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Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte

Michael E. Beyda
Fordham University School of Law

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AFFIRMATIVE IMMUNITY: A LITIGATION-BASED APPROACH TO CURB APPELLATE COURTS' RAISING QUALIFIED IMMUNITY SUA SPONTE

Michael E. Beyda*

Qualified immunity, to put it simply, provides public officials with immunity from civil lawsuits if they have violated an individual's constitutional rights under their official authority and those rights were not "clearly established" at the time of the official's actions. The doctrine has evolved into an elaborate framework that has plagued civil rights plaintiffs, as well as courts, for decades. Qualified immunity is an affirmative defense, and affirmative defenses are waived if not raised appropriately by the defendant. Moreover, issues that are not properly raised before the trial court, including affirmative defenses, are generally not considered for the first time on appeal. Nevertheless, courts have a long history of defying this general rule, and qualified immunity is no exception. This Note examines the historical development of and rationales for the qualified immunity doctrine, the purposes of affirmative defenses, and the reasons for the general rule that appellate courts do not consider issues for the first time on appeal. Additionally, this Note summarizes an inconsistent trend among appellate courts, some of which raise qualified immunity sua sponte, while others hold that qualified immunity is waived if not raised at the trial court appropriately. After recognizing that the original goal of qualified immunity was to prevent public officials from enduring the burdens of litigation and that appellate courts generally have discretion to consider issues for the first time on appeal, this Note proposes a two-part solution to balance these values. This Note's proposed framework returns qualified immunity to its original purpose and resolves the current inconsistency among appellate courts, while allowing appellate courts to raise issues for the first time on appeal when they consider it appropriate. The framework also prevents appellate courts from raising qualified immunity sua sponte inappropriately, which

* J.D. Candidate, 2022, Fordham University School of Law; B.B.A., 2019, Baruch College. I would like to express my gratitude to Professor Jed H. Shugerman for assisting me during this project. I would also like to thank Zach Huffman and the other editors of *the Fordham Law Review* for their encouragement, guidance, and thorough editing. I am grateful to G-d, my parents, my grandmother (Ma), my family, and my friends for their unending support and encouragement. Finally, I dedicate this Note to my grandfather, Papa. I love you and miss you.

can unduly burden civil rights plaintiffs and make it harder for them to recover damages if their constitutional rights have been violated.

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INTRODUCTION

In an age of polarized politics,¹ a growing and surprising ideological alliance is emerging to defeat a common legal enemy: qualified immunity.² The qualified immunity doctrine allows public officials to avoid civil liability for discretionary decisions they make in the line of duty.³ The U.S. Supreme Court adopted the qualified immunity doctrine after police officers were sued in their personal capacities under 42 U.S.C. § 1983 for arrests made pursuant to a statute that was later ruled unconstitutional.⁴ The Court held that an affirmative defense of good faith was available to the officers, “immunizing” them from suit if they acted pursuant to their authority in good faith.⁵ Hence, the qualified immunity doctrine was born. The Court’s primary concern was to ensure that police officers (and, by extension, other public officials) would be able to do their jobs effectively without the threat of civil liability hanging over them.⁶

Since then, however, the qualified immunity doctrine has snowballed into an elaborate objective framework⁷ that makes it harder for civil rights plaintiffs to sue for damages when their constitutional rights are violated.⁸

1. See John Avlon, Opinion, *Polarization Is Poisoning America. Here’s an Antidote*, CNN (Nov. 1, 2019, 1:17 PM), <https://www.cnn.com/2019/10/30/opinions/fractured-states-of-america-polarization-is-killing-us-avlon/index.html> [<https://perma.cc/4WH8-RP87>].

2. Press Release, NAACP Legal Def. Fund, LDF Joins Cross-Ideological Coalition in Submitting an Amicus Brief in Case Challenging Qualified Immunity (Apr. 10, 2019), <https://www.naacpldf.org/wp-content/uploads/Qualified-Immunity-Cato-Amicus.pdf> [<https://perma.cc/7MK9-Y4N7>] (describing a recent alliance of cross-ideological groups, ranging from the NAACP Legal Defense Fund to the Alliance Defending Freedom, filing a joint amicus brief calling for the U.S. Supreme Court to reconsider the qualified immunity doctrine).

3. See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 403–04 (S.D. Miss. 2020).

4. *Pierson v. Ray*, 386 U.S. 547, 550, 557 (1967).

5. *Id.* at 557.

6. *Id.* at 555 (explaining that police officers should not be forced to “choose between being charged with dereliction of duty if” they do not take a certain action “and being mulcted in damages” if they do).

7. See *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (noting that the qualified immunity doctrine “turns on the ‘objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken’” (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999))).

8. *Est. of Smart v. City of Wichita*, No. 14-2111, 2018 WL 3744063, at *1, *18 n.174 (D. Kan. Aug. 7, 2018) (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting)) (expressing concern that the current qualified immunity doctrine is moving federal courts “toward fully insulating police officers from trial”), *aff’d in part, rev’d in part*, 951 F.3d 1161 (10th Cir. 2020).

Because qualified immunity is an affirmative defense,⁹ it serves as a powerful legal weapon for public officials when they are sued personally for damages under § 1983. As a general rule, defendants must raise affirmative defenses at trial, or they risk waiving them.¹⁰ But what if qualified immunity is raised *sua sponte*¹¹—for the first time on appeal—by an appellate court when it otherwise would be waived?

This predicament highlights a fundamental disagreement that has quietly developed in the lower courts over the past several decades. Affirmative defenses are typically waived if not raised in the trial court first before an appeal is taken.¹² If an appellate court raises qualified immunity *sua sponte*, this can create several dilemmas. First, doing so flouts fundamental principles of civil procedure by departing from general waiver rules and contradicts the very nature of the appellate court system in the United States, which is to correct the errors of lower courts.¹³ Second, and more importantly, doing so can cause significant hardships for civil rights plaintiffs suing under § 1983, as qualified immunity is already a difficult legal hurdle to clear.¹⁴

For example, police officers arrested Jonathan Crowell on July 18, 1998, during a protest in Idaho.¹⁵ Police officers arrested Crowell after he refused to consent to a search of his knapsack simply because it looked heavy and bulky.¹⁶ Crowell sued the police officers under § 1983 for false arrest in violation of the Fourth Amendment.¹⁷ On appeal, the Ninth Circuit held that the arrest was unconstitutional.¹⁸ However, the Ninth Circuit *sua sponte* raised qualified immunity and held that the police officer was entitled to the doctrine's protection.¹⁹

This case illustrates the dangers of appellate courts considering issues *sua sponte*, especially in the qualified immunity context. Not only does raising qualified immunity *sua sponte* contravene the general rule that issues not raised in the trial court below are waived,²⁰ it can bar civil rights plaintiffs

9. See *infra* note 104 and accompanying text.

10. See *infra* note 86 and accompanying text.

11. When using the terminology “*sua sponte*” or “considering an issue raised for the first time on appeal,” this Note is generally referring to two ways appellate courts raise issues *sua sponte*. The first is when judges themselves raise an issue for the first time on appeal. See, e.g., *Graves v. City of Coeur D’Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003). The second is when the parties themselves raise the issue for the first time on appeal and the judge considers it for the first time. See, e.g., *United States v. Krynicky*, 689 F.2d 289, 291 (1st Cir. 1982). This Note uses this terminology interchangeably.

12. See generally Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958).

13. See *infra* Parts I.B–C (discussing the history of affirmative defenses and the role of appellate courts in the United States).

14. See *infra* note 76 and accompanying text.

15. See *Graves*, 339 F.3d at 832–33.

16. *Id.* at 836.

17. *Id.* at 833.

18. *Id.* at 844–45.

19. *Id.* at 845 n.23, 848.

20. See *infra* Parts I.B–C (discussing waiver rules and *sua sponte* actions by appellate courts).

from recovering damages from public officials even when the alleged misconduct actually violates their constitutional rights.²¹ This is one of a few examples of appellate courts raising qualified immunity *sua sponte*.²² Other appellate courts, however, hold steadfast to the general rule that they will not consider the affirmative defense of qualified immunity for the first time on appeal and that it is instead waived if not raised properly before the trial court.²³ This inconsistency between appellate courts may lead to disparate results for civil rights plaintiffs depending on which circuit adjudicates their § 1983 claims.²⁴

This Note explores whether appellate courts can, or should, raise the affirmative defense of qualified immunity *sua sponte*. Part I of this Note analyzes the legal frameworks surrounding these issues by analyzing three foundational legal regimes: (1) the history and jurisprudential development of the qualified immunity doctrine and its underlying policy concerns, (2) the origins and purposes of affirmative defenses, and (3) how *sua sponte* actions by appellate courts relate to the origins of the appellate court system in the United States.

Part II surveys circuit court decisions and outlines the inconsistency among lower courts as to whether qualified immunity can be raised *sua sponte* on appeal. Finally, Part III proposes an alternative two-part rule that will limit how and when appellate courts can raise qualified immunity *sua sponte*. The proposed rule will balance the goals of the qualified immunity doctrine, the purposes of affirmative defenses, and the historical role of appellate courts.

I. FIRST PRINCIPLES: QUALIFIED IMMUNITY, AFFIRMATIVE DEFENSES, AND *SUA SPONTE* ACTIONS

When an appellate court raises qualified immunity *sua sponte*, it implicates three crucial elements of law: the qualified immunity doctrine itself, the purposes of affirmative defenses and their intricate waiver rules, and the integrity of our appellate court system. Because qualified immunity is an affirmative defense²⁵ that might be subject to waiver if not raised appropriately,²⁶ appellate courts risk harming civil rights plaintiffs whose constitutional rights have been violated by resuscitating waived affirmative defenses that strongly favor public officials.²⁷ Part I.A documents the early

21. See *infra* Part II.A.2 (discussing *Graves* and how the Ninth Circuit granted a police officer qualified immunity after raising the issue *sua sponte*, even though the court found a violation of the plaintiff's constitutional rights).

22. See *infra* Part II.A (analyzing appellate court cases that have raised qualified immunity *sua sponte*).

23. See *infra* Part II.B (analyzing appellate court cases that refused to raise qualified immunity *sua sponte*).

24. See Petition for Writ of Certiorari at 10–13, *Hamner v. Burls*, 141 S. Ct. 611 (2020) (mem.) (No. 19-1291).

25. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

26. See *infra* Part I.B.3 (discussing waiver rules).

27. See *infra* Part I.A.3 (noting how qualified immunity is generally difficult for plaintiffs to overcome).

origins of the qualified immunity doctrine and its evolution over the past few decades. Part I.B explores the common-law foundations of affirmative defenses. Then, Part I.C analyzes the origins of the appellate court system in the United States and whether sua sponte actions by appellate courts are consistent with our system of adjudicating appeals.

A. *Qualified Immunity*

If a public official (for example, a police officer) acts unlawfully and violates an individual's constitutional rights, 42 U.S.C. § 1983 allows that aggrieved person to sue the official for civil damages.²⁸ Section 1983 provides a federal cause of action against public officials if they “depriv[e] [American citizens] of any rights . . . secured by the Constitution.”²⁹ But, soon after the Supreme Court, in *Monroe v. Pape*,³⁰ gave the green light to the plaintiffs to proceed with their civil suit against police officers under § 1983, the Court recognized a serious issue: the threat of being held personally liable for damages might inhibit public officials' abilities to do their jobs effectively.³¹ To address this concern, the Court adopted the qualified immunity doctrine.³² Under the original iteration of the qualified immunity doctrine, public officials were immunized from civil suit under § 1983 if they violated one's constitutional rights in “good faith” and with “probable cause.”³³ Today, however, the doctrine has evolved into an objective framework for evaluating the conduct of public officials.

Part I.A.1 recounts the adoption and historical background of § 1983 claims. Part I.A.2 discusses the adoption and evolution of the qualified immunity doctrine. Part I.A.3 analyzes the various justifications made by the Supreme Court in favor of the qualified immunity doctrine and various critiques of the doctrine.

