached that conclusion, question whether the "dog that didn't bark" canon of congressional silence leads to* Pierson*'s conclusion, and review other approaches to statutory interpretation for a broader look at whether § 1983 incorporates qualified immunity. Finally, it will trace the expansion of qualified immunity far beyond its original (yet still dubious) formulation in* Pierson *in 1967. Ultimately, this Article will conclude that the foundations of qualified immunity in* Pierson*'s reading of § 1983 are shaky and that the doctrine is poised to fall.*

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"A foolish man builds his house on sand."[1]

INTRODUCTION

Six years after the Civil War ended, Congress passed the Civil Rights Act of 1871. Section 1 is currently codified as 42 U.S.C. § 1983. The original language of § 1983 is plain, simple, and powerful. It made liable "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." As the Supreme Court would later explain, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."[2] And, as the 42nd Congress made plain, the Act was intended "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States."[3] It guarantees a civil remedy and makes no mention of any defense or immunity.

Nevertheless, in 1967, almost one hundred years after the passage of §

1. *Matthew* 7:24–27. Jesus offered his listeners the following advice during his Sermon on the Mount:

> Therefore everyone who hears these words of mine and puts them into practice is like a wise man who built his house on the rock. The rain came down, the streams rose, and the winds blew and beat against that house; yet it did not fall, because it had its foundation on the rock. But everyone who hears these words of mine and does not put them into practice is like a foolish man who built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash.

Id. The parable teaches that if a person does not build their house on solid foundation, regardless of what materials they use, the house will fall when challenges arise.

2. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

3. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983).

1983, the Supreme Court held in *Pierson v. Ray* that "the defense of good faith and probable cause" shields officers from monetary liability in § 1983 actions.[4] The Court concluded that the defense existed under the common law in 1871 and reasoned that if Congress meant to abrogate the good-faith qualified-immunity defense it would have done so explicitly.[5]

Since 1967 when the Court decided *Pierson v. Ray*, the doctrine has evolved to provide "ample protection to all but the plainly incompetent or those who knowingly violate the law."[6] Recently, scholars and judges, including Supreme Court justices, have criticized qualified immunity for myriad reasons.[7] However, these criticisms largely have ignored a funda-

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

5. *See* Owen v. City of Independence*,* 445 U.S. 622, 637 (1980) ("[A] tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" (quoting *Pierson*, 386 U.S. at 555)).

6. Malley v. Briggs, 475 U.S. 335, 341 (1986).

7. Scholars have criticized how courts interpret qualified-immunity standards differently. *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) ("One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves."); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court."); *see also* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1891 (2018) (arguing that qualified immunity has prevented law's development, overprotected officers, created confusion about applicable standards, and increased cost and complexity of civil rights litigation); SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:5 (2020) ("Under *Harlow* [*v. Fitzgerald*], defendants on summary judgment motion frequently will be dismissed without a consideration of the merits.").

Judges have noted the doctrine's chilling effects and have called for its reexamination. *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (explaining how, according to Ninth Circuit Judge Reinhardt, the Supreme Court's recent qualified-immunity decisions have so powerfully shielded law enforcement that people are left without means to enforce their rights despite egregious violations); Ventura v. Rutledge, 398 F. Supp. 3d 682, 698 n.6 (E.D. Cal. 2019) ("[T]his judge [Dale A. Drozd] joins with those who have endorsed a complete re-examination of the doctrine [of qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases.").

Supreme Court Justices themselves have also criticized the doctrine. *See* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials . . . we have diverged to a substantial degree from the historical standards."); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("As I have observed earlier, our 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 . . . ."); Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (noting there is "no basis" for the "clearly established law" analysis); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[The majority's

mental question: whether § 1983 should be interpreted to have incorporated a qualified defense for government officials into the Civil Rights Act of 1871. Scott Keller and Professor William Baude both have considered whether qualified immunity existed as a common-law defense in 1871.[8] Their work is important and insightful.

However, the existence of the common-law defense in 1871 does not necessarily determine whether § 1983 should be interpreted to have incorporated a qualified defense for government officials into the Civil Rights Act of 1871.[9] Rather, this is a question of statutory interpretation, and, to date, scholarship largely has failed to analyze it as such—particularly regarding legislative intent.[10] This Article does exactly that.

This Article argues that the foundation upon which qualified immunity is based is deeply flawed, and the Supreme Court ought to revisit its conclusions in *Pierson v. Ray*, the fountainhead of the doctrine. To this end, this Article proceeds as follows: Part I provides a brief overview of § 1983, including its historical context. Part II discusses the emergence of the good-faith, probable-cause defense in *Pierson v. Ray*. Part III considers how the *Pierson* Court reached its conclusion that qualified immunity provides government officials a defense in claims for monetary damages. Specifically, Part III reconsiders *Pierson's* qualified-immunity determination by applying three common theories of statutory interpretation: textualism, intentionalism, and dynamic statutory interpretation. Part IV briefly considers qualified immunity's evolution and whether stare decisis should affect future judicial action. This Article concludes that qualified immunity is a doctrine built on sand and ready to fall.

I. THE CIVIL RIGHTS ACT OF 1871

The Reconstruction era can be summarized as a period of hope, resistance, and counter-resistance. Following the end of the war and the end

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upholding qualified-immunity defense] tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").

8. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1337 (2021) (providing a comprehensive review of the state of the common law in 1871 on state-officer immunities); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–61 (2018) (highlighting "the historical problems" associated with qualified-immunity defense and arguing there is no legal basis for qualified immunity).

9. *See* Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 43 (2018) ("[Q]uestions concerning the 'lawfulness' and contours of qualified immunity doctrine should not and never have been answered simply by looking to the common law as it stood in 1871.").

10. *But see* Baude, *supra* note 8, at 47 (basing article's conclusions on principles of statutory interpretation and framing the question as one of defeasibility rather than incorporation). *But cf.* Levin & Wells, *supra* note 9, at 41 (responding to Baude's article and pointing out Baude applied "his preferred rules of statutory interpretation").

of slavery in the South, newly freed slaves began making inroads. Some Blacks were able to exercise newly won rights—legally marrying and eking out more autonomous lives.[11] About 2,000 African Americans held public office at some level of government during the Reconstruction era.[12] Nevertheless, as Blacks inched forward, they were met with staunch resistance. Southern politicians railed against political and civil protections for newly freed slaves, and the Ku Klux Klan began its terroristic campaign.[13]

In 1871, the U.S. House of Representatives created a committee to investigate the violence in the South.[14] As Thomas W. Willeford, a former Klansman, testified before Congress, the Klan's purpose "was to damage the Republican party as much as they could—burning, stealing, whipping n*****s."[15] The Klan also regularly targeted white sympathizers and

11. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 84 (2008) (unearthing stories of formerly enslaved people and their descendants after the Emancipation Proclamation).

12. *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877, at 154–55 (1990) (describing political involvement of African Americans). A total of sixteen African Americans served in the United States Congress during the Reconstruction era, and more than 600 were elected to state legislatures. *Id*. at 150–51. Hiram Rhodes Revels became the first African American elected to the United States Senate, representing Mississippi, in 1870. *Id.* at 150.

13. *See* Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 130 (2004) ("[T]he Klan morphed into one of the United States' first terrorist organizations."). The Klan was established to maintain white power, white control, and white supremacy in the South. *Id.* The Klan used tactics developed in the years of slavery of implementing a "night patrol" system—when "[a]rmed, mounted patrols traveled Southern roadways at night, looking for runaway slaves, curfew violators, and revolt instigators," and "attempted to frighten slaves into obedience." *Id.* at 136. Klan violence against Blacks escalated throughout the Reconstruction era. "Black schools were burned, teachers beaten, voters intimidated and political opponents of both races kidnapped and murdered." *Id.* at 137 n.39.

14. CONG. GLOBE, 42d Cong., 1st Sess. 116–17 (1871). *See also id.* at 173–75 (stating language of his proposed bill). As Representative William Stoughton, a member of the House committee investigating the violence, stated,

> The evidence taken before the Senate committee in relation to the outrages, lawlessness, and violence in North Carolina establishes the following propositions:
>
> 1. That the Ku Klux organization exists throughout the State, has a political purpose, and is composed of the members of the Democratic or Conservative party.
>
> 2. That this organization has sought to carry out its purposes by murders, whippings, intimidation, and violence against its opponents.
>
> 3. That it not only binds its members to execute decrees of crime, but protects them against conviction and punishment, first by disguises and secrecy, and second, by perjury, if necessary, upon the witness-stand and in the jury-box.
>
> 4. That all the offenders in this order, which has established a reign of terrorism and bloodshed throughout the State not one has yet been convicted.

Id. at 320. *See also* CONG. GLOBE, 41st Cong., 3d Sess. 577 (1871) (referring to a resolution to create a select committee to investigate into alleged violence in the Southern states).

15. CONG. GLOBE, 42d Cong., 1st Sess. 340 (1871). *See also* STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I 603 (Bernard Schwartz ed., 1970) [hereinafter CIVIL RIGHTS] (providing testimony of Thomas W. Willeford).

northern carpetbaggers.[16] Despite the widespread and systematic violence, Klansmen were rarely, if ever, prosecuted and convicted for their crimes.[17] The Klan's ability to skirt the law was partially attributable to their willingness to protect one another,[18] but it was also due to local and state government officials' failure to prevent and to prosecute such lawlessness.[19]

Congress responded to Southern violence and resistance with a series of provisions, including the Civil Rights Act of 1871.[20] The Civil Rights Act of 1871, which consists of seven parts,[21] had two overall aims: "(1)

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16. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329–30 (1952) ("[T]he Negro was not alone in his tribulations; white persons who had supported the Union cause or who were bold enough to advocate civil rights for the Negro were also the victims of terrorism in the South."); *see generally* J. MICHAEL MARTINEZ, CARPETBAGGERS, CAVALRY, AND THE KU KLUX KLAN (2007).

