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Hassel: Hassel: Living a Lie: The Cost of Qualified Immunity

# Living a Lie: The Cost of Qualified Immunity

Diana Hassel\*

## I. INTRODUCTION

Throughout the modern civil rights era,<sup>1</sup> a silent struggle has been waged over civil liability for the violation of constitutional rights. The issues struggled with are what kinds of constitutional wrongs should be compensated and out of whose purse the damages should come. The mechanism for resolution of these issues has largely been the application of immunity defenses to civil rights remedies. A system of immunity defenses has been overlaid on the broad remedy provided by 42 U.S.C. § 1983 (hereinafter “Section 1983”).<sup>2</sup> A determination of the scope of the immunity defense—which government officials should get it and how much—has provided the means to resolve, at least temporarily, difficult questions regarding the proper role of civil damage awards in protecting constitutional rights. The problem with this approach is that using the immunity defense as the language of the debate over the proper limits of civil rights remedies obscures choices that are being made on the fundamental and divisive issue of what constitutional wrongs should be compensated.

This Article explores how and why immunity defenses, particularly qualified immunity, have developed as camouflage for civil rights policy decisions. I first set forth, in Part II, the judicial origins and stated rationale for the current qualified immunity defense.

In Part III, I analyze the internal structure of the qualified immunity defense both as a type of legal directive and as applied in current litigation. By looking at the application of qualified immunity in recent cases, both the standard-like way in which the doctrine operates and the policy choices that underlie its application emerge. That some kinds of constitutional claims are more likely to

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1. Modern civil rights litigation began in 1961 with the reviving of 42 U.S.C. § 1983 (1994 & Supp. II 1996) in *Monroe v. Pape*, 365 U.S. 167, 170-71 (1961). *Monroe* launched the beginning of a broad application of Section 1983 to state and local officials.

2. Generally, Section 1983 provides for money damages for the violation by a state or local official of any right “secured by the Constitution.” 42 U.S.C. § 1983 (1994 & Supp. II 1996). A similarly broad remedy is available against federal officials based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971).

result in a successful use of the qualified immunity defense than others illuminates the way qualified immunity provides cover for policy choices. The broad qualified immunity standard allows for a determination concerning liability of the defendant that is very flexible and almost completely subject to the policy beliefs of the judge making the decision. By applying the qualified immunity standard, the court will, in essence, determine whether it is just for a particular defendant to pay damages and whether a particular plaintiff should be compensated for a particular constitutional wrong. Rather than address the appropriateness of compensating a category of wrong or protecting a category of governmental behavior, the decision will be articulated in immunity-speak—was the constitutional right allegedly violated clearly established at the time of the particular defendant's action and should that right have reasonably been known to this particular defendant. The hard question of whether, for example, a suspect who is wrongfully detained in a large drug sweep should receive monetary compensation from a Drug Enforcement Administration (DEA) agent who was relying on incorrect information will not be addressed. Rather, the issue before the court will be whether the defendant is entitled to qualified immunity. This way of resolving the issue of whether liability will be imposed is very effective in obscuring the policy decisions being made about the limits of liability. Only by piecing together many qualified immunity decisions is it possible to determine the pattern of likely results. The fact that certain kinds of constitutional wrongs will almost never subject a defendant to liability is not directly stated. Instead, the decisions articulate a particularized decision regarding a defendant's entitlement to immunity.

In Part IV, I explore both the usefulness of a doctrine such as qualified immunity that allows substantive choices to be made silently and the costs inherent in such a doctrine. While the qualified immunity defense arguably encourages quiescence by letting steam out of what might otherwise be a divisive area of public debate, we pay a high cost for its sedative effect. The defense encourages us to pretend that we have an even-handed way to address a wide range of civil rights violations. In fact, we do not. That no such system for redress is in place is, in perhaps some unarticulated way, known to the participants and onlookers in the civil rights drama. However, qualified immunity makes it possible to avoid the necessity of directly facing the question of which kinds of constitutional wrongs, if any, should be redressed by damage awards.