1. 42 U.S.C. § 1983: Enforcing Equal Protection of the Law via Constitutional Torts

Section 1983 was enacted as part of the 1871 Ku Klux Klan Act³⁴ in “respon[se] to ‘the reign of terror imposed by the Klan upon black citizens’” in the South.³⁵ After the Civil War, state governments in the South were not holding the Ku Klux Klan or its members criminally or civilly accountable for the violence they perpetrated, effectively denying their victims equal protection of the law under the Fourteenth Amendment's Equal Protection

28. See WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS (2020).

29. 42 U.S.C. § 1983; see also William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52 (2018).

30. 365 U.S. 167 (1961).

31. See *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967).

32. See *id.* at 557.

33. *Id.*

34. Ch. 22, 17 Stat. 13 (1871).

35. See *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)); *Monroe*, 365 U.S. at 171, 174–77.

Clause.³⁶ The purpose of § 1983 was to provide a civil remedy against official state actors who “were *unable* or *unwilling* to enforce a state law.”³⁷ After several decades of § 1983 not being utilized,³⁸ the Supreme Court permitted a § 1983 claim to proceed in *Monroe*, when the Court allowed a plaintiff to sue police officers after they entered the plaintiff’s home without a warrant.³⁹

2. Today’s Qualified Immunity Doctrine: The “Clearly Established” Analysis

After the Supreme Court accepted § 1983 as providing a cause of action, the Supreme Court, in *Pierson v. Ray*,⁴⁰ noted its fear that public officials might not do their jobs as effectively due to the threat of being held personally liable for damages.⁴¹ Thus, the Court crafted a solution to this problem: a limited immunity from torts for public officials arising out of actions taken in the line of duty.⁴² The *Pierson* Court held that a subjective defense of “good faith and probable cause” was available to public officials who are sued personally for depriving individuals of their constitutional rights.⁴³

About two decades later, the Supreme Court, in *Harlow v. Fitzgerald*,⁴⁴ made important modifications to the qualified immunity doctrine. First, the Court formulated a similar rationale as the *Pierson* Court did for granting qualified immunity—namely, that the fear of being sued personally would prevent public officials from performing their jobs effectively.⁴⁵ The Court, however, recognized that this risk was exacerbated by the subjective good faith test articulated in *Pierson*,⁴⁶ since it is incredibly difficult to determine good faith without “entail[ing] broad-ranging discovery and the deposing” of witnesses.⁴⁷ These social and practical litigation costs “can be peculiarly

36. *Monroe*, 365 U.S. at 171, 174–77.

37. *See id.* at 175–76.

38. *Jamison v. McClendon*, 476 F. Supp. 3d 386, 400–01 (S.D. Miss. 2020) (quoting Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 661–62).

39. *Monroe*, 365 U.S. at 170–71.

40. 386 U.S. 547 (1961).

41. *Id.* at 554.

42. *Id.* (explaining that a public official “should not have to fear that unsatisfied litigants may hound him with litigation . . . [S]uch a burden . . . would contribute not to principled and fearless decision-making [by the public officials] but to intimidation”).

43. *Id.* at 550, 557.

44. 457 U.S. 800 (1982). *Harlow* was a case about the immunity available to presidential aides rather than public officials sued under § 1983. *See id.* at 808–09. The Court, however, noted that “it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.” *Id.* at 809 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

45. *Id.* at 814.

46. *See Pierson*, 386 U.S. at 550, 557.

47. *Harlow*, 457 U.S. at 817.

disruptive to effective government.”⁴⁸ Thus, the *Harlow* Court changed the legal standard for qualified immunity. The Court crafted an objective inquiry: qualified immunity is available to public officials so long as they did not “violate *clearly established* statutory or constitutional rights of which a reasonable [public official] would have known” at the time the action was taken.⁴⁹

Nearly twenty years later, in *Saucier v. Katz*,⁵⁰ the Court refined the “clearly established law” inquiry by mandating a two-step sequential analysis to determine whether a public official is entitled to qualified immunity.⁵¹ First, a court must determine whether the public official’s actions were an actual constitutional violation.⁵² In so doing, a court must “set forth principles” of constitutional law.⁵³ If the court does not find a violation of a constitutional right, the inquiry ends here and the public official is entitled to qualified immunity.⁵⁴ If, however, a court finds that the public official’s actions did violate a constitutional right, the court moves to the second step: whether the official’s unconstitutional actions violated “clearly established” law.⁵⁵ Under the second prong, public officials violate “clearly established” law when it would “be clear to a reasonable [official] that [their] conduct was unlawful in the situation [they] confronted.”⁵⁶ In practice, the second prong requires a court to research whether there is precedent to determine what the “clearly established” law was at the time of the incident.⁵⁷ In other words, courts must look to precedent and determine whether the facts in those cases sufficiently resemble the facts in the case at bar to have put every public official on notice that those actions were unconstitutional at the time they occurred.⁵⁸

This two-step sequential analysis was later modified in *Pearson v. Callahan*,⁵⁹ which gave lower courts the discretion to choose the order in which to analyze the two *Saucier* prongs.⁶⁰ Thus, courts would apply the same two questions going forward, but they could now choose the order of

48. *Id.*

49. *Id.* at 818 (emphasis added).

50. 533 U.S. 194 (2001).

51. *See id.* at 201.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 207–08.

56. *Id.* at 202.

57. *See Ashcroft v. Al-Kidd*, 563 U.S. 731, 741–42 (2011) (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”).

58. *See Zadeh v. Robinson*, 928 F.3d 457, 468 (5th Cir. 2019) (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018)) (“For the law to be clearly established, there must be a close congruence of the facts in the precedent and those in the case before us.”).

59. 555 U.S. 223 (2009).

60. *See id.* at 236; *see also* *Petition for Writ of Certiorari, supra* note 24, at 15.

the questions or simply skip to the clearly established law prong.⁶¹ The Court identified several justifications for its rationale.⁶² Namely, the Court noted that *Saucier's* mandatory sequential framework is inefficient: parties and judges should not expend resources on briefing and ruling on novel constitutional issues when a simpler, dispositive resolution was available by deciding the clearly established law prong.⁶³ Additionally, the Court highlighted that, because judges usually recognize that the second prong easily disposes of cases, they might not analyze important constitutional questions scrupulously so they can quickly reach the second prong and dispose of a case.⁶⁴

3. The Policy Rationales and Critiques of Qualified Immunity

In addition to the overdeterrence issue discussed in *Harlow*, the Supreme Court has articulated various justifications and goals for granting qualified immunity to public officials. This section outlines some of the oft-repeated rationales behind the qualified immunity doctrine.

First, qualified immunity is meant to protect public officials from the “social costs” arising from “the expenses of litigation.”⁶⁵ The *Harlow* Court noted that the costs accompanying litigation are not only limited to time and money but also include the “distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of . . . people from public service.”⁶⁶ More specifically, the Supreme Court has emphasized the burdens of discovery and trial on public officials when they are sued. The Court has highlighted that “the ‘driving force’ behind creation of the qualified immunity doctrine” was to assure that “‘insubstantial claims’ against government officials [will] be resolved prior to discovery.”⁶⁷ Thus, qualified immunity is not just an immunity from liability; it is “an *immunity from suit*” itself.⁶⁸ Moreover, if qualified immunity is not granted in the early stages of a suit and the case is permitted to go to trial, the benefits of qualified immunity are lost because the goal of qualified immunity is to avoid subjecting public officials to time-consuming and costly discovery.⁶⁹

Second, qualified immunity endeavors to provide public officials “breathing room” in the discharge of their duties.⁷⁰ The Supreme Court

61. See *Pearson*, 555 U.S. at 236; see also *Petition for Writ of Certiorari*, *supra* note 24, at 15 (noting that “*Pearson* granted lower courts the discretion to go directly to the second step and evaluate the ‘clearly established’ prong of the qualified immunity analysis”).

62. See *Pearson*, 555 U.S. at 236–42.

63. *Id.* at 236–37.

64. *Id.* at 239.

65. *Harlow v. Fitzgerald*, 547 U.S. 800, 814 (1982).

66. *Id.* at 816.

67. *Pearson*, 555 U.S. at 231 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

68. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

69. *Id.* at 526.

70. See *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.”).

understood that public officials do not always have the requisite knowledge of whether a particular action is clearly unlawful in the circumstances they might face.⁷¹ Police officers, in particular, are in a unique position where they must make split-second decisions for the public's and their own safety while "traversing difficult contours of constitutional law," which may not be clear until a court applies the law to the facts.⁷²

Qualified immunity, however, has sustained significant critiques, both legal and practical. Legally, immunity itself is not mentioned anywhere in the text of § 1983.⁷³ Additionally, the clearly established law framework is nowhere to be found in § 1983 or the Constitution.⁷⁴

Practically, qualified immunity shuts the courtroom door on civil rights plaintiffs and allows defendant-public officials to "duck consequences for bad behavior."⁷⁵ As Justice Sotomayor once pointed out, the Supreme Court's current approach risks rendering the qualified immunity doctrine "an absolute shield for law enforcement officers."⁷⁶ Moreover, one qualified immunity scholar, Professor Joanna C. Schwartz, marshals empirical evidence that shows qualified immunity fails its basic policy goals.⁷⁷ First, Professor Schwartz argues it is questionable that the threat of being sued personally deters police officers from doing their jobs effectively.⁷⁸ Professor Schwartz cites studies indicating "that law enforcement officers infrequently think about the threat of being sued when performing their jobs" and that "a substantial percentage of officers believe lawsuits deter unlawful behavior."⁷⁹ Moreover, Professor Schwartz argues that "the doctrine is utterly miserable at achieving its goal" of preventing public officials from enduring discovery.⁸⁰ Data from approximately 1200 federal district court cases over a two-year period found that less than 1 percent of § 1983 claims were dismissed before discovery.⁸¹

To summarize, the goals of qualified immunity, as articulated by the Supreme Court, are undermined by legal, practical, and empirical critiques. The next section analyzes how the law surrounding affirmative defenses affects qualified immunity.

71. *Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts."); see also *Ashcroft*, 563 U.S. at 743.

72. *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 847 (9th Cir. 2003).

73. See Baude, *supra* note 29, at 50.

74. See *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020).

75. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); see also Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 6 (2017) (discussing the expansiveness of the qualified immunity doctrine and its impact on civil rights plaintiffs).

76. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

77. See generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *NOTRE DAME L. REV.* 1797 (2018).

78. *Id.* at 1811–14.

79. *Id.* at 1811–12.

80. *Id.* at 1809.

81. *Id.* ("[J]ust seven of these 1183 cases (0.6%) were dismissed on qualified immunity grounds before discovery.").

B. An Affirmative Shield: Affirmative Defenses and How Defendants Can Win Outside of the Case's Merits

To appreciate the issue of courts raising qualified immunity sua sponte, it is important to understand the origins and mechanics of affirmative defenses. Because qualified immunity is an affirmative defense,⁸² courts risk flouting its purpose and basic principles of civil procedure if they raise qualified immunity sua sponte.⁸³ Affirmative defenses allow a defendant to admit (or, for the sake of the suit, assume) that the plaintiff's prima facie case elements are true, while asserting that there are alternative grounds that allow the defendant to escape liability.⁸⁴

Qualified immunity is also called an *affirmative* defense for a reason: the *defendant* must affirmatively raise the defense or risk waiving it.⁸⁵ One important reason why a defendant must raise these defenses affirmatively is fairness.⁸⁶ If the legal system provides means for the defendant to escape liability even after, in theory, admitting to the plaintiff's factual claims, it is only fair that the plaintiff should be "provided with notice at a case's inception as to what affirmative material will be raised against it."⁸⁷ These rationales developed at common law but have evolved due to the adoption of the Federal Rules of Civil Procedure (FRCP). The next section provides an overview of affirmative defenses at common law and under FRCP.

1. The Common-Law Roots of Affirmative Defenses and FRCP 8(c)

At common law, a defendant is able to defeat a plaintiff's prima facie case by raising an affirmative defense.⁸⁸ An affirmative defense is a "defendant's assertion of facts and argument, that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true."⁸⁹ In other words, the defendant essentially "confesses" to the plaintiff's allegations but "avoids" liability by pointing to "additional new material" that defeats the claim.⁹⁰ That is why an affirmative defense is sometimes referred to as

82. See *infra* note 104 and accompanying text.

83. See Brief of Professors of Civil Procedure & Federal Courts as Amici Curiae in Support of Petitioner at 4–7, *Hamner v. Burls*, 141 S. Ct. 611 (2020) (mem.) (No. 19-1291) [hereinafter Brief of Professors] (discussing how a court's raising of an affirmative defense sua sponte undermines the adversarial process).