17. CIVIL RIGHTS, *supra* note 15, at 603 (quoting testimony from former Klansman that he had never "heard of a Klu Klux being convicted of any offense" in the state).

18. *Id.* (noting that Klan's members were obligated to commit perjury for one another and, if they were able, serve on juries to ensure acquittal).

19. *Id.* at 605. As Representative William Stoughton stated before Congress, "The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed . . . . There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals." *Id*. Similarly, Senator Frederick T. Frelinghuysen lamented, "It is poor comfort to a community that have been outraged by atrocities, for the officials to tell them, 'We have excellent laws on our statute books.'" CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871).

20. The Civil Rights Act was debated in the House of Representatives, 42nd Congress, from March 28 to April 6, 1871 and approved on April 20, 1871. *See generally* CONG. GLOBE, 42d Cong., 1st Sess. 309–521 (1871) (noting actions of Southern violence throughout); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983).

Other noteworthy legislation includes the following: the Thirteenth Amendment (ratified in 1865), the Civil Rights Act of 1866, the Fourteenth Amendment (ratified in 1968), the Fifteenth Amendment (ratified in 1870), and the Civil Rights Act of 1875. Congress also established the Freedmen's Bureau in 1865. The Freedmen's Bureau, formally known as the Bureau of Refugees, Freedmen, and Abandoned Lands, was established by Congress to provide former slaves and poor whites in the South with food, housing, medical aid, schools, and legal assistance. *The Freedmen's Bureau*, NAT'L ARCHIVES, https://www.archives.gov/research/african-americans/freedmens-bureau [https://perma.cc/248B-5STE] (last visited Nov. 21, 2021).

21. *See generally* CIVIL RIGHTS, *supra* note 15, at 596. The first section of the bill created a federal cause of action for persons deprived of a constitutional right by persons acting under the color of state law. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (current version at 42 U.S.C. § 1983). The second section created civil and criminal liability for persons conspiring to deprive another of certain rights and privileges. *Id.* § 2. Sections 1 and 2 were enacted because the Klu Klux Klan and other armed groups, such as the Knights of the White Camelia and white-citizen councils, often acted under the color of state law with state and local government complicity. *See generally* Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 333–58 (1967). Sections 3 and 4 gave the President power to suppress insurrection and violence. Civil Rights Act of 1871 §§ 3–4. The fifth section created liability for jurors who violated their sworn oath in a prosecution arising under the Act and who were complicit in the underlying conspiracy or combination. *Id.* § 5. Section 6 made government officials civilly liable for damages caused by their neglect when they had knowledge of a

to provide civil and criminal sanctions to deter infringements upon civil rights; and (2) to provide authority to the government to meet with force unlawful combinations and violence which interfered with civil rights or the execution of justice or federal law."[22]

Section 1, which currently is codified as 42 U.S.C. § 1983, has become the Act's most litigated provision. In its original form, Section 1 read:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.[23]

However, the Act did not remain in this form long. On June 22, 1874, Congress enacted the Revised Statutes of 1873, which codified the federal laws that were in effect on December 1, 1873, including the Civil Rights Act of 1871.[24]

The Revised Statutes of 1873 was the culmination of years of work. In the late 1860s, "President Johnson appointed a commission to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in nature."[25] The Commission worked for six years to revise the statutory code. The process was far from straightforward because of the sheer volume of materials and the fact that many of the recorded statutes had been modified or repealed.[26] When the commissioners finally

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conspiracy under Section 2 and failed to act. *Id.* § 6. Finally, Section 7 stated in part, "[t]hat nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto" and allowed for the continuation and completion of any related criminal proceedings. *Id.* § 7.

22. CIVIL RIGHTS, *supra* note 15, at 591.

23. Civil Rights Act of 1871 § 1.

24. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012 (1938).

25. *Id.* at 1013.

26. *Id.* at 1012.

submitted their report to a joint committee of Congress, the congressional committee determined that the Commission had so altered the statutes that Congress would not pass their revisions.[27] Thomas Jefferson Durant then assumed the task.[28] He was instructed to undo the Commission's revisions and rework the statutes.[29] His work became the Revised Statutes of 1873.[30]

Following these revisions, Section 1 of the Civil Rights Act of 1871 read:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[31]

The statute was markedly different from its original form. "That any person" was changed to "every person."[32] Revisers expanded the language regarding putative plaintiffs to include "any citizen of the United States" and added "and laws" to the end of the privileges-and-immunities phrase.[33] They also deleted several passages, specifically the portion of the statute noting that defendants would be liable "any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding," the jurisdictional provision, and the reference to the Civil Rights Act of 1866.[34]

Legislators noted that the Revised Statutes of 1873 contained not only errors, but significant statutory changes, and they authorized another set

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27. *Id.* at 1013. Notably, throughout the drafting, editing, and revision process, various lawyers, committee members, and other individuals reviewed the revisers' work on multiple occasions. *Id.*

28. *Id.* at 1013–14.

29. *Id.*; *see also* 2 CONG. REC. 820 (1874) (statement of Rep. Luke Poland) ("[W]e have, by the aid of Mr. Durant and by our own efforts in examining it, endeavored to make this a perfect reflex of the statutes as they stand.").

30. Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 LAW LIBR. J. 213, 218 (2020).

31. 24 Rev. Stat. § 1979 (1st ed., 1875), no. 1.

32. *Compare* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 *with* Rev. Stat. § 1979.

33. *Compare* Civil Rights Act of 1871 § 1 *with* Rev. Stat. § 1979.

34. *Compare* Civil Rights Act of 1871 § 1 *with* Rev. Stat. § 1979.

of revisions in 1878.[35] Nevertheless, the Civil Rights Act of 1871 remained in its revised form until 1979.[36]

Even in its revised form, Section 1 of the Civil Rights Act continued to promise injured parties a federal civil remedy. However, this provision of the Act was seldom used until the mid-1960s. From 1871 until 1920, only twenty-one cases were decided under 42 U.S.C. § 1983.[37] This dormancy was due, in part, to "unprecise draftsmanship" and "prevailing social and ethical values of the time."[38] "The greatest obstacle to the Act's successful application, however, stem[med] from judicial antipathy toward this type of reconstruction legislation."[39] Between its passage in 1871 and the 1960s, § 1983 was, essentially, moribund.[40]

II. "THE DEFENSE OF GOOD FAITH AND PROBABLE CAUSE"

The 1960s, not unlike the 1860s, was a decade of significant civil rights legislation and litigation.[41] In late 1960 the Supreme Court heard oral arguments in *Monroe v. Pape*.[42] The action stemmed from an early morning raid and arrest.[43] James Monroe alleged the City of Chicago and thirteen

35. The Civil Rights Act of 1871 was not the only statute to undergo revisions. House of Representatives member William Lawrence (R. Ohio) noted that the revisers had very often changed the meaning of existing statutes. *See* 2 CONG. REC. 825–28 (1874) (detailing revised statutes' changes from original statutes). In the first few years of the revision's enactment, more than 250 errors were discovered in the original enactment as well as in subsequent statutes correcting errors in previous versions. *See* Dwan & Feidler, *supra* note 24, at 1014 (explaining discovery of errors in revised statutes). The 1878 authorization was intended, in part, to address the discrepancies between original and revised statutes. Act of March 9, 1878, ch. 26, 20 Stat. 27. To this end, it included a provision specifically advising that when there were discrepancies between the original and revised version, the original version controlled. Dwan & Feidler, *supra* note 24, at 1016.

36. *See* Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (amending section 1979 of the Revised Statutes (codified at 42 U.S.C. § 1983) to include coverage of the District of Columbia in 1979).

37. Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951). Now codified as Section 1983 and classified within Title 42 of the U.S. Code, this section was formerly classified to Section 43 of Title 8 of the U.S. Code. 42 U.S.C. § 1983 note (Codification).

38. *Id.* at 362.

39. *Id*. at 363.

40. In the 1940s the Court began rethinking its definition of state action in the criminal context. Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 340 (1989) (quoting Screws v. United States, 325 U.S. 91, 109 (1945)). Specifically, the Supreme Court broadened the scope of claims to include "any misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* In 1961, the Supreme Court applied this broader definition of state action to § 1983. *Id.* This lawsuit was *Monroe v. Pape*, 365 U.S. 167 (1961).

41. William L. Taylor, *Federal Civil Rights Laws: Can They Be Made to Work?*, 39 GEO. WASH. L. REV. 971, 972 (1971).

42. 365 U.S. 167 (1961).

43. *Id.* at 169 ("The complaint allege[d] that 13 Chicago police officers broke into petitioners'

Chicago police officers violated the Fourteenth Amendment and that defendants were liable under § 1983.[44] The police defendants argued they were not liable because the search and arrest were in violation of Illinois state law and, accordingly, they were not acting "under color of state law," as required for § 1983 liability.[45] The Supreme Court rejected the police officials' argument and held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[46] This interpretation was crucial to § 1983's utility.[47] Had the Court limited liability to those cases where government officials were following state or local law, it would have foreclosed liability in all but those few cases in which state and local laws actually direct unlawful behavior.

Scholars attribute the rise in § 1983 litigation in the 1960s and 1970s to *Monroe*.[48] The increase in § 1983 filings also provided courts with more occasions to consider the statute and its defenses.

In 1967, the Supreme Court heard *Pierson v. Ray*, the first case to raise the good-faith, probable-cause defense since § 1983's mid-twentieth century resurrection.[49] This case, in many ways, is an archetypal civil-rights

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home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further allege[d] that Mr. Monroe was then . . . detained on 'open' charges for 10 hours . . . .").

44. *Id.* at 170.

45. *Id.* at 172.

46. *Id*. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

47. *See* Teressa Ravenell, *The Law Governing their Conduct*, 64 HOW. L.J. 349, 354 (2021) ("*Monroe* ensured government officials were liable under § 1983 for violating federal law even if, simultaneously, they were violating state or local laws.").