I conclude that the qualified immunity doctrine's usefulness is outweighed by the cost paid in the coherent development of civil rights law. Decisions concerning the direction of civil rights liability are being made but are not being acknowledged as such. Rather than continue this charade, the development of civil rights law would be better served by a more open judicial or legislative discussion of the policy choices that must be made. While there may be no immediate consensus on these choices, the formulation of the debate around the real issues, rather than the arcane requirements of the qualified immunity

defense, will at least provide a language with which to have the needed policy debate.

## II. JUDICIAL CREATION OF QUALIFIED IMMUNITY

In 1871, Congress created a civil remedy for the violation of constitutional rights pursuant to Section 5 of the Fourteenth Amendment.<sup>3</sup> That remedy, now known as Section 1983,<sup>4</sup> was passed as part of the Ku Klux Klan Act<sup>5</sup> and was enacted in response to violence against newly freed slaves and the inability or unwillingness of state officials to control the lawlessness that existed at that time.<sup>6</sup> The statute placed the federal government in the role of “guarantor of basic federal rights against state power” and was meant to “protect people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”<sup>7</sup> The plain language of Section 1983 appears to contemplate a broad remedy, providing that:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>8</sup>

On its face, the statute provides for no immunities from liability. Nonetheless, in a series of decisions beginning in 1967 with *Pierson v. Ray*, the United States Supreme Court created immunity defenses.<sup>9</sup> In a policy-driven analysis which

3. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1994 & Supp. II 1996)).

4. 42 U.S.C. § 1983 (1994 & Supp. II 1996).

5. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1994 & Supp. II 1996)).

6. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 47 (1983).

7. *Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)).

8. 42 U.S.C. § 1983 (1994 & Supp. II 1996).

9. 386 U.S. 547, 553-54 (1967). Prior to *Monroe v. Pape*, 365 U.S. 167 (1961), Section 1983 was largely unused as a method of enforcement of individual rights. Prior to *Monroe*, the statute was interpreted to apply only to a narrow range of state action. See *Civil Rights Cases*, 109 U.S. 3 (1883) (limiting the scope of the Civil Rights Act to actions taken pursuant to state law or authority). In *Monroe*, the state action necessary to trigger the application of Section 1983 was expanded to include actions of state officials which were contrary to state law. *Monroe*, 365 U.S. at 183. Since 1967 the number of cases brought pursuant to Section 1983 has expanded from 153 in 1967 to

was largely uninfluenced by any controlling law, the Court fashioned the qualified immunity defense. As it evolved, the stated purpose of the defense was to protect government officials who acted reasonably from frivolous law suits but also to provide damages for plaintiffs when a government official's conduct was particularly blameworthy. However, these stated rationales for the qualified immunity defense do not tell the whole story. The qualified immunity defense also provided a flexible mechanism for the resolution of civil rights actions that would leave the determination of the outcome almost entirely in the unfettered control of the courts.

The creation of the immunity defense began when the United States Supreme Court read Section 1983 as incorporating common law immunities that were in place in 1871, the time of Section 1983's original passage.<sup>10</sup> In *Pierson v. Ray*, Chief Justice Earl Warren, writing for the majority, concluded that a policeman in Mississippi sued under Section 1983 would be entitled to immunity from liability if he arrested civil rights workers under state law that was later found to be unconstitutional but that was valid at the time of the act.<sup>11</sup> He concluded that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunity" when it enacted Section 1983.<sup>12</sup> In addition to finding a nineteenth century common law basis for a good faith defense for police officers that was arguably incorporated in Section 1983, the Court's conclusion was also based on an assessment that sound policy supported such a defense. As Chief Justice Warren stated, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."<sup>13</sup> Thus, the roadmap for determining whether immunity defenses applied to Section 1983 actions was developed. Questions that had to be addressed were, first, whether the defense arguably existed in nineteenth century common law; second, whether there was a congressional intent to deviate from that immunity; and third, whether application of the defense was consistent with the policy underlying the civil rights statute.<sup>14</sup>

Taking an activist stance, the Court was not content to read Section 1983 on its face as providing no immunities or to leave the question to Congress whether to provide appropriate defenses by amendment of Section 1983. Instead, the Court imposed its vision of what it believed must be the limitations

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approximately 10,000 in 1986. SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 3 (1995).

10. *Pierson*, 386 U.S. at 553-54.