84. See Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 OR. L. REV. 177, 185 (2012).

85. See David H. Taylor, *Filing with Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, yet Waivable, Affirmative Defense?*, 47 SYRACUSE L. REV. 1037, 1040–42 (1997).

86. See Macfarlane, *supra* note 84, at 188.

87. See *id.*

88. See 5 ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 1270 (3d ed. 2020).

89. *Affirmative Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

90. 5 MILLER ET AL., *supra* note 88, § 1270.

“confession and avoidance” or simply “avoidance.”⁹¹ At common law, however, a defendant could not both deny the plaintiff’s allegations *and* raise an affirmative defense.⁹² Thus, when raising an affirmative defense, the defendant essentially says “yes, but . . .” to the plaintiff’s allegation.⁹³

FRCP 8(c) contains a nonexhaustive list of eighteen affirmative defenses, which states that a defendant must affirmatively plead “any avoidance or affirmative defense.”⁹⁴ Although FRCP 8(c)’s pedigree is rooted in the common law,⁹⁵ there is one notable departure: there is no technical requirement that the defendant need “confess” to the plaintiff’s allegations.⁹⁶ Some courts, however, have retained the common-law requirement that the defendant must admit to the allegations to raise an affirmative defense.⁹⁷ The next section analyzes some principles and practices courts use to determine when a defendant has waived an affirmative defense.

2. Affirmative Defenses Outside of FRCP 8(c)

As mentioned above, FRCP 8(c)’s list of affirmative defenses is not exhaustive.⁹⁸ FRCP, however, do not provide an instruction manual for how to determine which defenses are “affirmative.”⁹⁹ There are, however, principles that courts use to ascertain what is an affirmative defense that is not enumerated in FRCP 8(c).¹⁰⁰

One principle is federal precedent, which is the gold standard for determining whether a defense is an affirmative defense.¹⁰¹ According to Judge Charles E. Clark, former Second Circuit judge and drafter of the

91. FED. R. CIV. P. 8(c) (“[A] party must affirmatively state any avoidance or affirmative defense.”); *see* Macfarlane, *supra* note 84, at 185 (“Affirmative defenses are descendants of the common law plea of ‘confession and avoidance.’”).

92. *See* 5 MILLER ET AL., *supra* note 88, § 1271.

93. Macfarlane, *supra* note 84, at 185.

94. FED. R. CIV. P. 8(c). The affirmative defenses listed in FRCP 8(c) are as follows: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. *Id.*; *see also* MILLER ET AL., *supra* note 88, § 1271 (noting that the list of affirmative defenses in FRCP 8(c) “is not intended to be exhaustive”).

95. *See* 5 MILLER ET AL., *supra* note 88, § 1270 (referring to FRCP 8(c) as “a lineal descendant of the common law plea . . . of ‘confession and avoidance’”).

96. *Id.* (explaining that the “imposed election between the [defendant’s] right to deny the allegations in the complaint and the right to [raise an affirmative defense] has been eliminated by Rule 8(e)”).

97. *See, e.g.,* SEC v. Jantzen, No. A-10-CA-740, 2011 WL 250322, at *1–2 (W.D. Tex. Jan. 25, 2011) (holding that affirmative defenses that “are denials of what are elements of a prima facie case” are not “proper affirmative defense[s]”); Gwin v. Curry, 161 F.R.D. 70, 71–72 (N.D. Ill. 1995) (“[T]he basic notion that an [affirmative defense] should accept rather than contradict the well-pleaded allegations of the complaint remains valid.”).

98. *See supra* note 94 and accompanying text.

99. *See* 5 MILLER ET AL., *supra* note 88, § 1271.

100. *See generally id.* There are other considerations that determine nonenumerated affirmative defenses under FRCP 8(c). These include unfair surprise, the logical inference test, fairness, and policy. *See id.* These rationales are extraneous for the purposes of this Note and are omitted.

101. *Id.*

FRCP,¹⁰² the single most important factor in determining an affirmative defense that is not listed in FRCP 8(c) is whether federal court precedent has treated a defense as an avoidance or an affirmative defense.¹⁰³ As for qualified immunity, federal courts have treated it as an affirmative defense.¹⁰⁴ The next section provides a brief overview of how courts determine if and when an affirmative defense is waived.

3. The Rules of Waiver: How Affirmative Defenses Are Waived

FRCP 8(c) states that “a party must affirmatively state any avoidance or affirmative defense.”¹⁰⁵ As previously mentioned, *defendants* must raise an affirmative defense, and if they fail to do so, it “results in the waiver of that defense and its exclusion from the case.”¹⁰⁶ The reason for this requirement is fairness.¹⁰⁷ In the words of Judge Clark, it is “only fair” that affirmative defenses be raised affirmatively because they “seem[] more or less to admit the general complaint and yet . . . suggest some other reasons why” there should be no recovery for the plaintiff.¹⁰⁸ In other words, because defendants have the privilege of admitting to plaintiffs’ allegations while avoiding liability, they must comply with the “requir[ement] that [affirmative defenses] be pled in a particular way.”¹⁰⁹

While the general waiver rule under FRCP 8(c) might sound unequivocal, there are “numerous exceptions.”¹¹⁰ Courts generally take a liberal approach in determining whether an affirmative defense has been waived under FRCP 8(c).¹¹¹ As one court characterized the general approach to waiver rules:

102. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

103. 5 MILLER ET AL., *supra* note 88, § 1271 (“[P]rior decisions of federal courts . . . have been relied upon as indicative of what should be considered an ‘avoidance or affirmative defense.’”).

104. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (citing Gomez v. Toledo, 446 U.S. 635 (1980)) (“Qualified . . . immunity is an affirmative defense that must be pleaded by a defendant official.”); Simmons v. Bradshaw, 879 F.3d 1157, 1162 (11th Cir. 2018) (“A government official faced with a civil rights claim brought pursuant to 42 U.S.C. § 1983 is entitled to raise the affirmative defense of qualified immunity.”); Betts v. Shearman, No. 12 Civ. 3195, 2013 WL 311124, at *1, *4 (S.D.N.Y. Jan. 24, 2013) (“Qualified immunity is an affirmative defense.”).

105. FED. R. CIV. P. 8(c).

106. 5 MILLER ET AL., *supra* note 88, § 1278.

107. *See* Macfarlane, *supra* note 84, at 188–89.

108. 5 MILLER ET AL., *supra* note 88, § 1270 (quoting FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938, AND OF THE SYMPOSIUM AT NEW YORK CITY, OCTOBER 17, 18, 19, 1938, at 49 (Edward H. Hammond ed., 1938)).

109. Macfarlane, *supra* note 84, at 189.

110. 5 MILLER ET AL., *supra* note 88, § 1278.

111. *See* Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 (8th Cir. 2008) (quoting First Union Nat’l Bank v. Pictet Overseas Tr. Corp., 477 F.3d 616, 622 (8th Cir. 2007)) (explaining that “technical failure to comply with Rule 8(c) is not fatal” as long as raising the affirmative defense “does not result in unfair surprise” to the plaintiff); Miller Weisbrod, LLP v. Klein Frank PC, No. 13-CV-2695, 2014 WL 3512994, at *2–3 (N.D. Tex. July 16, 2014) (explaining that waiver will not occur if the defendant raises an affirmative defense at a time that will not cause prejudice to the plaintiff).

[U]nder Rule 8(c) we do not take a formalistic approach to determine whether an affirmative defense was waived. Rather, we look at the overall context of the litigation and have found no waiver where no evidence of prejudice exists and sufficient time to respond to the defense remains before trial.¹¹²

In addition to prejudice, courts also consider other factors, such as notice and unfair surprise.¹¹³ These factors are sometimes interrelated and assist the court in determining whether the defendant raised an affirmative defense “at a ‘pragmatically sufficient time’” to avoid waiver.¹¹⁴

The purpose of FRCP 8(c)’s requirement of raising defenses affirmatively is to provide the plaintiff with notice of the defense and an opportunity to prepare a response.¹¹⁵ However, it is possible to achieve notice within the boundaries of FRCP 8(c) as long as it is not prejudicial to the plaintiff.¹¹⁶ Thus, if a plaintiff receives notice of the affirmative defense “by some means other than the pleadings,” the defense is not waived as long as the plaintiff does not suffer prejudice.¹¹⁷ For example, say a plaintiff notices an affirmative defense in a response to a motion for summary judgment.¹¹⁸ The general rule is that affirmative defenses should be raised in the pleadings.¹¹⁹ If, however, the plaintiff is not prejudiced by the defendant’s failure to properly raise the defense in the pleadings but is aware of the defense incidentally (in this case, in a motion for summary judgment), the defense might not be waived.¹²⁰

Prejudice and unfair surprise to the plaintiff are also critical factors in determining whether waiver has occurred.¹²¹ Prejudice can occur if raising a defense outside of the pleadings would require plaintiffs “to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction.”¹²² Additionally, long periods of time between the pleadings and the defendant raising a new

112. *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009).

113. *See Rogers v. IRS*, 822 F.3d 854, 856 (6th Cir. 2016) (noting that an affirmative defense can be raised outside of the pleadings as long as it does not result in surprise or prejudice to the plaintiff); *Shelbyville Hosp. Corp. v. Mosley*, No. 13-CV-88, 2017 WL 5586729, at *1 (E.D. Tenn. Nov. 20, 2017) (listing notice and substantial prejudice as key factors for determining waiver).

114. *Shelbyville Hosp. Corp.*, 2017 WL 5586729, at *14 (quoting *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993)).

115. *Id.*

116. *Id.* at *15.

117. *Id.* (quoting *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993)).

118. *Id.*

119. *See Burton v. Ghosh*, 961 F.3d 960, 964–65 (7th Cir. 2020).

120. *Id.* at 965.

121. *See id.* (noting prejudice as a factor for determining waiver); *Rogers v. IRS*, 822 F.3d 854, 856 (6th Cir. 2016) (noting prejudice and unfair surprise as factors for determining waiver).

122. *Rogers*, 822 F.3d at 857 (quoting *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir. 1994)).

affirmative defense does not necessarily constitute waiver.¹²³ Similar factors are also considered when determining whether a plaintiff was unfairly surprised, including whether the plaintiff had notice of the defense, whether the plaintiff should have expected the defense to be raised, and whether the plaintiff was “afforded ample opportunity to respond.”¹²⁴ Finally, there are also procedural safeguards in the FRCP: FRCP 15 permits parties to liberally amend their pleadings should they seek to add affirmative defenses later in the litigation.¹²⁵

In sum, the law provides defendants with several backstops if they neglect to raise an affirmative defense or if they raise an affirmative defense incorrectly. These procedural safeguards allow defendants to properly abide by the “central tenets of the [American] adversarial model: that courts act as passive and neutral decisionmakers, reviewing only the legal and factual disputes presented for adjudication by the parties.”¹²⁶

C. *Super Courts: Appellate Courts Raising Issues Sua Sponte*

In light of the purposes of affirmative defenses and the considerable leeway trial courts allow defendants to preserve affirmative defenses, appellate courts raising affirmative defenses sua sponte create tension with the tenets of the adversarial system of party representation.¹²⁷ Indeed, the general rule that an appellate court will only consider issues presented by the parties before them “is as old as the common-law system of appellate review” itself.¹²⁸ This general rule, however, is subject to some exceptions and appellate courts can usually raise issues sua sponte if they desire.¹²⁹ This section looks to the origins of this general rule, its exceptions, and its rationales.

1. *Singleton v. Wulff*: The Origins of the General Rule

In *Singleton v. Wulff*,¹³⁰ the Supreme Court noted that “[i]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.”¹³¹ The rule stems from the English legal system.¹³² Originally, a jury or judge who rendered a false verdict or false judicial decision was tried on appeal and potentially subject to imprisonment for that

123. See *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (reversing the trial court for holding that the affirmative defense of qualified immunity was waived solely on the basis that fifty-two months had passed between the pleadings and the raising of the defense).