48. Comment, Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 934 (1984); *see also* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 15–21 (1980) (discussing § 1983 litigation after *Monroe*). Whitman provided the following statistics regarding § 1983 litigation in the 1960s and 70s:

> Between 1961 and 1979, the number of federal filings under section 1983 (excluding suits by prisoners) increased from 296 to 13,168. Civil rights petitions by state prisoners increased from 218 cases in 1966, to 11,195 in 1979. In 1976, almost one out of every three "private" federal question suits filed in the federal courts was a civil rights action against a state or local official.

Id. at 6.

49. Pierson v. Ray, 386 U.S. 547, 547 (1967). It is noteworthy that Congress passed no less than nine civil-rights statutes between *Monroe v. Pape*, decided in 1961, and *Pierson v. Ray*, decided in 1967. *See* Fair Labor Standards Amendments of 1961, Pub. L. 87-30, 75 Stat. 65, 29 U.S.C. § 203 et. seq. (increases minimum wage and provides coverage for employees); Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, 29 U.S.C. § 206 (prohibits discrimination in employment compensation on the basis of sex); Title II, Civil Rights Act of 1964, Pub. L. 88-352, §§ 201–07, 78 Stat. 241, 243–46, 42 U.S.C. § 2000a (prohibits discrimination in places of public accommodation); Title VI,

case. In *Pierson*, a multiracial group of clergymen were arrested for attempting to use segregated facilities while on a "prayer pilgrimage" to promote racial equity and integration.[50] They sued the government officials who arrested and imprisoned them.[51] They filed their complaint on September 10, 1962, shortly after the Supreme Court had held a similar state statute unconstitutional, and named the police officers who arrested them and the magistrate judge who convicted them as defendants. They alleged the officials "had violated § 1983 . . . and that respondents were liable at common law for false arrest and imprisonment."[52] At the civil trial the defendants argued that the plaintiffs instigated a violent mob, and, thus, their arrests were necessary to mitigate the situation; therefore, the defendants were immune from civil liability.[53] However, on appeal, the Fifth Circuit held that, although the judge was entitled to immunity, the arresting officers "would be liable in a suit under § 1983 for an unconstitutional arrest even if they acted in good faith and with probable

Civil Rights Act of 1964, Pub. L. 88-352, §§ 601–05, 78 Stat. 241, 252–53, 42 U.S.C. § 2000d (prohibits discrimination in all federally funded programs); Title VII, Civil Rights Act of 1964, Pub. L. 88-352, §§ 701–16, 78 Stat. 241, 253–66, 42 U.S.C. § 2000e (prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex); U.S. CONST. amend. XXIV, § 1 (1964) (eliminates poll taxes in federal elections); Older Americans Act of 1965, Pub. L. 89-73, 79 Stat. 218, 42 U.S.C. § 3001 et seq. (provides assistance in the development of new programs to help older persons); Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286, 42 U.S.C. §§ 301–1305 (provides hospital insurance and medical assistance to older persons); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 52 U.S.C. § 10301 (1965) (prohibits denial of right to vote on the basis of race); Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830, 29 U.S.C. § 201 (extends employment protections and benefits to additional persons); Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, 29 U.S.C. § 621 et seq. (1967) (prohibits discrimination in employment on the basis of age).

Additionally, United States presidents during this period signed several executive orders establishing sanctions and enforcement measures for those entities that do not comply with equality opportunities. *See* Exec. Order No. 10,925, 3 C.F.R. § 448 (1959–1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *as amended in* 42 U.S.C. § 2000e (Supp. V, 1965–1969) (established the President's Committee on Equal Employment Opportunity); Exec. Order No. 11,114, 3 C.F.R. § 774 (1959–1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-1965), *as amended in* 42 U.S.C. § 2000e (Supp. V 1965–1969) (extended prohibitions of previous orders to federal and federally aided construction projects); Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *as amended in* 42 U.S.C. § 2000e (Supp. V, 1965–1969) (vesting administrative control in the Secretary of Labor and established the Office of Federal Contract Compliance as the executory body). Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963), *as amended in* 42 U.S.C. § 1982 (1964) (requiring all departments and agencies in the executive branch "to take all action necessary and appropriate to prevent discrimination [in housing] because of race, color, creed or national origin").

50. Respondent police officers arrested and charged the clergymen for breaching the peace in violation of § 2087.5 of the Mississippi Code. *Pierson*, 386 U.S. at 549. Respondent judge convicted petitioners, but their cases were dropped on appeal. *Id.* at 549–50.

51. *Id.*

52. *Id.* at 550. To be clear, plaintiffs brought both state and federal claims against the defendants.

53. *Id.* at 557.

cause in making an arrest under a state statute not yet held invalid."[54] In short, "good faith and probable cause" was not a defense to a § 1983 claim.[55] The Supreme Court granted certiorari to determine, inter alia, whether "the Court of Appeals correctly held that [police officers] could not assert the defense of good faith and probable cause to an action under § 1983 for unconstitutional arrest."[56]

When they appeared before the Supreme Court, the police officials argued that they had probable cause to arrest the clergymen and that this was a defense to liability.[57] Defense counsel and the justices spent approximately thirteen minutes of the oral argument (which lasted nearly seventy minutes) discussing the question of immunity for the police officers.[58] In those few minutes, Elizabeth Watkins Hulen Grayson made the following statement:

> I'd like to get to the immunity of the police officers because if there is anyone that I feel [I] have [to] stand here that needs representation and that I would like to do my best to represent, it is the policeman on the beat in these troubled times. When he doesn't know what to do, he has to make snap decisions. He has no lawyer running along his side to tell him what the law is and what the facts are, whether he's right. . . . He doesn't know what the fine points of the law. He has got to use his best judgment in whether or not there is violence about to occur.
>
> And that is what we submit. That is the common-law immunity of police officers, it . . . goes as far back as the immunity of judges. If they have reasonable grounds to believe that there's probable cause about a violence, then under the common-law breach of the peace they have a right to make an arrest without a warrant. In other words, probable cause is a complete defense

54. *Id*. at 550.

55. Pierson v. Ray, 352 F.2d 213, 218 (5th Cir. 1965), *aff'd in part, rev'd in part* 386 U.S. 547 (1967) ("Inherent in the *Monroe* holding is the principle that good faith and reliance upon a state statute subsequently declared invalid are not available as defenses. *Monroe v. Pape* did not expressly rule upon the question of immunity but the result necessarily implies rejection of such a defense as a general proposition.").

56. *Pierson*, 386 U.S. at 551–52. The Court also granted certiorari to determine whether judicial immunity shielded the judge from damages and whether the plaintiffs should be denied damages because they consented to their arrest by going to a bus station anticipating they would be illegally arrested. *Id*.

57. Oral Argument at 57:48, Pierson v. Ray, 386 U.S. 547 (1967) (No. 79), https://www.oyez.org/cases/1966/79 [https://perma.cc/D2H8-59WS] [hereinafter *Pierson* Oral Argument].

58. *See generally id.* Counsel and the Court spent most of the oral arguments debating the applicability and parameters of judicial immunity.

> to a police officer for a suit for damages at common law. There is no change under 1983.[59]

Shortly thereafter she shifted to good faith. Specifically, she argued the following:

> The rule in Mississippi and the rule of most places is that unconstitutional law is a nullity cannot be applied to work hardship to oppose liability on a public officer who in the performance of his duty was acting in good faith in reliance on the validity of the statute before any court has decided it invalid. . . . [Y]ou can't impose liability on someone which were legal when they did it and then come along six years later, saying we're going to make that, that there was [a] constitutional statute then but we're going to make it illegal now.[60]

Accordingly, the police officials' defense to the false-arrest claim consisted of two different strands: the defense of probable cause, which, under common law, is a defense to tort false-arrest claims, and the good-faith defense, which stems from reasonable reliance on a facially constitutional statute. So understood, the defense is quite narrow; the probable-cause argument only applied in cases alleging false arrest, and the good-faith defense was limited to those cases where the defendant relied on state or local law.[61]

Mississippi Code § 2087.5 is central to this dispute. The statute made it unlawful for a person to congregate in a public place with the "intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby."[62] The officers alleged that when the clergymen arrived at the bus depot, "thirty or forty [people] followed them in," and the crowd was upset and making "wrongful and violent gestures."[63] The officers testified they "felt imbalance was about to ensue and that it would ensue if they did not arrest them."[64] The plaintiffs alleged they were arrested because they violated the "White Only" sign that

59. *Pierson* Oral Argument, *supra* note 57, at 56:11–57:58 (as transcribed by the author from official audio file).

60. *Id.* at 1:03:41–1:04:33 (as transcribed by the author from official audio file).

61. In fact, defense counsel noted in oral argument, neither defense would have been available to the police officials in *Monroe v. Pape* because liability was premised on an illegal search (not an unlawful seizure) and the defendants were acting "contrary to the state statute." *Id.* at 1:06:29–1:06:54 ("Monroe versus Pape didn't even deal with acting under state statute in good faith believing it was to be valid."); *see also* Monroe v. Pape, 365 U.S. 167, 169 (1961) (addressing a § 1983 lawsuit against police officers and the City of Chicago after thirteen police officers invaded and ransacked a family's home without a warrant, and arrested and detained plaintiff for ten hours without a warrant and without arraignment).

62. Pierson v. Ray, 386 U.S. 547, 549 n.2 (1967).

63. *Pierson* Oral Argument, *supra* note 57, at 41:37–42:02.

64. *Id.*

was posted outside the bus station and that the officers fabricated the angry mob.[65] The parties agreed that the clergymen had tickets to board the bus and remained peaceful throughout the encounter.[66]

To prevail on their § 1983 claim, the plaintiffs had to prove that the defendants deprived them of a constitutional right.[67] The officers' decision to arrest the clergymen implicated both the Fourth Amendment and the Fourteenth Amendment equal protection.[68] The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures.[69] If the officers arrested the clergymen without probable cause, they deprived them of this right.[70] Assuming the truth of the officers' allegations, arguably, it was the crowd, not the clergymen, who violated § 2087.5.[71] Furthermore, the officers' decision to arrest the clergymen rather than the crowd of whites raises equal protection concerns. The Equal Protection Clause ensures that states provide persons within their jurisdiction equal protection under the law.[72] This provision was passed, in part, to ensure that Blacks were not subjected to harsher criminal or civil penalties than their white counterparts.[73]

Accordingly, there are three related issues at play in *Pierson*:

(1) whether the defendants could assert a defense of good faith and probable cause in a § 1983 action for wrongful arrest;[74]

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65. *Pierson*, 386 U.S. at 553.