11. *Id.* at 557.

12. *Id.* at 554. In 1871, police officers were entitled under tort law to a defense of good faith and probable cause. *Id.* at 556.

13. *Id.* at 555.

14. *See id.*

on liability under Section 1983.<sup>15</sup> This imposition of an immunity defense, while ostensibly based at least in part on the state of the common law at the time of the enactment of Section 1983 and the drafters' presumed intention to incorporate these defenses, was largely based on the Court's sense that it would be unfair to have individual government officials held personally liable when they acted in good faith but were later determined to have violated constitutional rights.

In the years that followed *Pierson*, the Court sorted through which government officials were entitled to absolute immunity and which were protected by good faith, or qualified immunity. Prosecutors,<sup>16</sup> judges,<sup>17</sup> members of Congress,<sup>18</sup> and the President<sup>19</sup> were entitled to absolute immunity from liability for the violation of constitutional rights. Absolute immunity for these officials was necessary to protect the functioning of central governmental systems. Judges and prosecutors must not be subject to the burden of civil rights actions to protect the trial process.<sup>20</sup> Members of the legislature must not

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15. In his dissent in *Pierson*, Justice Douglas disagreed with the premise that the drafters of Section 1983 must have meant to incorporate then existing common law immunities. *Id.* at 561 (Douglas, J., dissenting). He argued that Congress would have made its intention to incorporate the common law into Section 1983 clear if it had that intention. *Id.* at 560-61.

16. *Imbler v. Pachtman*, 424 U.S. 409 (1976). To determine that prosecutors were entitled to absolute immunity, the Court looked to the common law: "1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 418. The conclusion that absolute immunity was necessary was also based on the belief that the policy of "protect[ing] the decision-making process in which the official is engaged" was a sound one. *Id.* at 435. See also *Kalina v. Fletcher*, 118 S. Ct. 502, 510 (1997) (holding prosecutor absolutely immune if "performing traditional functions of an advocate").

17. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) ("The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.").

18. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

*Id.* at 373. Members of Congress are also protected by the Speech and Debate Clause of the Constitution. *Id.* U.S. CONST. art. I, § 6.

19. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (stating the absolute immunity from damages liability is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). "[O]ur immunity decisions have been informed by the common law. . . . This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government." *Id.* at 747-48.

20. *Imbler*, 424 U.S. at 418, 427. Police officers when testifying in criminal trials

be subject to liability in order to allow them to freely exercise their legislative responsibilities.<sup>21</sup> The gravity of the responsibilities of the President require that he or she be free from the distraction of liability for civil rights claims.<sup>22</sup> The decision to insulate certain government officials from liability was driven by the Court's determination that critical governmental functions must remain unfettered so as to provide better government for all. These decisions were to a large extent unabashedly based on the policy choices of the Court.

Having carved out absolute immunity for some categories of government officials, the Court also refined the good faith defense first articulated in *Pierson*. The standard for qualified immunity as it began in *Pierson* was described as the "defense of good faith and probable cause" that protected police officers who took actions which, in good faith, they believed to be constitutional.<sup>23</sup> The Court reached this conclusion by looking to the "background of tort liability."<sup>24</sup> Since tort law provided a good faith defense for police officers who made an arrest that was later determined to be unlawful, that defense was incorporated into Section 1983.<sup>25</sup> Thus, at the early stages of the development of the qualified immunity defense, the Court bound itself quite closely to existing common law tort defenses.<sup>26</sup>

After *Pierson*, the good faith defense was expanded beyond a protection for police officers. In *Scheuer v. Rhodes*, the Court declared that the qualified

are also entitled to absolute immunity. *Briscoe v. Lahue*, 460 U.S. 325, 335-36 (1983).

21. *Tenney*, 341 U.S. at 373.

22. *Nixon*, 457 U.S. at 752. Interestingly, although they occupy the same functional position in state government, governors do not enjoy absolute immunity. *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974).

23. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court applied this defense to a Section 1983 action because it was the common law defense available to the torts of false arrest and imprisonment. *Id.*

24. *Id.* at 556-57.