124. See *Rogers*, 822 F.3d at 857.

125. HOWARD M. ERICHSON & J. MARIA GLOVER, CIVIL PROCEDURE 82–84 (2021); see also *Burton*, 961 F.3d at 965–66.

126. Brief of Professors, *supra* note 83, at 3.

127. *Id.*

128. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1061 (1987).

129. *Id.*

130. 428 U.S. 106 (1976).

131. *Id.* at 120.

132. See Martineau, *supra* note 128, at 1026.

mistaken decision.¹³³ This appeals process was done in equity proceedings in the House of Lords, the principal appellate court in England.¹³⁴ The House of Lords “had the power to review any issue of law or fact regardless of whether it was in the record.”¹³⁵ This system eventually evolved into the writ of error, which is now the basis of American court procedures for appealing a judgment rendered below.¹³⁶

As its name suggests, the writ of error is “predicated on the concept that its purpose was to determine whether the trial judge had erred.”¹³⁷ Thus, the writ of error logically limited appellate courts to reviewing matters actually decided by the trial court to determine whether an error had occurred.¹³⁸ Thus, unlike the House of Lords, which could raise any issue it desired to “render . . . judgment it thought justice demanded,”¹³⁹ common-law writ of error appellate courts could not “raise new issues sua sponte” and were confined to ruling on questions “reflected in the record.”¹⁴⁰ In sum, appellate courts in the common-law writ of error system could only review matters of law since “[t]he purpose [of an appeal in the writ of error system] was not to test whether the proper party had won, *but only whether the judge had made an error.*”¹⁴¹

As mentioned above, the American appellate court system is based on the writ of error approach.¹⁴² This approach is consistent with the adversarial model of party representation, in which *the parties* are responsible for proffering legal arguments and are generally required to preserve legal arguments or defenses for appeal.¹⁴³ The American legal system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”¹⁴⁴

2. Exceptions to the General Rule

The general rule that appellate courts will not decide issues raised for the first time on appeal is subject to exceptions.¹⁴⁵ The *Singleton* Court, while

133. *See id.*

134. Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The “Gorilla Rule” Revisited*, 17 J. APP. PRAC. & PROCESS 113, 117 (2016).

135. *Id.*

136. *See* Martineau, *supra* note 128, at 1026.

137. *Id.*

138. *See id.* at 1026–27.

139. Offenkrantz & Lichter, *supra* note 134, at 117 (quoting Martineau, *supra* note 128, at 1027).

140. *Id.* (quoting Martineau, *supra* note 128, at 1026–28).

141. Martineau, *supra* note 128, at 1026–27 (emphasis added).

142. Offenkrantz & Lichter, *supra* note 134, at 118.

143. *See* Brief of Professors, *supra* note 83; *see also* Martineau, *supra* note 128, at 1030 (noting that litigants have “an obligation to assert [their] rights at the first opportunity”).

144. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)).

145. *See* *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009) (addressing the affirmative defense of qualified immunity sua sponte notwithstanding the fact that it was raised for the

announcing the general rule, also stated that they “announce no general rule” and that “[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion” of appellate courts.¹⁴⁶ So while appellate courts generally do not consider issues raised for the first time on appeal, the *Singleton* Court left the door open for courts to raise issues sua sponte.¹⁴⁷

The first exception to the general rule, which is “universally recognized,” is subject matter jurisdiction.¹⁴⁸ Subject matter jurisdiction, which is essentially whether a federal court has the power to hear a certain case,¹⁴⁹ can be raised by the court or any party at any stage of litigation.¹⁵⁰ If the court—trial or appellate—realizes that it lacks subject matter jurisdiction, it *must* dismiss the case.¹⁵¹ While it would seem like a flagrant violation of the general rule if subject matter jurisdiction is raised for the first time on appeal, subject matter jurisdiction is a mandatory prerequisite for a federal court to hear any case ab initio.¹⁵² As Professor Robert Martineau has explained, “the general rule presupposes subject matter jurisdiction,” so it is not really a per se exception to the rule.¹⁵³ Moreover, any case heard where a court lacks subject matter jurisdiction exceeds the “elemental power of the courts,” since the legislature, not the litigants or courts, confer the jurisdictional power to hear a case.¹⁵⁴

There are multiple nonjurisdictional exceptions to the general rule, which appellate courts have relied on when deciding an issue for the first time on appeal.¹⁵⁵ The issue, however, is that courts may not explicitly state when they raise an issue sua sponte, and if they do, their analysis as to why they are raising the issue might be cursory.¹⁵⁶

first time on appeal); *Graves v. City of Coeur D’Alene*, 339 F.3d 828, 845–46, 845 n.23 (9th Cir. 2003) (same).

146. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

147. The *Singleton* Court did not prescribe specific criteria for when an appellate court can raise an issue for the first time on appeal. The Court did, however, outline some considerations courts could take into account, such as if “proper resolution is beyond any doubt” or “where ‘injustice might otherwise result.’” *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

148. Martineau, *supra* note 128, at 1045.

149. See ERICHSON & GLOVER, *supra* note 125, at 443.

150. Martineau, *supra* note 128, at 1045–46.

151. *Id.*

152. *Id.* at 1046–47.

153. *Id.* at 1047.

154. See Vestal, *supra* note 12, at 502; see also FED. R. CIV. P. 12(h)(1) (listing defenses that a party can waive, including personal jurisdiction, but excluding subject matter jurisdiction).

155. See Martineau, *supra* note 128, at 1034–56 (noting that some exceptions to the general rule include sovereign immunity, fundamental error, and issues certain to arise in other cases); Vestal, *supra* note 12, at 499–508 (noting exceptions such as contra bonas mores and interpretation of instruments). For the purposes of this Note, only pertinent exceptions that plausibly arise in the qualified immunity context are analyzed.

156. See Vestal, *supra* note 12, at 497 (“Unless there is a dissenting opinion noting the fact, only the attorneys for the litigants will be aware that the court has decided the case on issues not argued to the court.”). This point is well illustrated by *Story v. Foote*, where the Eighth Circuit raised qualified immunity sua sponte. 782 F.3d 968, 969–70 (8th Cir. 2015). The court

One exception is that courts might raise new issues sua sponte only to *affirm* the trial court.¹⁵⁷ The reason is that merely affirming a lower court based on different reasoning would not waste judicial resources because no further proceedings would be necessary and the lower court arrived at the correct judgment anyway.¹⁵⁸ Another court has laid out four notable exceptions to the general rule for when a court can raise issues sua sponte for the first time on appeal.¹⁵⁹ The First Circuit, in *United States v. Krynicki*,¹⁶⁰ heard an appeal where the government raised an argument that was not raised below in the trial court.¹⁶¹ The court acknowledged the general rule but also acknowledged *Singleton*, which allows courts to consider issues for the first time on appeal in “exceptional cases or particular circumstances.”¹⁶² The court outlined four reasons for its departure from the general rule.¹⁶³

First, the court held that “purely legal” issues that do not require additional fact-finding can be decided for the first time on appeal.¹⁶⁴ The court noted that an essential reason for the general rule is to permit the parties to develop the factual record extensively in light of the issues raised below.¹⁶⁵ When purely legal issues are presented on appeal, however, this rationale is absent.¹⁶⁶ Second, the court noted that the resolution of the case based on the new issue was “highly persuasive” and “le[ft] no doubt as to the proper resolution of th[e] issue.”¹⁶⁷ The court reasoned that the government’s argument in *Krynicki* was so persuasive that it justified raising the issue for the first time on appeal.¹⁶⁸ Third, the court noted that the issue was “almost certain to arise in other cases.”¹⁶⁹ The logic is that simple, purely legal issues should be decided, even if raised for the first time on appeal, to preserve limited judicial resources.¹⁷⁰ Finally, the last factor is whether declining to decide the issue at bar would “result in a miscarriage of justice.”¹⁷¹

justified its sua sponte action simply by citing a screening statute and stating that the court can rule on “any ground supported by the record” even though the lower court dismissed the suit without discussing qualified immunity. *Id.* at 970. Judge Kermit E. Bye dissented, pointing out that he was “unable to find[] any cases where the Eighth Circuit sua sponte raised the affirmative defense of qualified immunity after the district court dismissed [the case] without mention of qualified immunity.” *Id.* at 975 (Bye, J., concurring in part and dissenting in part).

157. See Vestal, *supra* note 12, at 491–92.

158. See *id.*

159. *United States v. Krynicki*, 689 F.2d 289, 291–92 (1st Cir. 1982); see also Martineau, *supra* note 128, at 1035–37 (analyzing *Krynicki*).

160. 689 F.2d 289 (1st Cir. 1982).

161. *Id.* at 291.

162. *Id.* (quoting *United States v. Miller*, 636 F.2d 850, 853 (1st Cir. 1980)).

163. *Id.* at 291–92.

164. *Id.* at 291.

165. See *id.*; see also Martineau, *supra* note 128, at 1038–40.

166. See *Krynicki*, 689 F.2d at 292.

167. *Id.*

168. See *id.*

169. *Id.*

170. See *id.*

171. *Id.*

3. Rationale for the General Rule and Critiques of Its Exceptions

The general rule is fundamental to our appellate court system. First, because the appeals process is rooted in the writ of error model, in which appellate courts only review errors made by the trial court, it is naturally incongruous for an appellate court to decide a case on an issue raised for the first time on appeal.¹⁷² In other words, if appellate courts review issues that were not decided by a trial court, then the appellate courts are not rectifying any errors.¹⁷³ This flouts the fundamental purpose of appellate courts in our system of adjudication.¹⁷⁴

Second, appellate courts raising issues sua sponte contradicts the adversarial nature of party representation, which is a hallmark of American law.¹⁷⁵ Appellate courts are meant to be “passive instrumentalities” and the “initiative is never theirs” when it comes to raising arguments for the parties.¹⁷⁶

Third, appellate courts raising issues sua sponte can waste judicial resources and prevent uniformity in the law.¹⁷⁷ Appellate courts that raise new issues sua sponte may have to do their own research into the legal issues that usually are completed by the litigants, which wastes judicial resources.¹⁷⁸ Moreover, appellate courts tend to depart from the general rule inconsistently,¹⁷⁹ which creates uncertainty as to when an appellate court will raise or permit new issues on appeal.¹⁸⁰ This might encourage litigants to engage in gamesmanship by raising certain issues below, hoping to prevail on those grounds; if they fail, they might then raise new or waived issues on appeal hoping for the appellate court to entertain those arguments sua

172. Offenkrantz & Lichter, *supra* note 134, at 118; Vestal, *supra* note 12, at 490–91.

173. Vestal, *supra* note 12, at 491 (“Since the lower court has not been given an opportunity to consider the matter and rectify it, the lower court has not erred, and it follows that the appellate court cannot act.”).

174. *See* Offenkrantz & Lichter, *supra* note 134, at 117–18.

175. Brief of Professors, *supra* note 83, at 4 (“It is well-established that in our adversarial system, [courts] do not, or should not, sally forth each day looking for wrongs to right’ and instead ‘normally decide only questions presented by the parties.’” (alteration in original) (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020))).

176. Vestal, *supra* note 12, at 487; *see also* Offenkrantz & Lichter, *supra* note 134, at 117 (noting that the writ of error model “ultimately reflected the idea of the ‘adversary process,’ under which the litigants rather than the court controlled the issues in the case”).

177. *See* Martineau, *supra* note 128, at 1024 (asserting that raising issues sua sponte without any principled justification can make it harder for litigants to predict when and why an appellate court will take such an action); Vestal, *supra* note 12, at 495 (arguing that raising new issues sua sponte causes appellate courts to “do all of the work, analytical and research, with absolutely no assistance from the parties”).

178. Vestal, *supra* note 12, at 495.

179. *See* Martineau, *supra* note 128, at 1057 (noting that “[i]nconsistency is the hallmark of the various exceptions” to the general rule).