66. *Id.*

67. Gomez v. Toledo, 446 U.S. 635, 640 (1980) (citing Monroe v. Pape, 365 U.S. 167, 171 (1961)).

68. *See Pierson*, 386 U.S. at 553 (describing officers' conduct toward plaintiffs).

69. U.S. CONST. amend. IV.

70. People v. Melock, 599 N.E.2d 941, 946 (Ill. 1992) ("Absent probable cause or a warrant based thereon, an arrest is violative of the fourth amendment protections." (citing Dunaway v. New York, 442 U.S. 200 (1979))); Dunaway v. New York, 442 U.S. 200, 216 (1979).

71. *See Pierson*, 386 U.S. at 553 (describing police accounts of unruly mob).

72. U.S. CONST. amend. XIV, § 1.

73. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard, R-Mich.) ("[The Equal Protection Clause] abolishes all class legislation . . . and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."); *see also, e.g.*, Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L.R. 499, 531–32 (1985) (noting the Equal Protection Clause does more than protect individuals against discrimination, but also ensures states enforce those protections); Avins, *supra* note 21, at 342, 347, 351 (explaining that the Equal Protection Clause concerned the administration and enforcement of laws affording citizens an affirmative right to protection from discrimination).

74. As the defendants pointed out in their brief, except for the Fifth Circuit, all the appellate courts to address this issue held that police officers were shielded by the good-faith, probable-cause defense. Brief for Respondents in Cause No. 79 and Petitioners in Cause No. 94 at 45, Pierson v. Ray, 386 U.S. 547 (1967) (Nos. 79, 94), 1966 WL 115420; *see also* Cobb v. City of Malden, 202

(2) whether the defendants had probable cause under the statute—i.e., whether there was a Fourth Amendment deprivation;[75] and finally,

(3) even assuming they had probable cause, whether police officials deprived the clergymen of their Fourteenth Amendment equal-protection rights by arresting them and not arresting the crowd of whites who had gathered. So understood, the Court could have resolved this case in several different ways. First, as the defendants suggested, the justices could hold that the defendants were entitled to immunity based upon good faith and probable cause—the defendants were not liable because they relied in good faith on a facially constitutional statute and had probable cause to believe the plaintiffs violated that statute. They also could have held that plaintiffs failed to establish a constitutional deprivation, which was a necessary element of their claim, because the defendants had probable cause to arrest them under the statute, so the police officials did not violate the Fourth Amendment. Finally, they might have held that even if the arresting officers had probable cause to arrest the plaintiffs, the officials violated the Fourteenth Amendment's Equal Protection Clause when they failed to arrest the white aggressors who had gathered at the station. Furthermore, the good-faith, probable-cause defense would be moot in this context—good faith is negated by discriminatory intent and probable cause is irrelevant to Fourteenth Amendment equal-protection claims.[76]

Ultimately, the Supreme Court's decision regarding the police officers' liability centered on the defendants' immunity argument, rather than the underlying constitutional claims. Specifically, the Court held "that the defense of good faith and probable cause, which the Court of Appeals

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F.2d 701, 707 (1st Cir. 1953) (affirming city council members' qualified-immunity defense); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963) (affirming judge's and prosecutor's immunity); Jennings v. Nester, 217 F.2d 153, 155 (7th Cir. 1954) (dismissing plaintiff's § 1983 claim); Mueller v. Powell, 203 F.2d 797, 800 (8th Cir. 1953) (affirming probable-cause defense); Agnew v. City of Compton, 239 F.2d 226, 231 (9th Cir. 1956) (dismissing § 1983 claim when officers misunderstood law); Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963) (reversing directed verdict order in favor of officers, because jury question arose as to whether officers' conduct was "so arbitrary, unreasonable and without probable cause" for liability under § 1983).

With that said, many of the cases defendants cited to did not directly address the question of a good-faith, probable-cause defense in § 1983 cases. *See e.g.*, Barr v. Matteo, 244 F.2d 767, 769 (D.C. Cir. 1957) (considering whether government official waived "qualified privilege" in a libel action); Norton v. McShane, 332 F.2d 855, 863 (5th Cir. 1964) (applying official immunity to police officers in three malicious arrest claims); Cohen v. Norris, 300 F.2d 24, 34 (9th Cir. 1962) (noting it is not the court's position to narrow the application of § 1983 claims).

75. *See* Teressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C. L. REV. 379, 399 (2021) (identifying probable-cause issue often embedded in § 1983 claims alleging false arrest, false imprisonment, or malicious prosecution).

76. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."[77] The Court rationalized the availability of common-law immunities as follows:

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . Congress would have specifically so provided had it wished to abolish the doctrine.[78]

As numerous judges and scholars have observed, since *Pierson*, the qualified-immunity doctrine has continued to grow and evolve.[79] Yet, as judges and legislators continue to consider the propriety of the qualified-immunity doctrine, it seems appropriate to consider its origins and, more specifically, whether the Court correctly held in *Pierson v. Ray* and properly recognized the defense of good faith and probable cause in § 1983 actions.[80] This is best understood as a question of statutory interpretation.[81]

III. THE ART OF STATUTORY INTERPRETATION

In 1803, Chief Justice Marshall announced that it is "emphatically the province and duty of the judicial department to say what the law is."[82] Yet statutory interpretation is no easy task.[83] Perhaps it is because of the

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

78. *Id.* at 554–55. The Supreme Court did not actually determine that the officials were entitled the defense of good faith and probable cause; rather, they held it was available to them and remanded the case for further consideration. *Id.* at 558.

79. *See* Levin & Wells, *supra* note 9, at 63–66 (discussing several notable Supreme Court holdings on qualified immunity following *Pierson*); *see also* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 613–15 (2021) (explaining how the Court's analysis of § 1983 claims has shifted over time); *see also, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) (explaining how qualified-immunity doctrine has evolved to extend protection to almost all but the plainly incompetent).

80. To be clear, the *Pierson* majority did not hold that the officers were entitled to qualified immunity; rather, it held that immunity was available in § 1983 claims alleging false arrest and remanded the case back to the trial court to determine whether the officers "reasonably believed in good faith that the arrest was constitutional." *Pierson*, 386 U.S. at 557–58.

81. *See* Levin & Wells, *supra* note 9, at 42 ("Common sense suggests that this type of litigation raises issues of statutory interpretation . . . .").

82. Marbury v. Madison, 5 U.S. 137, 177 (1803).

83. *See* Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1206 (1990) ("The business of statutory interpretation consists in giving meanings to words, a task more difficult than it sounds."). For example, lawyers have debated the proper scope of the hypothetical law "no vehicles in the park" for decades. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION:

inherent challenges of statutory interpretation that the Supreme Court has failed to develop a clear system for executing this essential job. [84] Justice Scalia once lamented, "We American judges have no intelligible theory of what we do most."[85] In short, it is unclear just *how* judges ought to interpret the law.[86] "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[87] This, to say the least, makes the task of interpreting statutes cumbersome—there is no clear roadmap how, exactly, one ought to proceed.[88]

Judges and scholars have long debated how courts should interpret statutes.[89] Accordingly, there are many ways to read a statute, and there is rarely, if ever, a clear "right way" to do so.[90] This is especially true of 42 U.S.C. § 1983 – a Reconstruction-era statute that Congress has revised and amended and on which the Supreme Court has rendered dozens of

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THEORIES, TOOLS, AND TRENDS 1 (2018), https://crsreports.congress.gov/product/pdf/R/R45153 [https://perma.cc/L8AD-9PME]. "Vehicles" may seem straightforward, yet does the term include bicycles? Golf carts? Strollers? Drones? *Id.* ("This deceptively simple hypothetical . . . illustrates the challenges of statutory interpretation.").

84. *See* Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 585–86 (2001) ("Despite significant scholarly and judicial attention, no universally accepted approach to statutory interpretation has emerged in America.").

85. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (1997). Scalia noted, "So utterly unformed is the American Law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is." *Id.* at 16.

86. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

87. *Id.*

88. *See id.* (expressing hope that a judge's own considered theory of statutory interpretation will serve the law's ultimate purpose). The uncertainties of interpreting § 1983 are further compounded if one believes, as Levin and Wells assert, that § 1983 is a common-law statute. *See* Levin & Wells, *supra* note 9, at 43 (noting that scholars like Professor William Baude premise their interpretation of § 1983 on it being a "normal" statute, but asserting that normal rules of interpretation do not apply to this "common law statute").

89. *See* John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 203 (2002) (reflecting on the long debate over judge's role interpreting statutes).

90. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) ("One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases."). As Professor Mullins has observed, we have a "surplus of theories." Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 16–18 (2003) (providing the following non-exhaustive list of interpretative canons: originalism, intentionalism, modified intentionalism, imaginative reconstruction, purposivism, textualism, New Textualism, structural textualism, dynamic statutory interpretation, and practical reasoning).

decisions.[91]

Since the 1960s when plaintiffs began filing § 1983 claims more regularly, judges have debated how to interpret the statute, including the applicability of the qualified-immunity defense.[92] Justice Thomas has questioned the disconnect between the immunity available to government officials in 1871 and the contemporary qualified-immunity defense.[93] He also has complained that the Court has "completely reformulated qualified immunity along principles not at all embodied in the common law."[94] Current and former justices have voiced similar concerns about the qualified immunity doctrine, and Justice Sotomayor has become more vocal about the dangers of the doctrine.[95]

Although some justices have questioned various aspects of the qualified-immunity defense, none has questioned whether Congress intended

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91. *See generally*, Levin & Wells, *supra* note 9, at 54–62 (noting various tools the Court has used to interpret § 1983).