180. *Id.* at 1024 (noting that inconsistent reasoning from appellate courts as to when they raise issues sua sponte creates uncertainty and encourages more appeals, which “adds to the already overwhelming caseload of American appellate courts”).

sponte.¹⁸¹ In sum, this uncertainty might incentivize more appeals, which increases the workload on appellate courts.¹⁸²

Fourth, raising issues sua sponte on appeal can stunt the development of a full and robust record for the appellate court to review.¹⁸³ The *Singleton* Court noted that the general rule is critical for the ability of litigants to gather relevant, salient evidence for the issues they proffer at trial.¹⁸⁴ Thus, considering issues for the first time on appeal can prevent the aggrieved party from gathering evidence or preparing arguments in a timely manner.¹⁸⁵

Finally, raising an issue sua sponte can cause surprise.¹⁸⁶ The “purely legal” questions exception to the general rule highlights the issue of surprise.¹⁸⁷ Because cases tend to last for many months or years, litigants have ample time to develop the record and their legal arguments.¹⁸⁸ Raising an issue sua sponte, however, might force a party to prepare a legal argument on an incomplete record and over a much shorter time frame.¹⁸⁹ Moreover, the assumption in the “purely legal” questions exception—that there is no need for additional fact-finding—is questionable considering that “[n]o case is tried so completely and competently that an appellate court can confidently say that the trial would have gone exactly the same way if a new, determinative, legal issue had been raised in the trial court.”¹⁹⁰

To summarize, although it may be common for appellate courts to raise issues sua sponte,¹⁹¹ doing so is not entirely consistent with the writ of error

181. See, e.g., *Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664, 669 (1st Cir. 1996) (holding that a qualified immunity defense was waived at the pretrial stage because the defendant delayed raising the defense, which prejudiced the plaintiff); see also *Martineau*, *supra* note 128, at 1048–49 (explaining the “enormous advantage” a state party has if it knows an appellate court will raise Eleventh Amendment immunity sua sponte, since it gives the state party the liberty to raise an unrelated argument at trial, and if the state party loses, it can raise the Eleventh Amendment defense on appeal).

182. See *Martineau*, *supra* note 128, at 1024.

183. See *id.* at 1037 (“To suggest that an appellate court can look at the record and conclude that no additional, relevant evidence could have been introduced on a completely new legal issue had the parties known it would be decisive in the case simply flies in the face of what we know about the trial process.”).

184. See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

185. *Id.* at 120 (noting that parties might be surprised by a new issue raised on appeal that they were unable to adequately introduce evidence for at the trial level); *Vestal*, *supra* note 12, at 493 (noting that if an issue is raised sua sponte, litigants might not be given the opportunity to “consider the matter and urge arguments in support of and against the position adopted by the reviewing court”); see also *Martineau*, *supra* note 128, at 1028–31.

186. See *Singleton*, 428 U.S. at 120 (quoting *Hormel v. Helvering*, 312 U.S. 552, 55 (1941)) (explaining that the general rule is essential “in order that litigants [] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence”).

187. See *supra* note 164 and accompanying text.

188. *Martineau*, *supra* note 128, at 1039.

189. *Id.*

190. *Id.* at 1037.

191. One famous instance of the Supreme Court raising an issue sua sponte is *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Timothy Macht & Derek Borchardt, *Can Courts Introduce Legal Issues Not Raised by the Parties?*, N.Y.L.J. (July 2, 2020, 3:37 PM), <https://www.law.com/>

model, which presupposes reviewing an error made by the trial court.¹⁹² Additionally, appellate courts raising issues sua sponte can cause significant practical problems, including unfairness to litigants¹⁹³ and the inefficient use of judicial resources.¹⁹⁴

II. AFFIRMATIVE OR SPONTANEOUS IMMUNITY?: THE INCONSISTENCY AMONG APPELLATE COURTS

As noted above, if a defendant does not raise an affirmative defense in a timely manner, it may be subject to waiver.¹⁹⁵ Generally, an appellate court will only consider arguments raised in the trial court.¹⁹⁶ Appellate court judges do, however, have the discretion to consider waived arguments or consider new legal issues sua sponte.¹⁹⁷ Some appellate courts have raised the affirmative defense of qualified immunity sua sponte even though the lower court did not address the issue. Others, however, emphasize that it is an affirmative defense that must be raised by the defendant in the lower court, or it is waived.

Part II analyzes the inconsistency of federal circuit courts as to whether a defendant waives qualified immunity if they fail to raise it properly in the trial court or whether judges can raise it sua sponte on appeal. Specifically, Part II.A examines circuit court decisions raising qualified immunity sua sponte on appeal. Part II.B analyzes circuit court decisions asserting that qualified immunity must be raised by the defendant at the trial court.

A. Spontaneous Immunity

Because of the broad discretion *Singleton* confers to appellate courts to consider new issues on appeal,¹⁹⁸ some circuit courts have raised the qualified immunity affirmative defense sua sponte.¹⁹⁹ This section outlines select cases from the Second, Eighth, and Ninth Circuits that have raised qualified immunity sua sponte. Although the cases have different procedural postures, the result is the same in each: the appellate court raised qualified immunity sua sponte when it otherwise would have been waived.

1. *Dean v. Blumenthal*

In *Dean v. Blumenthal*,²⁰⁰ the Second Circuit relied on the “purely legal” issue exception to the general rule when raising qualified immunity sua

newyorklawjournal/2020/07/02/can-courts-introduce-legal-issues-not-raised-by-the-parties/
[<https://perma.cc/M5KN-YW78>].

192. See *supra* note 141 and accompanying text.

193. See *supra* note 181 and accompanying text.

194. See *supra* notes 177–182 and accompanying text.

195. Taylor, *supra* note 85, at 1042; see also *supra* Part I.B.

196. See generally Vestal, *supra* note 12.

197. See *supra* Part I.C.

198. See *supra* Part I.C.

199. See Petition for Writ of Certiorari, *supra* note 24, at 12–13.

200. 577 F.3d 60 (2d Cir. 2009).

sponte.²⁰¹ In 2002, then Connecticut Attorney General (and now Senator) Richard Blumenthal was sued by Martha Dean, then a candidate running against Blumenthal in the Connecticut attorney general race.²⁰² As attorney general, Blumenthal instituted a policy that prohibited attorney general candidates from receiving campaign contributions from any outside counsel that had worked with the Connecticut Office of the Attorney General.²⁰³ Dean sued under § 1983 for: (1) a violation of the First Amendment right to receive campaign contributions and (2) the deprivation of due process rights under the Fourteenth Amendment to receive campaign contributions from willing donors.²⁰⁴

The Second Circuit raised qualified immunity *sua sponte* during oral argument.²⁰⁵ The court, in a footnote, acknowledged that the general rule is “that an appellate court will not consider an issue raised for the first time on appeal.”²⁰⁶ The court, however, cited two reasons for departing from the general rule.²⁰⁷ First, it cited the “purely legal” issue exception to the general rule, in which appellate courts can raise issues *sua sponte* if the issues do not require additional fact-finding.²⁰⁸ Because the clearly established law analysis from *Saucier*’s second prong fits into this category, the court found it appropriate to raise qualified immunity *sua sponte*.²⁰⁹ Second, the court stated that the general rule “is prudential, not jurisdictional” and that it “ha[d] [the] discretion to consider waived arguments” on appeal.²¹⁰ The Second Circuit then granted Blumenthal qualified immunity, stating that there was “no clearly established” right to receive campaign contributions at the time Blumenthal enforced the policy.²¹¹

2. *Graves v. City of Coeur D’Alene*

Like the Second Circuit in *Dean*, the Ninth Circuit in *Graves v. City of Coeur D’Alene*²¹² raised qualified immunity *sua sponte*, relying on the “purely legal” issue exception to the general rule.²¹³ The Ninth Circuit, however, articulated an additional rationale for departing from the general rule: it held that it could rule on any issue supported by the record.²¹⁴ In *Graves*, one of the defendant-police officers arrested one of the plaintiffs,

201. *Id.* at 67 n.6.

202. *Id.* at 63.

203. *Id.*

204. *Id.*

205. *Id.* at 67 n.6.

206. *Id.* (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)).

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.* (quoting *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (per curiam)).

211. *Id.* at 68–70.

212. 339 F.3d 828 (9th Cir. 2003).

213. *Id.* at 845–46 n.23.

214. *Id.*

who was a counterprotester at a neo-Nazi rally.²¹⁵ The officer justified the arrest for a number of reasons: (1) the plaintiff refused to allow the officer to search his knapsack, which appeared full with cylindrical objects and other bulky items that the officer suspected was a bomb; (2) there was a “hostile atmosphere” among the protestors and counterprotestors, which included earlier threats of violence, and police had previously received reports of missing explosives from a nearby construction site, which they feared would be used at the protest; and (3) the plaintiff refused to provide identification and grew increasingly agitated when asked to do so by police.²¹⁶ The plaintiff sued the officers under § 1983 for arresting him without probable cause.²¹⁷

After trial, the jury returned a verdict for the defendant-police officer, finding that there was probable cause to conduct the arrest.²¹⁸ The plaintiffs filed posttrial motions for a judgment notwithstanding the verdict and for a new trial.²¹⁹ The trial court denied those motions.²²⁰

The plaintiffs appealed to the Ninth Circuit that, in a lengthy constitutional analysis, concluded that the officer lacked probable cause to conduct the arrest.²²¹ In short, the court noted that there was insufficient individualized suspicion to support an arrest, despite the hostile atmosphere and the plaintiff’s bulky knapsack.²²² Thus, the Ninth Circuit held that the arrest was a violation of the plaintiff’s constitutional rights.²²³

Were that the end of the court’s analysis, the plaintiff likely would have recovered damages from the defendant-police officer under § 1983. The Ninth Circuit, however, raised qualified immunity *sua sponte* and cited two reasons for doing so.²²⁴ First, the court relied on the “purely legal” issue exception to the general rule and noted that the qualified immunity analysis in this case involved “an issue of law and . . . [the factual] record ha[d] been fully developed.”²²⁵ Second, the court noted that the defendant-police officers raised qualified immunity in their answer to the plaintiff’s complaint.²²⁶ Because the court can “affirm the decision of the district court on any ground supported by the record,” it raised qualified immunity *sua sponte*.²²⁷

The court then applied the qualified immunity analysis.²²⁸ Because the court already found that the defendant-police officer violated the plaintiff’s

215. *Id.* at 834, 837.

216. *Id.* at 834–37, 843.

217. *Id.* at 833.

218. *Id.* at 837.

219. *Id.*

220. *Id.*

221. *Id.* at 833, 844.

222. *Id.* at 843–45.

223. *Id.* at 845.

224. *Id.* at 845 n.23.

225. *Id.*; *see supra* Part I.C.2.

226. *Graves*, 339 F.3d at 845 n.23.

227. *Id.*

228. *Id.* at 845–88.

constitutional rights by conducting an arrest without probable cause, the court proceeded directly to the clearly established prong of the qualified immunity analysis.²²⁹ The court found that while the underlying arrest was a violation of the plaintiff's Fourth Amendment rights, that violation was not clearly established law at the time of the arrest.²³⁰ Thus, the court held that the defendant-police officers were entitled to qualified immunity.²³¹

3. *Hamner v. Burls*

Like the Second and Ninth Circuits, the Eighth Circuit, in *Hamner v. Burls*,²³² raised qualified immunity sua sponte by relying on the “purely legal” issue exception.²³³ Like the Ninth Circuit, the Eighth Circuit justified its decision by stating that it could rely on any legal issue in the record.²³⁴ The Eighth Circuit also introduced a new rationale: efficiency.²³⁵ In 2015, Hamner, an inmate, alerted prison guards to a potential attack against a prison guard.²³⁶ The guards, however, moved Hamner to administrative segregation because of “security concerns.”²³⁷ In administrative segregation, Hamner was confined to a prison cell for twenty-three hours per day, served cold food, was unable to read due to lack of lighting, and was denied almost any human contact.²³⁸ Moreover, Hamner's requests for his prescription medications were ignored by the guards.²³⁹

Hamner filed a § 1983 suit against the prison guards, initially alleging a violation of his due process rights and a retaliation claim.²⁴⁰ In the defendants' answer to the complaint, defendants raised qualified immunity as an affirmative defense.²⁴¹ Hamner then amended his complaint to add an Eighth Amendment claim and expand on his due process claim.²⁴² The defendant-prison guards moved to dismiss the amended complaint for failure to state a claim but did not raise qualified immunity in their motion to dismiss.²⁴³ The district court granted the motion.²⁴⁴ On appeal, the Eighth Circuit raised qualified immunity sua sponte and requested supplemental

229. *Id.* at 846.