92. *See id.* (noting how the Court decided several cases after *Pierson v. Ray*).

93. Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). Justice Thomas went on to say that the Court asserted its power to make "freewheeling policy choice[s]" and recommended that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id.* at 1871–72 (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)); *see also* Baude, *supra* note 8, at 48 (arguing that common-law qualified immunity looks very different now from when it was created in 1871).

94. *Ziglar*, 137 S. Ct. at 1871 (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987)). Three years later in *Baxter v. Bracey*, he argued the doctrine is "no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (quoting *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring)). Justice Thomas wrote, for the first century of its existence, "the Court did not recognize an immunity under § 1983 for good-faith official conduct." *Id.* at 1863. In subsequent cases, immunity was confined to certain circumstances based on specific analogies to the common law. *Id.* Later, the Supreme Court abandoned that approach and only applied the immunity to state executive officials, the National Guard, and university presidents for practical reasons. *Id.* The seminal qualified-immunity case, *Harlow v. Fitzgerald*, changed the trajectory of the defense entirely. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding government officials not liable for civil damages when their conduct "does not violate clearly established statutory or constitutional rights" they should reasonably have known). Justice Thomas made similar criticisms in 2021 when the Court once again declined to hear a case. *See* Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., dissenting) ("[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?").

95. *See* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials . . . we have diverged to a substantial degree from the historical standards."); *see also* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[The Court] has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted . . . ."); Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (arguing qualified-immunity doctrine in effect "renders the protections" of the Constitution "hollow"); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing Supreme Court's reversal of Ninth Circuit's denial of qualified immunity for an officer who shot a woman holding a knife "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished").

to incorporate the defense when it enacted the Civil Rights Act of 1871.[96] The remainder of Part III considers how the Supreme Court has moved beyond § 1983's statutory language to hold that qualified immunity provides government officials a defense in claims for monetary damages.

As noted in Part II, *Pierson v. Ray* is the fountainhead case for qualified immunity.[97] There, the Court addressed the propriety of qualified immunity in three swift steps; it

(1) considered the statutory language,[98]

(2) described the legislative history and common-law defenses available to police officials,[99] and

(3) discussed the policy considerations justifying immunity.[100]

Conveniently, these steps generally align with the theories of statutory interpretation: textualism, intentionalism, and dynamic statutory interpretation, respectively. Part III reconsiders *Pierson's* qualified-immunity determination applying each of these theories.

A. Textualism

Textualism probably offers the most straightforward approach to statutory interpretation. Black's Law Dictionary defines textualism as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means."[101] Justice Scalia, a renowned textualist, has explained that the aim of a textualist is not to inquire what the legislature meant, but to ask what the statute means.[102] A textualist determines what the statute means by reading and adhering to the statutory text.[103] Scalia offered the following advice regarding statutory interpretation: "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[104]

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96. *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (expressing doubt about qualified-immunity jurisprudence). Furthermore, to date, lower courts and scholars also have failed to consider this issue. *See supra* notes 9–10 and accompanying text (arguing qualified immunity is a question of statutory interpretation but has not been analyzed as such).

97. *See supra* Part II (discussing emergence of good-faith, probable-cause defense).

98. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967) ("[Section] 1983 . . . makes liable 'every person' who under color of law deprives another person of his civil rights.").

99. *See id.* ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.").

100. *See id.* at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

101. *Textualism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

102. SCALIA, *supra* note 85, at 23.

103. BRANNON, *supra* note 83, at 13–14.

104. SCALIA, *supra* note 85, at 23.

In 1967, when the Court decided *Pierson v. Ray*, § 1983 read in its entirety:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[105]

Had the *Pierson* Court limited itself to § 1983's statutory language, there is little question the justices would have concluded that the defendants were not entitled to any sort of affirmative defense. In 1967, the statute did not mention any immunities or defenses.[106] Furthermore, the Act guaranteed that "every person" acting under color of state law who causes a person to be deprived of a constitutional right will be liable for that deprivation.[107] A defense or immunity necessarily would undermine this broad guaranty. If some officials are immune, then it is no longer true that "every person" acting under color of state law is liable. Thus, had the Court limited itself to § 1983 statutory language, it ought to have concluded that the defendants were not entitled to the good-faith, probable-cause defense.

The Court, however, did not stop with the statutory text, and instead moved to § 1983's legislative history.[108]

B. Intentionalism

Intentionalism offers one explanation as to why the *Pierson* Court did not end its inquiry with the statutory language. Intentionalism is based upon the principle that the Court ought to act "as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."[109] However, one of the chief criticisms of intentionalism is that it

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105. *Pierson*, 386 U.S. at 548 n.1.

106. *Id.*

107. *Id.*

108. *Id.* at 554 (noting legislative record did not indicate Congress meant to abolish common-law immunities).

109. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990). Intentionalism and originalism are synonymous. *See Intentionalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) (referring readers to originalism).

Purposivism is a related but distinct theory of statutory interpretation. Purposivism is based upon the principle that every legislative act has a purpose, and a judge's aim should be to interpret the statute to best effectuate that purpose. Eskridge & Frickey, *supra* note 109, at 332–33. Applying this doctrine, the Supreme Court has said, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940). Section 1983's mandate seems

is often difficult to discern legislative intent.[110]

In the face of these challenges, canons give judges a "rule" they can apply to interpret the text.[111] Several canons explicitly concern legislative intent.[112] In *Pierson*, the Court's decision regarding the availability of the good-faith, probable-cause defense seems to rest entirely on the Sherlock Holmes Canon, or the "dog that did not bark" canon, which allows the Court to infer from congressional silence an intent to maintain status quo.[113]

This is exactly what the Court did in *Pierson*. Specifically, the Court concluded, "Congress would have specifically so provided had it wished to abolish the doctrine."[114] This conclusion, however, is questionable in several respects. There are, of course, the general criticisms scholars have lodged against this canon.[115] Setting these aside, it remains unclear that

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clear—every person acting under color of state law shall be liable for subjecting, or causing another to subject, a person to the deprivation of a federally protected right.

110. Eskridge & Frickey, *supra* note 109, at 325–26. Other criticisms of intentionalism include: the questionable assumption that judges can recreate historical understanding, the possibility that the interpretive issue was not considered by the original legislature, and the construction of original legislative intent puts aside other values of statutory interpretation. *Id.* at 330–32. Section 1983's unique revisionist history compounds this problem. Section 1983 was enacted in 1871 but underwent significant revisions in 1873. *See supra* Part I (giving judges and scholars two different conversations to consider).

111. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (stating that while canons are not rigid rules, they are "guides" that help judges determine legislative intent).

112. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 97–100 (1994) (outlining canons of statutory interpretation in appendix). Specifically, canons such as the rule of continuity and the "dog didn't bark" canon among others, require the court to look at legislative intent to determine their applicability. *Id.* at 99, 101.

113. *See Pierson*, 386 U.S. at 554–55 (reasoning that if Congress meant to abolish common-law immunities when it passed § 1983 it would have explicitly done so). Professor Krishnakumar observed that cases relying on this canon may be divided into three categories:

> (1) the "no mention" cases, in which the Court posits that the rejected interpretation would work a drastic change in the law, and simply notes that there was no mention of such a change in the legislative history (or, in some cases, in the statutory text); (2) the "silence-is-telling" cases, in which the Court posits that the rejected interpretation would work a drastic change in the law, emphasizes that no one discussed such change in the legislative record, and insists that if Congress had intended the change, someone surely would have commented on it; and (3) the bankruptcy cases, in which the Court invokes a bankruptcy-law-specific presumption that Congress does not intend to effect changes to pre-Code practice, unless the legislative history indicates otherwise.

Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 7 (2016). She also noted that some cases do not explicitly reference the canon, "though the presumption they subtly invoke is very much the one embodied in the canon." *Id.* at 9.

114. *Pierson*, 386 U.S. at 554–55.

115. *See, e.g.*, Krishnakumar, *supra* note 113, at 22 ("First, the canon makes several improbable assumptions about how the legislative process works. Second, the canon is conceptually loose, lacking any clear limits or boundaries for defining problematic levels of change. Moreover, it is somewhat circular in its logic. Third, and related to the second, the canon provides inadequate

this canon should apply in this particular context—a civil remedial statute that does not purport to codify the common law.

Furthermore, even if one is convinced that the canon applies, the conclusion that Congress incorporated a qualified-immunity defense into § 1983 depends on two underlying factual points: (1) that Congress was actually silent regarding the abrogation of common-law defenses and (2) that this was a common-law defense in 1871. A review of § 1983 legislative history and late-nineteenth-century common law strongly suggests that the first factual assumption is wrong. Stated differently, even if qualified immunity existed as a common-law defense in 1871 there is evidence that Congress was explicit about its intent to abrogate the defense.

1. The "Dog That Didn't Bark" Canon in Practice

The "dog that didn't bark" canon stems from Arthur Conan Doyle's Sherlock Holmes story *Silver Blaze*, in which Sherlock Holmes deduces that because no dog barked, nothing unusual happened during the night.[116] Imported into the context of statutory interpretation, it means that when the legislature is silent—i.e., in the absence of clear legislative intent—a judge should assume that the legislature did not intend the newly enacted statute to alter the common law.[117] In short, under this rule courts may "infer meaning from legislative silence."[118]

Silence is a necessary component of any statute.[119] Congress simply cannot address every condition and contingency in either the statutory

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notice to legislators about when they need to highlight a change created by a new law or amendment, and how specific they need to be about such change. Fourth, the canon sometimes favors statutory constructions that would treat like entities differently, and thus causes horizontal coherence problems. Fifth, the canon elevates congressional inaction above duly enacted statutory text."); *see also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J. L. & PUB. POL'Y 61, 68–69 (1994) (noting that intent-as-law canon has no substantive constitutional nor common-law grounding).