230. *Id.* at 846–47.

231. *Id.* at 847–48.

232. 937 F.3d 1171 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 611 (2020) (mem.).

233. *Id.* at 1176.

234. *Id.*

235. *See id.*

236. *Id.* at 1174.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1175.

241. Answer at 4, *Hamner v. Burls*, No. 17-CV-00079, 2018 WL 2033406 (E.D. Ark. Apr. 9, 2018), *report and recommendation adopted*, No. 17-CV-79, 2018 WL 2024613 (E.D. Ark. May 1, 2018), *aff'd on other grounds*, 937 F.3d 1171.

242. *See generally* Plaintiffs Amended Complaint, *Hamner*, 2018 WL 2033406 (No. 17-CV-00079).

243. Motion to Dismiss Plaintiff's Amended Complaint, *Hamner*, 2018 WL 2033406 (No. 17-CV-00079).

244. *Hamner*, 937 F.3d at 1175.

briefing on the issue.²⁴⁵ Hamner asserted that, because the defendants merely stated qualified immunity in their answer and did not raise it in their motion to dismiss, they waived the defense at this stage of the litigation.²⁴⁶ The Eighth Circuit rejected that argument.²⁴⁷

The Eighth Circuit justified its decision to raise qualified immunity sua sponte by noting that it could “resolve the appeal . . . where the defense was established on the face of the complaint.”²⁴⁸ The court acknowledged that the affirmative defense of qualified immunity was not raised in the motion to dismiss.²⁴⁹ The court, however, reasoned that the procedural posture had changed so significantly that it was appropriate to consider qualified immunity for the remaining constitutional claims because “qualified immunity could be dispositive as to the only claims left on appeal.”²⁵⁰

The Eighth Circuit also articulated two additional reasons as to why the defense could be raised sua sponte.²⁵¹ The first was efficiency: the defendants stipulated that they would raise qualified immunity on remand if, on appeal, the court reversed the district court on any claims.²⁵² And then, because the defendants would likely appeal again to the Eighth Circuit to review the qualified immunity question, the court reasoned that there is “nothing to be profited by that procedural roundabout.”²⁵³ Second, the court reasoned that the qualified immunity question is a “purely legal” question “amenable to consideration for the first time on appeal.”²⁵⁴

The court also articulated three other reasons why it departed from the general rule and raised qualified immunity sua sponte. First, like the Second and Ninth Circuits, the court reasoned that the qualified immunity question was “purely legal” and that no additional fact-finding was necessary.²⁵⁵ Second, the court stated that it could affirm on qualified immunity grounds since “the defense was established on the face of the complaint.”²⁵⁶ This appears similar to the Ninth Circuit’s rationale in *Graves*, in which the court affirmed the trial court based on the issues in the record.²⁵⁷ Third, the court stated that because it had requested supplemental briefing on the qualified

245. *Id.* at 1176 (“Because the parties had not briefed the issue, we requested supplemental filings to address whether any or all of the district court’s judgment should be affirmed based on qualified immunity.”).

246. *Id.*

247. See Motion to Dismiss Plaintiff’s Amended Complaint, *supra* note 243.

248. *Hamner*, 937 F.3d at 1176.

249. *Id.* If the same procedural posture had occurred before the First Circuit in *Guzmán-Rivera v. Rivera-Cruz*, for example, the qualified immunity defense would have been waived at the pleadings stage. See *Guzmán-Rivera v. Rivera-Cruz*, 98 F.3d 664, 667 (1st Cir. 1996) (noting that, should a defendant fail to assert qualified immunity in a preanswer motion to dismiss, the qualified immunity defense would be waived for the pleadings stage).

250. *Hamner*, 937 F.3d at 1176.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. See *supra* note 227 and accompanying text.

immunity issue, the parties had “notice and an opportunity to be heard” on the qualified immunity issue even though the court had raised it sua sponte.²⁵⁸

B. Affirmative Immunity

As the cases above note, the Second, Eighth, and Ninth Circuits have previously allowed qualified immunity defenses to be raised sua sponte. In contrast, appellate courts from every other circuit have strictly applied the general rule.²⁵⁹ That is, where the qualified immunity defense was not appropriately raised, it was waived as to that stage of litigation. This section samples cases from these other circuit courts that do not allow qualified immunity to be raised for the first time on appeal.

1. *Guzmán-Rivera v. Rivera-Cruz*

In *Guzmán-Rivera v. Rivera-Cruz*²⁶⁰, the First Circuit rejected the government’s invitation to raise qualified immunity sua sponte and outlined the various stages of litigation in which a defendant can raise that affirmative defense.²⁶¹ The plaintiff in *Guzmán-Rivera* was convicted of murder in 1989.²⁶² The plaintiff’s father conducted an independent investigation and was able to vindicate his son’s innocence.²⁶³ The plaintiff sued employees of the U.S. Department of Justice under § 1983 for failing to reinvestigate the facts of his case and for failing to move for his release after establishing his innocence.²⁶⁴

The First Circuit outlined when a defendant can appropriately raise the affirmative defense of qualified immunity at the various stages of litigation before the defense is waived.²⁶⁵ It held that the first stage is on the pleadings.²⁶⁶ Instead of filing an answer to a complaint, the defendant can

258. *Hammer*, 937 F.3d at 1176. The Supreme Court prefers that appellate courts require supplemental briefing when a new issue is raised sua sponte. *See* Offenkrantz & Lichter, *supra* note 134, at 136.

259. *See, e.g.*, Greer v. Dowling, 947 F.3d 1297, 1303 (10th Cir. 2020); Robinson v. Pezzat, 818 F.3d 1, 11 (D.C. Cir. 2016); Summe v. Kenton Cnty. Clerk’s Off., 604 F.3d 257, 269–70 (6th Cir. 2010); Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009); Bines v. Kulaylat, 215 F.3d 381, 385 (3d Cir. 2000); Suarez Corp. v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997); Guzmán-Rivera v. Rivera-Cruz, 98 F.3d 664, 667–69 (1st Cir. 1996); Kelly v. Foti, 77 F.3d 819, 822–23 (5th Cir. 1996); Moore v. Morgan, 922 F.2d 1553, 1557–58 (11th Cir. 1991). Note that this is not a formal “circuit split,” however, because raising an issue sua sponte on appeal is discretionary. *See supra* Part I.C. For example, the Ninth Circuit panel in *Mansourian v. Regents of the University of California* refused to raise qualified immunity sua sponte, whereas the Ninth Circuit panel in *Graves* did the opposite. *See* *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010); *see also* Petition for Writ of Certiorari, *supra* note 24, at 10–12.

260. 98 F.3d 664 (1st Cir. 1996).

261. *Id.* at 666–67.

262. *Id.* at 666.

263. *Id.*

264. *Id.*

265. *Id.* at 667.

266. *Id.*

move to dismiss under a qualified immunity theory, and if the motion is granted, the defendant is entitled to qualified immunity before discovery begins.²⁶⁷ The second stage is summary judgment, which occurs postdiscovery but pretrial.²⁶⁸ If the defendant moves for summary judgment on the basis of qualified immunity and the discovery evidence does not raise a genuine dispute of a material fact(s), the suit can be dismissed before trial.²⁶⁹ The third stage is at trial.²⁷⁰ Thus, for example, if a defendant raises the affirmative defense of qualified immunity improperly in a preanswer motion to dismiss (the pleadings stage), it will be waived for the pleadings stage and can only be raised in a later stage of the litigation.²⁷¹

The court was mindful of the fact that not placing a strict waiver rule on qualified immunity can incentivize abuse by a defendant.²⁷² Because qualified immunity is an exception to the final judgment rule, a defendant can appeal a denial of qualified immunity immediately.²⁷³ For example, a defendant can raise a nonimmunity theory in a preanswer motion to dismiss, and if that fails, the defendant can raise another preanswer motion to dismiss on qualified immunity grounds.²⁷⁴ If that fails, the defendant can immediately appeal that decision.²⁷⁵ This allows a defendant to initiate several time-consuming appeals, which can unduly prejudice plaintiffs by causing them to accumulate significant legal fees and can lead to potential witnesses' memories fading.²⁷⁶ This can also substantially burden the courts, which would need to wade through these dilatory motions to dismiss, interlocutory appeals of qualified immunity denials, and remands of those interlocutory appeals.²⁷⁷ Thus, the First Circuit held that failure to raise the qualified immunity defense appropriately can lead to waiver at the various stages of litigation.²⁷⁸

In *Guzmán-Rivera*, the defendant waived the qualified immunity defense at the summary judgment phase of litigation.²⁷⁹ The defendant raised two nonqualified immunity defenses in a motion for summary judgment.²⁸⁰ The first motion for summary judgment, based on a statute of limitations theory, was denied.²⁸¹ Later, on the eve of trial, the defendants again moved for summary judgment, this time based on an absolute immunity theory.²⁸² After that motion was denied, the defendant amended the answer to include

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 667–68.

273. *Id.* at 667.

274. *See id.* at 668.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 668–69.

280. *Id.* at 669.

281. *Id.* at 666.

282. *Id.* at 669.

qualified immunity and, eight months later, moved for summary judgment on that basis.²⁸³

The First Circuit held that “the piecemeal fashion in which defendants have brought forward their defense [was] unduly time consuming for the courts and potentially prejudicial to the plaintiff.”²⁸⁴ Thus, the defendant waived the qualified immunity defense at the summary judgment phase based on the failure to raise the defense in a timely fashion.²⁸⁵

2. *Suarez Corp. v. McGraw*

*Suarez Corp. v. McGraw*²⁸⁶ also demonstrates strict adherence to the general rule in the qualified immunity context. *Suarez*, unlike *Guzmán-Rivera*, did not deal with qualified immunity being raised in a dilatory manner. Rather, the defendant merely raised the defense for the first time on appeal, hoping that the appellate court would consider it.²⁸⁷ The Fourth Circuit, however, rejected the defendant’s invitation and held steadfast to the general rule that affirmative defenses not properly raised are waived.²⁸⁸ In *Suarez*, the West Virginia attorney general sued several companies, including Suarez Corporation, under the West Virginia Consumer Credit and Protection Act.²⁸⁹ Suarez Corporation then published an advertisement in a local newspaper, criticizing the state attorney general for the decision to bring suit.²⁹⁰ In response, the attorney general’s office announced it would move forward with the suit against Suarez Corporation alone.²⁹¹ Suarez Corporation sued the attorney general under § 1983, citing retaliation against its First Amendment rights and a violation of equal protection.²⁹²

As with many of these cases, the procedural posture in *Suarez* is complicated yet crucial. The attorney general moved to dismiss Suarez Corporation’s claims for failure to state a claim, asserting only an absolute immunity defense.²⁹³ The trial court denied this motion and the attorney general appealed to the Fourth Circuit.²⁹⁴ On appeal, the attorney general urged dismissal of the complaint based not only on an absolute immunity theory but also on a qualified immunity theory, which was raised for the first time on appeal.²⁹⁵ The Fourth Circuit rejected this invitation, holding that the defense was waived at the summary judgment stage of the litigation

283. *Id.*

284. *Id.*

285. *Id.*

286. 125 F.3d 222 (4th Cir. 1997).

287. *Id.* at 226.

288. *Id.*

289. *Id.* at 224.

290. *Id.*

291. *Id.*

292. *Id.* at 225.

293. *Id.* at 225–26.