116. ARTHUR CONAN DOYLE, *Silver Blaze*, *in* SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 521, 540 (2003).

117. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 634 (1990).

118. Krishnakumar, *supra* note 113, at 5. *See, e.g.*, Shaw v. Merchants' Nat'l Bank, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 302 (1959) ("We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms and in the absence of a clear Congressional policy to that end, we cannot go so far." (internal citations omitted)); Tex. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) (finding that "unless . . . the pre-existing right is so repugnant to the statute," the common-law rights must stand). *But see* Harrison v. PPG Indus., Inc., 446 U.S. 578, 589 (1980) (finding that "any other final action" should be given its plain meaning because legislative intent was silent on its definition).

119. *See* Burns v. United States, 501 U.S. 129, 136 (1991) (stating that not every congressional silence is "pregnant," so there is not a meaning to every situation Congress is silent on).

text or the legislative history.[120] Nevertheless, the "dog that didn't bark" canon assumes that if Congress intended the statute to alter the status quo this, at a minimum, would have elicited a discussion and that discussion would be captured and reflected in the statute's legislative history.[121] Professor Krishnakumar has written about this canon in detail.[122] She noted that "[a]lthough increasingly common, 'failure to comment' arguments are not necessarily successful in all cases," and "there is little coherence or consistency in the Court's application of the Sherlock Holmes canon."[123] In fact, there is no clear way for courts to determine whether the canon is applicable because there is no subject-matter limitation. [124]

Unfortunately, the Court has given little guidance as to when judges should give meaning to congressional silence. Just two years after deciding *Pierson*, the Court noted, "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route."[125]

Since at least the mid-twentieth century, the Court has recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law."[126] Courts, arguably, are more inclined to interpret statutes against the common law when the statute at issue codifies common-law traditions or "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice."[127] If it is sensible to apply the Sherlock Holmes canon anywhere, it is, most likely, in these contexts: criminal statutes or statutes codifying common-law rules. In fact, courts have declined to apply the canon when there is clear text or different uses of language in parallel provisions, and where there is an unsettled status quo.[128]

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120. *See* John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. REV. 737, 741 (1984) ("[D]espite any intuitive appeal reliance on congressional silence may possess, there exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress.").

121. Krishnakumar, *supra* note 113, at 3.

122. *Id.*

123. *Id.* at 5–6. *See also* Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (questioning the wisdom of "assuming that dogs will bark when something important is happening" and noting the Court has "forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past").

124. Krishnakumar, *supra* note 113, at 46.

125. Zuber v. Allen, 396 U.S. 168, 185 (1969).

126. United States v. Bailey, 444 U.S. 394, 415 n.11 (1980) (citing Morissette v. United States, 342 U.S. 246 (1952)).

127. *Morissette*, at 263.

128. Krishnakumar, *supra* note 113, at 20. The status quo must be settled prior to the legislation to interpret using this canon. In the case of § 1983, the status quo was not settled in 1871 regarding civil remedies for civil-rights violations. *See* CIVIL RIGHTS, *supra* note 15, at 605–06 (recounting

These justifications, however, are largely inapplicable to § 1983. First and foremost, § 1983 is a civil remedial statute, not a criminal statute. Legislators clearly were motivated by the South's failure to protect its citizens from lawlessness and violence.[129] As explored in Section III.B.2, there is little support for the supposition that Section 1 of the Act was intended to emulate, recreate, or codify common-law actions or defenses.[130] Put simply, § 1983 is a poor place to apply the Sherlock Holmes canon.[131]

2. Silence and Sound: The History of the Civil Rights Act of 1871

Even if one assumes that the Court should apply the Sherlock Holmes canon when interpreting § 1983, the canon very much depends on congressional silence. There is, however, strong evidence that Congress was not silent regarding the incorporation of the qualified-immunity defense into § 1983.

As noted in Section III.A, § 1983's text explicitly mandates that "every person" shall be liable. Thus, immunities seem inconsistent with § 1983's statutory scheme.[132] As the Court would later explain in *Owen v. City of Independence*,

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of

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1871 House debates on how to enforce Fourteenth Amendment violations by Southern police and other public officials).

129. *See* CIVIL RIGHTS, *supra* note 15, at 605–06 (detailing civil-rights violations in the South leading up to Act's passage).

130. *See* infra Part III.B.2.

131. *But see* Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled by* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 663 (1978) ("Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."); Baude, *supra* note 8, at 50 (pointing out that although § 1983's text does not reference immunities directly, some statutes nevertheless "are often subject to defenses derived from common law"). Baude essentially skirted the question. He noted, "[l]egal texts that seem categorical on their faces are frequently 'defeasible'—that is, they are subject to implicit exceptions made by other rules of law." *Id.* He then simply conceded that "perhaps Section 1983 permits such an unwritten immunity defense despite its seemingly categorical provisions for liability." *Id*. The remainder of the article argued that, notwithstanding this implicit common-law defense, qualified immunity is not "legally justified." *Id. See also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105–07 (2017) (detailing how unwritten rules coexist with written laws to create some of law's most important interpretive rules).

132. *See supra* Section III.A; *see generally* 42 U.S.C. § 1983.

> authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[133]

Immunities, by their very nature, undermine liability.[134] Nevertheless, the Court has waved off the text and, instead, looked to the legislative history. There, it claims to have been met with congressional silence. The justices, however, arguably were looking in the wrong place.[135]As noted in Part I, the Civil Rights Act underwent significant statutory provisions in 1873. Importantly, the revisers deleted language from the original statute that guaranteed liability "notwithstanding" "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary."[136] Professor Alexander Reinert argued that this specific language explicitly abrogated any common-law defenses.[137] Stated more plainly, Congress included this provision to make it clear that § 1983 guaranteed liability even if another law—like a common-law defense—would negate liability. In its original form § 1983 explicitly abrogated qualified immunity.

And while one might argue that the subsequent revision, which deleted this provision, undermines this argument, it is important to recall the history of the revisions. As detailed in Part I, these revisions were not intended to alter the substantive law.[138] When a joint committee found the revising committee had made substantive changes to the statutory code,

133. Owen v. City of Independence, 445 U.S. 622, 650–51 (1980) (quoting *Monroe*, 365 U.S. at 184, 172).

134. *See Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining immunity as "[a]ny exemption from a duty, liability, or service of process").

135. Rather than reviewing the legislative history de novo, the Court appears to have relied heavily on *Tenney v. Brandhove*. Pierson v. Ray, 386 U.S. 547, 554 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951))).

136. *See supra* Part I (detailing differences between 1871 and 1873 versions of § 1983).

137. Loyola University Chicago 2021 Law Journal Symposium, *The Criminal Justice System in Review: Accountability, Reform & Policy*, LOY. UNIV. CHI. L. SCH., at 4:31:05 (Apr. 9, 2021), https://luc.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=25024f92-6dd0-4b49-858b-ad0a01278b24 [https://perma.cc/TKZ7-XUEK] [hereinafter 2021 Law Journal Symposium] ("There actually is good reason to believe that Congress—the Congress that enacted § 1983—actually *did* mean to replace common-law protections."). Professor Reinert compared the reviser's version of § 1983 that we still have today with the version enacted in 1871, which originally contained the operative language "any such law, statute, ordinance regulation, custom, or usage of the State to the contrary notwithstanding." *Id.* (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13). Professor Reinert explained, "it was explicit language meant to take away any privilege or immunity under state law. . . . This language was left out of the version we get by the reviser, for reasons that no one understands, but . . . the reviser couldn't change positive law, so the positive law that exists is the one that was enacted by the 1871 Congress." *Id.* at 4:31:38).

138. *See supra* notes 25–36 and accompanying text.

they assigned Thomas Jefferson Durant to essentially restart the endeavor.[139] Furthermore, when it became clear that *his* work contained errors and statutory changes, legislators authorized another set of revisions.[140] Congress clearly was concerned that the 1873 revisions changed the substance and meaning of the statutes and, importantly, they sought to correct and undo these changes. The Court should have considered the original statutory language and convoluted history of revisions when attempting to discern Congress's original intent. The Court's failure to consider the original statutory language and to consider more carefully its surrounding legislative history casts serious doubts upon *Pierson v. Ray*'s conclusion that Congress intended to incorporate common law defenses when it enacted § 1983.

3. Qualified Immunity in 1871

Despite its dubious basis, the Court has stated on several occasions that Congress, through its silence, incorporated common-law immunities into § 1983.[141] In his article *Qualified and Absolute Immunity at Common Law,* Scott Keller "start[ed] from the premise articulated by the Supreme Court that the common law of 1871 dictates state-officer immunities" and reviewed the common-law immunities available to government officials in the late nineteenth century.[142] Keller found that, in fact, a qualified-immunity defense for government officials did exist at common law in 1871.[143] However, he concluded that today's qualified-immunity defense is markedly different from that earlier version.[144] He pointed to three specific differences. First, while high-ranking executive officers enjoyed absolute immunity at common law, they only have qualified immunity today.[145] Second, in 1871, the qualified-immunity defense was not

139. 2 CONG REC. 820 (1874). Representative Poland stated, "[W]e have, by the aid of Mr. Durant and by our own efforts in examining it, endeavored to make this a perfect reflex of the statutes as they stand . . . ." *Id.*

140. Dwan & Feidler, *supra* note 24, at 1016. In 1878 Congress approved an Act updating the Revised Statutes and providing that "in case of any discrepancy between the new edition and the original statutes passed since December 1, 1873, the latter should control." *Id.*; *see also* Act of Mar. 9, 1878, ch. 26, 20 Stat. at L. 27 (amending prior Act of 1877 to update Revised Statutes and provide that "in case of any discrepancy, the effect of any original act as passed by Congress" would control).

141. *See, e.g.*, Bradley v. Fisher, 80 U.S. 335, 347 (1871) (judicial immunity); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (legislative immunity); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (prosecutorial immunity); Briscoe v. LaHue, 460 U.S. 325, 326 (1983) (witness immunity); Nixon v. Fitzgerald, 457 U.S. 731, 753–54 (1982) (executive immunity).