294. *Id.* at 226. The Fourth Circuit held that a denial of a FRCP 12(b)(6) motion, based on an absolute immunity theory, is an appealable collateral order. *Id.*

295. *Id.*

because it was first being raised on appeal.²⁹⁶ Because the “notice of appeal to [the Fourth Circuit] only specifically refer[red] to the defense of absolute immunity,” and the court had “refused to consider sua sponte a defense of qualified immunity . . . when it was not properly preserved below,” the court did not consider the qualified immunity question.²⁹⁷

3. *Bines v. Kulaylat*

In *Bines v. Kulaylat*,²⁹⁸ the Third Circuit, likewise, rejected an invitation to raise qualified immunity sua sponte for the first time on appeal.²⁹⁹ The court’s reasoning, however, differed from the reasoning of *Guzmán-Rivera* and *Suarez*. Notably, the court explicitly cited *Singleton*’s general rule and provided reasoning why it did not depart from the general rule and raise qualified immunity sua sponte.³⁰⁰ In *Bines*, the plaintiff, a prison inmate, suffered from painful swelling of his lymph nodes.³⁰¹ The defendant-prison doctor refused the plaintiff’s request to have his lymph nodes excised and instead prescribed medication to alleviate the pain after two months of refusing to provide the plaintiff with pain medication.³⁰² The plaintiff sued under § 1983, asserting that the defendant acted with “deliberate indifference to his medical needs” in violation of the Eighth Amendment’s protection against cruel and unusual punishment.³⁰³

In his pleadings, the defendant invoked twenty-three affirmative defenses, including qualified immunity.³⁰⁴ The defendant, however, did not raise a qualified immunity defense in his summary judgment motion.³⁰⁵ After the trial court denied the motion, the defendant took an interlocutory appeal to the Third Circuit based on the trial court’s denial of his nonqualified immunity-based summary judgment motion.³⁰⁶

On appeal, the defendant raised qualified immunity for the first time.³⁰⁷ The court refused to consider the qualified immunity defense because it was not raised in his summary judgment motion.³⁰⁸ The court cited the general rule from *Singleton* that appellate courts “will not review an issue on appeal that has not been raised below.”³⁰⁹ Notably, the court explained why some potential exceptions to the general rule did not apply.³¹⁰ First, the court rejected any sort of “injustice” that might occur to the defendant if the

296. *Id.*

297. *Id.*

298. 215 F.3d 381 (3d Cir. 2000).

299. *Id.* at 385.

300. *Id.*

301. *Id.* at 383.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 383–84.

306. *Id.* at 384.

307. *Id.* at 385.

308. *Id.*

309. *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).

310. *Id.*

qualified immunity defense cannot be raised for the first time on appeal.³¹¹ Because the defendant can raise qualified immunity at the trial court and take an interlocutory appeal if the motion is denied, there is no risk of “manifest injustice.”³¹² Second, the court noted that the qualified immunity inquiry would not be a “purely legal” issue because the questions surrounding the qualified immunity inquiry related to the defendant’s subjective mindset, which is a factual question that needs to be developed at the trial court.³¹³

III. AFFIRMATIVE IMMUNITY: WHEN AN APPELLATE COURT CAN CONSIDER QUALIFIED IMMUNITY *SUA SPONTE*

Part II examined cases in which appellate courts used their broad discretion to raise issues *sua sponte* and others in which courts strictly held to the general rule that issues should not be raised for the first time on appeal. Raising the affirmative defense of qualified immunity *sua sponte*, as Part II.A demonstrated, can be particularly troublesome. First, qualified immunity is already a difficult affirmative defense for civil rights plaintiffs to overcome.³¹⁴ Allowing appellate courts to consider qualified immunity for the first time on appeal, when the defense would have otherwise been waived, can effectively lock civil rights plaintiffs out of the courtroom.³¹⁵ Even worse, a case in which a plaintiff would have received a favorable judgment but for the court’s raising qualified immunity *sua sponte* on appeal highlights “the most obvious prejudice to the [plaintiff]: the taking away of a judgment in the [plaintiff]’s favor.”³¹⁶ At the same time, as Part I has made clear, courts generally take a liberal approach in determining waiver of affirmative defenses.³¹⁷ Moreover, there is precedent for appellate courts raising issues *sua sponte*, since *Singleton* provides broad discretion to appellate courts to consider new issues for the first time on appeal.³¹⁸ This Note, mindful of the importance of adhering to the general rule that issues should not be raised *sua sponte*—but aware that it does occur—aims to resolve this inconsistency. This Note proposes two rules to rectify the current inconsistency among appellate courts surrounding whether qualified immunity can be raised *sua sponte* on appeal and, if so, when. Part III.A outlines the two proposed rules. Part III.B argues that courts raising qualified immunity *sua sponte* contravene public policy. Part III.C advocates for a potential legislative solution in the alternative.

311. *Id.*; see also Martineau, *supra* note 128, at 1041 (noting miscarriage of justice as a factor to consider when appellate courts deviate from the general rule).

312. *Bines*, 215 F.3d at 385.

313. *Id.*; see *supra* notes 162–164 and accompanying text (describing “purely legal” issues as a common exception to the general rule for raising issues for the first time on appeal).

314. See *supra* note 80 and accompanying text.

315. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (“To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior.”).

316. Martineau, *supra* note 128, at 1038.

317. See *supra* Part I.B.2.

318. See *supra* Part I.C.

A. *The Sunk Costs Test: A Two-Part Litigation-Based Framework*

The First Circuit, in *Guzmán-Rivera*, outlined the various stages during litigation when a defendant can raise the affirmative defense of qualified immunity.³¹⁹ The *Guzmán-Rivera* court recognized that there are a number of opportunities for a defendant to raise qualified immunity at various stages of the litigation without waiving it.³²⁰

These stages of litigation are useful for courts to determine exactly when a defendant waived qualified immunity.³²¹ This “stages of litigation” analysis, however, ignores the fundamental purpose of the qualified immunity doctrine: to prevent public officials from enduring the burden of time-consuming and costly discovery.³²² The Supreme Court, in *Mitchell v. Forsyth*,³²³ recognized that if a suit against a public official is not dismissed on qualified immunity grounds before the case goes to the discovery or trial stage, the benefits of the qualified immunity doctrine are lost, since the public official would have to endure discovery and the trial itself.³²⁴ Because a central purpose of qualified immunity is to avoid such an outcome and to provide defendant-public officials with “immunity from suit” and not just immunity from liability,³²⁵ appellate courts must keep these foundational principles in mind when determining whether qualified immunity was waived. Thus, this Note proposes a two-part legal framework for analyzing whether the defendant waived qualified immunity, consistent with the core principles of the qualified immunity doctrine.

1. The Sunk Costs Test: Part One

The first part of the rule is simple: appellate judges, acting on their own without any of the parties raising the issue, may *never* raise qualified immunity sua sponte. This bright-line rule is consistent with the nature of affirmative defenses and the role of appellate courts. Affirmative defenses are rooted in the common-law theory of confession and avoidance, where a defendant admits to the allegations of the plaintiff’s prima facie case but avoids liability on other grounds.³²⁶ Thus, a judge raising an affirmative defense sua sponte logically forces the defendant-public official to confess to the allegations of the plaintiff and avoid liability on other grounds.³²⁷ In the qualified immunity context, this is a serious action: the judge forces a public official, someone who the public entrusts with power,³²⁸ to admit that

319. See *supra* notes 267–73 and accompanying text.

320. See *supra* note 267 and accompanying text.

321. See *supra* note 267 and accompanying text.

322. See *supra* note 71 and accompanying text.

323. 472 U.S. 511 (1985).

324. See *supra* note 69 and accompanying text.

325. See *Mitchell*, 472 U.S. at 526; see also *supra* note 68 and accompanying text.

326. See *supra* Part I.B.

327. See *supra* note 90 and accompanying text.

328. See Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1156 (2014).

the official violated the plaintiff's constitutional rights.³²⁹ This contravenes the adversarial theory of party representation because a defendant may very well strategically avoid raising certain arguments.³³⁰ If defendants wish to maintain that they did not violate plaintiffs' constitutional rights—a grave allegation indeed—courts raising an affirmative defense on their behalf *sua sponte* give them no choice but to implicitly confess to doing so.³³¹

2. The Sunk Costs Test: Part Two

The second part of the proposed test is a two-step sequential analysis. This part assumes that the *defendant*, rather than the appellate court, raised the affirmative defense of qualified immunity for the first time on appeal. The general, guiding principle for this part of the rule is that an appellate court should only permit the defendant to raise a waived qualified immunity defense for the first time on appeal if doing so would not cause undue hardship or prejudice to the plaintiff.³³² This is because allowing an affirmative defense to be raised for the first time on appeal is already a departure from basic principles of civil procedure.³³³

At step one, a court must make a threshold determination: whether the qualified immunity analysis would involve a purely legal question.³³⁴ If additional facts must be found, the court must automatically decline to consider the issue for the first time on appeal. If it is a purely legal question, the court may proceed to step two.

At step two, the court must determine the stage of the litigation. Because a central goal of qualified immunity is to prevent a government official from enduring the burdens of discovery and trial,³³⁵ it is appropriate to determine whether these benefits have been lost and whether the burdens of litigation have become a sunk cost. Under this Note's proposed rule, an appellate court would only be allowed to permit a defendant to raise a qualified immunity defense for the first time on appeal at the pleadings or motion to dismiss stage of the litigation before discovery is taken.³³⁶ If the defense is raised after these stages, it is waived and cannot be raised for any other stage of the litigation. By then, the benefits of qualified immunity, which are to "avoid 'subject[ing] government officials . . . to the burdens of broad-reaching

329. See *supra* note 55 and accompanying text (discussing qualified immunity's requirement that a public official violate a plaintiff's clearly established constitutional rights).

330. See Brief of Professors, *supra* note 83, at 10.

331. See *supra* note 90 and accompanying text.

332. See *supra* Part I.B.3 (discussing prejudice to the plaintiff as a factor for whether an affirmative defense was waived).

333. See *supra* Part I.C.

334. This threshold question is consistent with the approach of multiple courts that have used the "purely legal issue" justification for departing from the general rule that courts will not consider a new issue raised for the first time on appeal. See, e.g., *Hammer v. Burls*, 937 F.3d 1171, 1176 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 611 (2020) (mem.); *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009).

335. See *supra* note 69 and accompanying text.

336. See *ERICHSON & GLOVER*, *supra* note 125, at 7–8.

discovery,” have been lost and the burdens sought to be avoided by qualified immunity are already a sunk cost.³³⁷

This proposed rule is sound for several reasons. First, it is consistent with the original goals of the qualified immunity doctrine. Permitting a qualified immunity defense to be raised at, say, the summary judgment stage after discovery has been taken³³⁸ would be counterproductive. Indeed, the Supreme Court in *Harlow* specifically eliminated the subjective good faith requirement because determining good faith “may entail broad-ranging discovery . . . [and] [i]nquiries of this kind can be peculiarly disruptive of effective government.”³³⁹ If the current qualified immunity doctrine is premised on objective factors specifically to avoid time-consuming and distracting discovery, it is incongruous for the doctrine to provide that same protection after discovery has already been taken.³⁴⁰

This Note’s proposed rule is also consistent with the nature of affirmative defenses. Allowing an appellate court from raising qualified immunity sua sponte when no party has raised the issue would force the conclusion that the defendant admits to the allegations of the plaintiff’s prima facie case without the defendant’s consent.³⁴¹ Additionally, an affirmative defense is a privilege by which a defendant can avoid liability on grounds outside the merits of the plaintiff’s prima facie case, but a defendant must admit to the allegations of the plaintiff’s prima facie case to benefit from that privilege.³⁴² If the defendant does not take advantage of that privilege at an early stage in the litigation to avoid being subject to discovery—which is one of the primary goals of qualified immunity³⁴³—the court should presume that the defendant has consented to endure these burdens. Finally, allowing some leeway as to when the affirmative defense of qualified immunity is waived is consistent with the permissive approach courts take with regard to allowing defendants to preserve affirmative defenses, so long as the plaintiff is not prejudiced.³⁴⁴

Finally, this Note’s proposed rule is in accord with our adversarial system’s principle of party representation. First, *any* sua sponte action by an appellate court, where the lower court did not act on an issue raised for the first time on appeal, is naturally incongruous with the writ of error model, which undergirds the legal system.³⁴⁵ If qualified immunity is raised sua sponte for the first time on appeal, no error could have been made by the lower court regarding qualified immunity (because the lower court did not

337. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)).

338. See ERICHSON & GLOVER, *supra* note 125, at 8.

339. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 893 n.31 (2014) (quoting *Harlow*, 457 U.S. at 817).

340. See *supra* notes 49–57 and accompanying text (discussing the current objective approach of the qualified immunity doctrine).