142. Keller, *supra* note 8, at 1343.

143. *Id.* at 1344.

144. *Id.* at 1399–400.

145. *See id.* at 1380–81 (explaining that *Scheuer v. Rhodes*, 416 U.S. 232 (1974), marked the

available when an officer acted maliciously. The Court, however, eliminated the subjective prong of the good-faith qualified-immunity standard in *Harlow v. Fitzgerald*.[146] The last divergence is that in common law, the plaintiff had the burden to prove improper purpose with clear evidence, while today, there is confusion over this burden.[147] In short, today's qualified-immunity defense is almost unrecognizable from its 1871 ancestor.

C. Dynamic Statutory Interpretation

The Court often seems to have adopted a sort of smorgasbord approach to qualified immunity—they apply whatever theory of interpretation suits their appetite at that particular moment.[148] Professors Levin and Wells argued that because § 1983 is a "common-law statute," this approach makes sense.[149] They describe the task of interpreting common-law statutes as follows:

> Unlike with "normal" statutes, when it comes to common law statutes, many of the normal rules of statutory interpretation fall away: textualism has no meaning, originalism is beside the point, judicial consideration of relevant policy interests is welcome, the assumption that legislatures rather than courts correct judicial er-

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initial departure from the common law regarding absolute immunity for high-ranking executive officials, in holding that "[t]hese considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government" based on a "good-faith" defense).

146. *See id.* at 1384–99 (discussing the *Harlow* Court's departure from the 1871 common-law good-faith defense); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (holding that an official's acts should be reviewed using objective criteria).

147. *See* Keller, *supra* note 8, at 1396–1400 (analyzing evolving burden-of-proof standards for plaintiffs after *Harlow*).

148. *See* Levin & Wells, *supra* note 9, at 63 (noting that the Court alternates among 1871 tort law, policy arguments, and a functional approach).

149. *Id.* at 43–46 (criticizing Baude for analyzing § 1983 as one would a "normal statute" and arguing § 1983 is better understood as a "common-law statute," which "should not be interpreted solely as a product of the time of their enactment or according to strict rules of statutory interpretation"); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that statutes should be interpreted in light of their "societal, political, and legal context").

Levin and Wells further explained "[t]here is no universally agreed-upon and readily-identifiable group of common law statutes." Levin & Wells, *supra* note 9, at 45. Rather, they argued that common-law statutes share three characteristics: (1) common-law "statutes are written broadly"; (2) "they are enacted against a rich common law tradition that they incorporate"; and (3) "they are *old*." *Id.* at 45–46. I agree that § 1983 is broadly written and is old; however, it is presumptuous to conclude that Congress intended to incorporate common-law traditions without examining Congress's legislative intent. In fact, an examination of § 1983's original statutory language is a good indication that Congress did *not* intend to incorporate common law traditions. See *supra* notes 135–146 and accompanying text.

> rors through a bicameral legislative process is rejected, and judicial precedents themselves are to be flexibly applied, updated, or jettisoned as circumstances and developed wisdom warrant.[150]

This approach aligns with dynamic statutory interpretation, which takes an evolutive perspective, unraveling common-law statutes by considering their present societal, political, and legal context.[151] Eskridge, like Levin and Wells, argued that judges should use a dynamic approach when interpreting § 1983.[152]

As previously noted, the Court in *Pierson* did not stop with either the statutory text or the legislative history; the justices also considered the defendants' policy arguments.[153] Justice Warren reasoned that police should not be required to choose between being charged with neglect of duties when the officer does not perform an arrest, assuming that probable cause does exist, and being sued for damages if the officer does perform the arrest.[154] Analogously, he reasoned, the same consideration applies when the officer reasonably acted under a statute that he believed to be lawful, but that was later held unconstitutional.[155] Since *Pierson*, the Court has relied heavily on policy arguments to justify its expansion of qualified immunity.[156]

However, these policy arguments seem misplaced when one reframes

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150. Levin & Wells, *supra* note 9, at 45.

151. Eskridge, *supra* note 149, at 1479.

152. *See id.* at 1486 ("A dynamic approach to section 1983 would not stop with the historical perspective, especially when the historical evidence is indirect and confusing and the statute is old. The interpreter would ask herself what interpretation is most consistent with § 1983 as it has evolved over time."); *see also id.* at 1488 (asserting that, at this point, textualism is of little value when interpreting § 1983); *id.* at 1554–55 (concluding that dynamic statutory interpretation is most appropriate when the statute is old but still widely litigated and faces significantly changed societal problems or legal contexts; however, it is least appropriate when the statute is recent and addresses the issue reasonably decisively).

153. In oral arguments, counsel for the police officials pled to the justices:

> I urge the Court to give this case serious consideration because of its importance in the future litigation of the thousands of cases in the federal court and on the effect, it will have on the police force all over the country if they are subject to suit and subject to money damages with little pay in families and they are subject upon to suits for damages. It can have a disastrous effect on protection of the public.

Pierson Oral Argument, *supra* note 57, at 1:05:23–1:05:49.

154. Pierson v. Ray, 386 U.S. 547, 555 (1967).

155. *Id.*

156. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (finding that qualified immunity should also protect against "diversion of official energy from pressing public issues" and arguing "the fear of being sued will 'dampen the ardor'" of public servants (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))); Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (finding that disruptive discovery process that would hinder officials in their duties should be avoided); Ashcroft v. al-Kidd*,* 563 U.S. 731, 740 (2011) (finding that "efficient" application of qualified immunity calls for analysis of objective reasonableness).

Pierson's facts and places them against the backdrop of § 1983's legislative history. The Court categorizes the plaintiffs' claim as a false-arrest claim.[157] The plaintiffs' argument, however, may be better understood as an equal-protection claim.[158] As detailed in Part II, the plaintiffs were a group of Black and white clergy traveling from New Orleans, Louisiana, to Dearborn, Michigan, in 1961. Not only were the plaintiffs exercising their constitutional right to interstate travel but, by disregarding the "Whites Only" sign posted outside the bus depot, this mixed-race group of plaintiffs tested the bounds of the Equal Protection Clause. The arresting officers argued they were entitled to the defense of good faith and probable cause because they reasonably relied on Mississippi Code § 2087.5 when they arrested the clergymen.

If one assumes, as the defendants alleged, that a white mob threatened imminent violence, the defendants presented a colorable argument that they should not be liable for the arrest—the statute makes it unlawful to congregate in a public area "under circumstances such that a breach of peace may be occasioned thereby."[159]

Arguably, however, the police violated the Equal Protection Clause when they arrested the clergymen and let the angry white mob, the true instigators, go free.[160] This was precisely the harm the Civil Rights Act of 1871—"an Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States"—was intended to protect against.

If judges are to consider the policy arguments that justify qualified immunity, it seems equally appropriate that they understand and assess the policy arguments that underpin § 1983.

Shortly after the passage of the Thirteenth Amendment, Southern states, in an attempt to recreate the slave system, began passing Black

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

158. *See supra* notes 68–80 and accompanying text (describing equal-protection issues at play in *Pierson*).

159. *Pierson*, 386 U.S. at 549; *see supra* notes 74–76 and accompanying text (arguing that defendants' probable-cause argument could be understood as refuting an element of plaintiff's case-in-chief or as an affirmative defense).

160. *See* Boynton v. Virginia, 364 U.S. 454, 456 (1960) (considering similar unlawful arrest where plaintiff was convicted of violating state law for refusing to leave white section of restaurant in a Virginia bus station); *see also id.* at 457 (explaining that Court granted certiorari on two issues: (1) whether plaintiff's criminal conviction "is invalid as a burden on commerce in violation of Art. I, § 8, cl. 3 of the Constitution," and (2) "whether the conviction violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment"); *id.* at 457 (ultimately declining to decide case on these constitutional issues but rather on Interstate Commerce Act grounds).

Codes.[161] "[T]he post-War legal system used race as a proxy for criminality in attempting to preserve the legacy of slavery through the criminal law."[162] Congress responded to these statutes and Southern resistance with its own legislation, including the Fourteenth Amendment.[163] Gressman summarized the Reconstruction era as follows:

> Such were the congressional efforts from 1866 to 1875 to make secure the constitutional ideals of freedom and equality for all. Never before or since has there been so much important federal legislation regarding civil rights. The changes made by this series of enactments and constitutional additions were of a most significant nature, altering substantially the balance between state and federal power. Civil rights were conceived of as inherent ingredients of national citizenship and as such were entitled to federal protection. And that protection was to be accorded in an affirmative fashion . . . The federal government was given effective weapons to combat and defend against all who would deprive inhabitants of the United States of their rights to be free of inequalities and distinctions based on race, color and previous condition of servitude. These weapons were usable against both private individuals and those acting under color of state law.[164]

Promulgating a good-faith probable-cause defense in *Pierson*, a civil rights case with equal-protection implications, is antithetical to 42 U.S.C. § 1983 and the Reconstruction era from which it emerged.[165] Since *Pierson*, however, qualified immunity has only expanded.

IV. QUALIFIED IMMUNITY TODAY

If one counts *Pierson* as the birth of qualified immunity, the doctrine is now more than fifty years old. At its inception, the good-faith, probable-cause defense was quite narrow—it only applied in false-arrest cases where the defendant claimed to have relied on a facially valid statute.[166]

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161. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 319 (1st ed. 1982) ("Many northerners, including Republican rank-and-file in Congress, saw in the Codes thinly disguised efforts to reenact the substance of slavery, including race control and labor discipline . . . .").

162. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 65 (2004).

163. Gressman, *supra* note 16, at 1323–36 (detailing Reconstruction-era legislation).

164. *Id.* at 1336.

165. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949) ("The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated."); *see also id.* at 353, 357 (describing how laws classifying based on race are antithetical to the Equal Protection Clause); *id.* at 342 (adding that the Equal Protection Clause requires fair and equal enforcement of laws).

166. *See* supra Part II (discussing the emergence of the good-faith, probable-cause defense).

As Justice Kennedy observed, today "we have diverged to a substantial degree from the historical standards [of immunity]."[167] Now, "nearly all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials."[168] That is the consequence of fifty years of evolution—fifty years of precedent. And after fifty years of precedent, arguably, the Supreme Court is poorly positioned to reverse *Pierson* and its progeny.[169]

But what if the Court's interpretation in *Pierson* was flawed? One might assume that after years of silent assent, it falls upon legislators, not judges, to correct erroneous statutory interpretations.[170] However, the principle of stare decisis is a "principle of policy and not a mechanical formula of adherence to the latest decision."[171] As the Court explained in *Patterson v. McLean Credit Union*, judicial "precedents are not sacrosanct," but "any departure from stare decisis requires special justification."[172] To overturn a prior interpretation of a statute, one must show that its "justification was badly reasoned, or that the rule has proved to be unworkable."[173]

In fact, the Court already has overruled its § 1983 holdings on at least two occasions. In *Monroe v. Pape*, the Supreme Court held that a municipal corporation did not constitute a person for the purposes of a statute.[174]

167. Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *see also* Anderson v. Creighton, 483 U.S. 635, 645 (1987) ("[T]he Court completely reformulated qualified immunity along principles not at all embodied in the common law.").

168. Baude, *supra* note 8, at 82.

169. Stare decisis is "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019). "It is behind this wise and salutary maxim that courts and judges love to take refuge, in times and circumstances that might induce them to doubt of themselves." *Ex parte* Bollman, 8 U.S. 75, 87 (1807). This is particularly true in the context of statutory interpretation. Because Congress has the power to reject a court's reading by enacting additional legislation, stare decisis assumes a "special force" when the statutory interpretation "has been accepted as settled law for several decades." 20 AM. JUR. 2D *Courts* § 136 (2021). Silence becomes acquiescence. The Court is especially hesitant to overturn precedent the doctrine is long-standing. *Id.*

170. Levin and Wells noted that 42 U.S.C. § 1983 is a broad and expandable statute for which courts should take a dynamic approach to properly understand and apply it. Levin and Wells stated that this statute "should not be interpreted solely as a product of the time of [its] enactment or according to strict rules of statutory interpretation," and to look beyond how the statute was interpreted in 1871 in order to form an appropriate outcome for the case at hand. Levin & Wells, *supra* note 9, at 46.

171. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (quoting Boys Mkts., Inc. v. Retail Clerks, 398 U.S. 235, 241 (1970)), *superseded by statute*, Civil Rights Act of 1991, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442, 450 (2008).

172. *Id.* (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

173. 20 AM. JUR. 2D *Courts* § 136 (2021).

174. Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). In that case, the City of Chicago moved to dismiss a complaint on the grounds

Almost twenty years later, the Supreme Court overruled its prior decision, stating that the Congress from 1871 would have absolutely considered a municipality a person under 42 U.S.C. § 1983.[175] In considering whether to overturn *Monroe*, this Court stated that they "ought not 'disregard the implications of an exercise of judicial authority'" even if that decision was determined correct for one hundred years.[176] In *Pearson v. Callahan*, the Court overruled its earlier decision in *Saucier v. Katz*.[177] In so doing, the Court noted that "[*s*]*tare decisis* is not an inexorable command"[178] and "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."[179] This is not to suggest that revisiting *Pierson* and its qualified-immunity legacy will not "upset expectations." However, stare decisis is not an excuse to maintain an erroneous course of action.[180]

CONCLUSION

Statutory interpretation is a cumbersome task. Judges often approach it as sort of imagined conversation between themselves and legislators. In many respects, it is a guessing game. Judges begin with the text but then read between the lines and into legislative silences.[181] The "dog that didn't bark" canon, specifically, allows courts to infer meaning from legislative silence, and legislative silence resonates most after the judiciary has spoken. When the legislature does not revise a statute following a

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that it was not liable for a violation of the Civil Rights Act. *Id.* at 170. The Supreme Court agreed, holding that for the purposes of the Civil Rights Acts municipalities, such as the City of Chicago, did not count as persons. *Id.* at 191–92.

175. *Monell*, 436 U.S. at 663.

176. *Id.* at 696 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 307 (1962)).

177. Pearson v. Callahan, 555 U.S. 223, 236 (2009). The Court granted certiorari to determine whether police officers were entitled to qualified immunity when they conducted a warrantless search of respondent's house. *Id.* at 227. In a unanimous opinion, the Court determined that *Saucier*'s two-prong analysis was no longer mandatory and that judges could exercise sound discretion when determining which of the two prongs of the qualified-immunity analysis should be addressed first considering the factual circumstances at hand. *Id.* at 236. In doing so, this ensured all constitutional questions were addressed when it came to causes of action under § 1983.

178. *Id.* at 233 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

179. *Id.*

180. *Id.* at 234. One early formulation of what has come to be known as "the first law of holes" stated, "[n]or would a wise man, seeing that he was in a hole, go to work and blindly dig it deeper . . . ." *Letting Bryan Down Easy*, WASH. POST, Oct. 25, 1911, at 6.

181. Krishnakumar, *supra* note 113, at 6 ("[A]lthough the Justices view attentiveness to congressional silence as part of their duty as faithful agents of the legislature, they often end up using the dog that did not bark canon to guard against changes they find normatively problematic.").

court opinion on that statute, later courts may deem that legislators implicitly approve of the court's interpretation.[182] In short, judges assume that when they speak, legislators are listening, and that legislators would speak up if they disagreed with their interpretation.[183]

Yet legislative silence does not free the judiciary from its most fundamental task—statutory interpretation. "Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration."[184]

Today, many wise people have questioned and attacked the qualified-immunity defense. Scholars increasingly pan the doctrine.[185] The House passed a bill limiting qualified immunity.[186] Several states have curtailed their own renditions of qualified immunity.[187] Federal trial court judges

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182. 20 AM. JUR. 2D *Courts* § 136 (2021); *see also* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 601 n.4 (1985) ("Congress is always free to reject this Court's interpretation of a federal statute by passing a new law.").

183. There is evidence to support this assumption. In *Pulliam v. Allen,* the respondent filed a § 1983 claim against a Virginia magistrate judge alleging his "practice of imposing bail on persons arrested for nonjailable offenses under Virginia law and of incarcerating those persons if they could not meet the bail was unconstitutional." 466 U.S. 522, 524–25 (1984), *superseded by statute*, Federal Courts Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3853. Respondents sought declaratory and injunctive relief. *Id.* at 524. The trial court found for the plaintiff, enjoined Pulliam's practice, and, over the defendant's objections, awarded the plaintiff $7,691.09 in costs and attorney's fees under § 1988. *Id*. at 525. Specifically, Magistrate Pulliam argued "the award of attorney's fees against her should have been barred by principles of judicial immunity." *Id.* The case eventually reached the Supreme Court. The justices considered late-nineteenth-century common-law practices and the policy rationales for and against allowing immunity in the injunctive context and ultimately held "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id*. at 529–43.

Twelve years after the Court decided *Pulliam*, Congress amended § 1983 to add the following language: "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (1996). This addition plainly extends judicial immunity to § 1983 cases seeking injunctive relief and, in so doing, effectively overruled the Court's decision in *Pulliam*.

184. *Pearson*, 555 U.S. at 235 (alteration in original) (quoting Payne v. Tennessee, 501 U.S. 808, 829–30 (1991)).

185. *See supra* note 7 and accompanying text.

186. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

187. *See, e.g.*, COLO. REV. STAT. § 13-21-131 (eliminating qualified immunity for state-court claims); An Act Concerning Police Accountability, H.R. 6004, 2020 Gen. Assemb., 2020 Conn. Pub. Acts (omnibus policing bill eliminating qualified immunity for state-court claims); New Mexico Civil Rights Act, 2021 N.M. Laws Ch. 119 (H.B. 4) (eliminating qualified-immunity defense for public officials); An Act Relating to Permissible Uses of Force by Law Enforcement and Correctional Officers, 2021 Wash. Legis. Serv. Ch. 324 (S.S.H.B. 1310) (West) (requiring law enforcement and community corrections officers to use least amount of physical force necessary); N.Y.C. ADMIN. CODE L.L. 2021/048 (2021) (enacted) (creating a right of security against unreasonable search and seizure, and excessive force, enforceable by civil action); S. 1991, 2021–2022 Leg.,

have asked the Court to reconsider the defense.[188] Even Supreme Court justices have joined the chorus of criticism.[189] The storm has come. The qualified-immunity doctrine, with *Pierson v. Ray* as its foundation, is built on sand. It is ready to fall.

244th Sess. (N.Y. 2021) (eliminating qualified immunity for state claims); S. 2, 2021 Leg., Reg. Sess. (Cal. 2021) (enacted) (eliminating certain immunity provisions for peace officers, implementing certification procedures for peace officers); H.B. 609, 2021 Leg., 47th Reg. Sess. (La. 2021) (prohibiting qualified immunity for officers as a defense in state-court claims). *But see* Fla. Stat. § 166.241 (2021) (limiting local municipalities' ability to reduce funding for law-enforcement agencies); S. 479, 89th Gen. Assemb., 2021 Reg. Sess. (Iowa 2021) (denying state funds to local entity that reduces law-enforcement agency budget).

188. *See* 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/RX3F-57HJ] (criticizing qualified immunity); *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020) (describing qualified immunity as a manufactured doctrine that needs to be invalidated).

189. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (stating "qualified immunity for public officials" had "diverged to a substantial degree from the historical standards"); Crawford-El v. Britton, 523 U.S. 574, 611 (Scalia, J., dissenting) (admitting that the Supreme Court has not even "purported to be faithful to the common-law immunities that existed when § 1983 was enacted"); Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (noting that there is "no basis" for the "clearly established law" analysis); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[Qualified immunity] tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.").