341. See *supra* Part I.B.

342. See *supra* note 109 and accompanying text.

343. See *supra* note 69 and accompanying text.

344. See *supra* Part I.B.

345. See *supra* Part I.C.3.

decide the issue *ab initio*), and there is naturally no error for the appellate court to correct.³⁴⁶ In sum, this approach is consistent with the current practices of appellate courts raising issues for the first time on appeal³⁴⁷ and stays true to the adversarial model in American law where the courts only “decide . . . questions presented by the parties.”³⁴⁸

B. The Sunk Costs Test Supports Public Policy

This Note’s proposed rule avoids many issues caused by appellate courts raising issues *sua sponte*. First and foremost, raising qualified immunity *sua sponte* can greatly impair judicial efficiency.³⁴⁹ In *Hamner*, Judge Steven M. Colloton observed that efficiency was an important reason for raising qualified immunity *sua sponte*.³⁵⁰

Judge Colloton may be right in the short term. A potential short-term benefit of raising an issue *sua sponte* on appeal is that the trial court saves *some* time by not considering the issue below.³⁵¹ Other than this potentially minimal benefit, the more likely results of raising an issue *sua sponte* on appeal are net neutral at best and, at worst, catastrophic for judicial efficiency.³⁵² At best, the appellate court considers the new issue on appeal and affirms the trial court, requiring no additional work for the trial court.³⁵³ At worst, a new issue raised on appeal can result in the reversal of the trial court’s decision and remand for further proceedings, which is time-consuming and costly for the litigants, trial court, and appellate court.³⁵⁴ Regardless, the appellate court considering an issue for the first time on appeal must expend time and resources deciding whether to consider the new issue in the first place and, if so, analyzing its merits.³⁵⁵

Additionally, it would be more efficient for courts to force defendant-public officials to raise the qualified immunity defense in the lower court.³⁵⁶ If defendants are incentivized to raise qualified immunity below as early as possible, the trial court can analyze and apply the qualified immunity defense early on and dismiss the case before judicial resources are expended during discovery, trial, and appeal. Moreover, the immediate appealability of a qualified immunity determination mitigates any risk to the defendant of the trial court erroneously denying the defense.³⁵⁷ In fact, the Supreme Court has held that defendants are entitled to multiple interlocutory appeals when

346. *See supra* Part I.C.3.

347. *See supra* Part I.C.2.

348. *See* Petition for Writ of Certiorari, *supra* note 24, at 13 (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)).

349. *See supra* Part I.C.

350. *Hamner v. Burls*, 937 F.3d 1171, 1176 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 611 (2020) (mem.).

351. *See Martineau, supra* note 128, at 1031.

352. *Id.* at 1031–32.

353. *Id.* at 1031.

354. *Id.* at 1031–32.

355. *Id.* at 1032.

356. *See* Brief of Professors, *supra* note 83, at 13–14.

357. *See Behrens v. Pelletier*, 516 U.S. 299, 314 (1996) (Breyer, J., dissenting).

qualified immunity is denied at various stages of the litigation, including the motion to dismiss stage.³⁵⁸ Thus, the defendant has multiple avenues through which to avoid an adverse denial of qualified immunity, and appellate courts should allow trial courts to wade through these arguments and avoid wasteful appeals and remands.

In addition, raising qualified immunity *sua sponte* can create unpredictability, which also decreases judicial efficiency.³⁵⁹ For example, if litigants see that issues are being raised *sua sponte*, they may begin to enter facts into the record in advance to prepare for potential arguments that will be raised for the first time on appeal.³⁶⁰ This practice is time-consuming, confusing, and wasteful if the particular issues that litigants are concerned about are not actually raised *sua sponte* on appeal. Appellate courts that routinely raise issues *sua sponte* can also encourage defendants to take appeals more often, causing parties to become less scrupulous about raising affirmative defenses in a timely fashion in the hope that the appellate court will just raise the otherwise waived affirmative defense *sua sponte* later on.³⁶¹

Finally, and most importantly, qualified immunity is incredibly difficult for civil rights plaintiffs to overcome.³⁶² Allowing appellate courts to raise qualified immunity *sua sponte* can introduce a dispositive affirmative defense for defendant-public officials when neither party raised the issue, which can create enormous injustice. *Graves* is emblematic of this issue.³⁶³ As discussed above, the Ninth Circuit in *Graves* found that the defendant-police officer actually violated the plaintiff's constitutional rights.³⁶⁴ The court, however, raised qualified immunity *sua sponte* and ruled in favor of the defendant-police officer anyway.³⁶⁵ This case highlights the very danger of an appellate court raising an issue *sua sponte*, especially in the context of qualified immunity: plaintiffs can have a potential victory taken away from them by an appellate court raising a dispositive affirmative defense *sua sponte*.³⁶⁶ Had the *Graves* court refrained from raising qualified immunity *sua sponte*, the plaintiff likely would have recovered against the police

358. *Id.* The *Behrens* Court recognized that the goal of the qualified immunity doctrine was for public officials “to avoid the burdens of ‘such *pretrial* matters as discovery,’” and assured that a denial of a motion to dismiss on qualified immunity grounds—not just a denial at summary judgment—would be immediately appealable to allow the defendant to exercise the protection against the burdens of pretrial matters, such as discovery. *Id.* at 308 (majority opinion) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

359. *See Martineau, supra* note 128, at 1024.

360. *Id.* at 1031.

361. *See supra* notes 180–81 and accompanying text.

362. *See supra* note 76 and accompanying text.

363. 339 F.3d 828 (9th Cir. 2003); *see also supra* Part II.A.2 (presenting the facts and holding of *Graves*).

364. *See supra* note 223 and accompanying text.

365. *See supra* Part II.A.2.

366. *See Martineau, supra* note 128, at 1038.

officer.³⁶⁷ Instead, the court's sua sponte action took away the plaintiff's victory.³⁶⁸

Regardless of these rationales, courts should not prioritize bare policy interests of preserving judicial resources when doing so would (1) ignore potential civil rights violations and (2) contravene basic principles of civil procedure.³⁶⁹ There are also multiple safeguards that can assist defendants in preserving their affirmative defenses.³⁷⁰ It is therefore incongruous to allow appellate judges to raise qualified immunity sua sponte and hand defendant-public officials a dispositive affirmative defense when the FRCP and accompanying case law are already lenient to defendants who fail to raise their affirmative defenses appropriately.³⁷¹ Allowing appellate courts simply to raise affirmative defenses on appeal, especially qualified immunity—a high legal hurdle for plaintiffs to clear—may further evince a prodefendant bent among federal courts adjudicating civil rights cases.³⁷²

C. Legislative Alternatives

In the wake of the murder of George Floyd in May of 2020 by a Minneapolis police officer,³⁷³ a bipartisan proposal to eliminate the qualified immunity doctrine was introduced in the U.S. House of Representatives.³⁷⁴ While the proposed bill certainly resolves many legal issues with the qualified immunity doctrine generally, it remains unclear whether it will prevent future abuses of power by public officials.³⁷⁵ Moreover, police

367. See *supra* Part II.A.

368. See *supra* note 231 and accompanying text.

369. See Brief of Professors, *supra* note 83, at 4 (explaining how appellate courts raising waived or forfeited arguments “damages judicial legitimacy by placing appellate courts in the role of litigants, making decisions about the best legal arguments to resolve a case”).

370. See *supra* Part I.B.3.

371. See *supra* Part I.B.3.

372. See Brief of Professors, *supra* note 83, at 14.

373. Neil MacFarquhar et al., *Ex-Officer Charged in Death of George Floyd in Minneapolis*, N.Y. TIMES (Apr. 12, 2021), <https://www.nytimes.com/2020/05/29/us/minneapolis-police-george-floyd.html> [<https://perma.cc/RSW2-MA26>].

374. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020). Calls to end qualified immunity are cross-ideological, as this proposal was cosponsored by House Democrats, a Republican, and a member of the Libertarian Party. See Cosponsors: H.R.7085—116th Congress (2019–2020), CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/7085/cosponsors?q=%7B%22party%22%3A%22all%22%7D> [<https://perma.cc/LB76-HZQ4>] (last visited Apr. 14, 2021). Criticisms of qualified immunity at the jurisprudential level are also cross-ideological. See, e.g., *Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) (“I have previously expressed my doubts about our qualified immunity jurisprudence.”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (explaining that the Supreme Court’s current approach to qualified immunity might “tell[] the public that palpably unreasonable conduct will go unpunished”); *Cox v. Wilson*, 971 F.3d 1159, 1161 (10th Cir. 2020) (Lucero, J., dissenting) (noting that the qualified immunity case in question “clearly demonstrates so much of what is wrong” with the doctrine); *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

375. See Daniel Epps, Opinion, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html> [<https://perma.cc/Z7J4-Y7KG>] (explaining that combinations of

officers, even if they are found civilly liable in a § 1983 suit, “virtually never pay” damages because they are either indemnified by their police department employers; plaintiffs choose to sue the municipality over the defendant-officer; or their legal fees are reimbursed by insurance policies, the police department’s municipality, or a police union.³⁷⁶ Thus, it remains unclear whether abolishing qualified immunity wholesale will remedy the ills of police brutality.

Statistical evidence, moreover, shows that the underlying goals of qualified immunity are largely not achieved. First, qualified immunity’s principal goal of preventing public officials from enduring the burdens of discovery is often not met.³⁷⁷ As discussed above in Part I.A.3, a study of close to 1200 federal district court opinions in qualified immunity cases found that just 0.6 percent of those cases were dismissed prior to the discovery phase of the litigation.³⁷⁸ Second, the other goal of qualified immunity—ensuring that the threat of personal liability does not deter public officials from performing their jobs effectively—is also questionable. Specifically, police officers “virtually never pay” damages in § 1983 suits, as they are either judgment-proof, indemnified, or their attorney’s fees are reimbursed.³⁷⁹ Thus, legislation eliminating qualified immunity might therefore rid the judiciary of a confusing and complicated legal doctrine, while avoiding the dire consequences many proponents of qualified immunity fear would occur if it were abolished.³⁸⁰

CONCLUSION

The legal deck of cards is stacked against civil rights plaintiffs when they encounter the qualified immunity doctrine. It makes sense that the doctrine is an affirmative defense, because the law wants to ensure that defendants use this privilege appropriately. When defendants do not use this privilege appropriately, however, the general rule is that an affirmative defense is waived. In a party representation system of justice, this general rule is a benefit civil rights plaintiffs ought to reap. When an appellate court revives a waived qualified immunity defense, it can very well slam the courtroom door shut on civil rights plaintiffs at any stage of the litigation. At the same

widespread police officer indemnification by police departments and preexisting law that widely defers to use of deadly force by police officers is likely to maintain the status quo even if qualified immunity is eliminated). *But see* Jay Schweikert, Opinion, *Yes, Abolishing Qualified Immunity Will Likely Alter Police Behavior*, CATO INST. (June 17, 2020, 6:06 PM), <https://www.cato.org/blog/yes-abolishing-qualified-immunity-will-likely-alter-police-behavior> [<https://perma.cc/GA24-3QGP>] (disagreeing with Professor Daniel Epps and arguing that eliminating qualified immunity can spur changes in police behavior).

376. *See* Schwartz, *supra* note 77, at 1805–07.

377. *See supra* notes 80–81.

378. *See* Schwartz, *supra* note 77, at 1809.

379. *See id.* at 1805–07.

380. *See id.* at 1800 (suspecting that current Supreme Court Justices might hesitate to overturn qualified immunity because they fear that eliminating the doctrine “would alter the nature and scope of policing . . . in ways that would harm government officials and society more generally”).

time, however, it is long-standing practice for appellate courts to raise waived issues sua sponte. This Note is mindful of these competing interests and aims to strike a middle ground, with an eye toward the goal of the qualified immunity doctrine: preventing public officials from enduring painstaking discovery and litigation that can affect their ability to do their jobs. Thus, this Note proposes a two-part solution that permits courts to raise a waived qualified immunity defense but only at the pleadings stage. This Note's proposal will likely promote judicial efficiency and refocus the qualified immunity doctrine on its original purpose—without gutting the doctrine wholesale—while providing greater protection for civil rights plaintiffs. Finally, and most importantly, this Note's proposal will prevent civil rights plaintiffs from losing hard-fought legal battles to vindicate their constitutional rights just because a waived defense was raised sua sponte late in the game.