25. *Id.*

26. The Court did not feel so bound to the common law when it considered the immunity of municipalities. The Court determined that in enacting Section 1983, Congress necessarily meant to abrogate sovereign immunity for a municipality's governmental actions. *Owen v. City of Independence*, 445 U.S. 622, 647 (1980); *see also Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). This waiver of sovereign immunity took place even though such immunity was firmly established at the time of enactment and even though Section 1983 does not explicitly state that such a waiver of immunity was intended. That the Court was much less deferential to the surrounding common law when it dealt with the issue of municipal liability, as opposed to its treatment of immunities available to individuals, is another indication that the Court's deference to common law principles in the area of individual liability was largely policy driven. While the Court explained in *Owen* that municipalities were not protected by sovereign immunity for their governmental actions, they nonetheless were denied the defense of qualified immunity. *Owen*, 445 U.S. at 650.

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immunity defense was generally available to all officers of the executive branch of government based on

all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.<sup>27</sup>

Shortly thereafter, in *Wood v. Strickland*, the Court extended qualified immunity to school board members.<sup>28</sup> The *Strickland* court described the immunity standard as allowing for liability only if the school board member “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.”<sup>29</sup> The application of the qualified immunity defense thus depended on both objective and subjective factors: what the official reasonably knew at the time of his action; whether the official had a good faith belief that he was acting in accordance with constitutional requirements; and whether the official intended to do “other injury” to the student. All of these elements had to be examined before the immunity could be successfully invoked.

The creation of the qualified immunity defense was based on an explicit balancing of interests. On the one hand, providing absolute immunity to all government officials would eliminate the possibility of recovery for a wide range of claims and would, in large part, eviscerate Section 1983.<sup>30</sup> On the other hand, providing no defense would unfairly subject government officials to punishment when they were carrying out their jobs in good faith.<sup>31</sup> The Court also feared that providing no immunity would result in harm to society at large because government officials would be reluctant to act and thus would not

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27. 416 U.S. 232, 247-48 (1974). *Scheuer* concerned claims brought by university students based on the actions of the Ohio National Guard during disturbances at Kent State University. The plaintiff brought claims against the Governor, other state officials and members of the national guard. The Court determined that the claims against the officials were not barred by executive or absolute immunity. *Id.* at 235.

28. 420 U.S. 308 (1975).

29. *Id.* at 322.

30. *See Scheuer*, 416 U.S. at 243, 248. In part because of its concern that expanding immunity would eliminate the possibility of recovery for a civil rights violation, the Court determined in *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), that municipalities could not invoke an immunity defense.

31. *See Scheuer*, 416 U.S. at 245.



vigorously fulfill their obligations.<sup>32</sup> The pull of these conflicting interests led to modifications of the qualified immunity defense. Most often the perceived need to protect government officials was the driving force behind the alterations made to the defense.

In the early development of the defense, there were both objective and subjective components to the qualified immunity standard. Protection would be denied if the government official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate [] constitutional rights” or if the official “took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.”<sup>33</sup> Thus, two qualities had to be present to successfully invoke the qualified immunity defense—a reasonable understanding of the law and a pure, or at least not malicious, heart.

Application of the subjective component of the defense was often dependent on the resolution of factual disputes. The plaintiff would raise the factual issue of whether the defendant maliciously took the allegedly unconstitutional action. Because of this dispute concerning the defendant’s intent, it was difficult for a defendant to have a claim dismissed based on qualified immunity prior to trial. This delay in the resolution of the lawsuit was perceived to be unfair to defendants as it embroiled them in potentially meritless and lengthy litigation.<sup>34</sup> In response, the Court eliminated the subjective requirement of good faith from the qualified immunity defense in *Harlow v. Fitzgerald*.<sup>35</sup> The rationale for eliminating that element of the defense was to protect government officials from frivolous law suits. “[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”<sup>36</sup> The newly articulated qualified immunity test provided that “government officials performing discretionary functions generally are shielded from liability for civil damages

32. *Id.* at 241 (“[T]he public interest requires decisions and action to enforce laws for the protection of the public. . . . [I]t is better to risk some error and possible injury from such error than not to decide to act at all.”). In *Butz v. Economou*, 438 U.S. 478, 517 (1978) (Rhenquist, J. dissenting), Justice Rhenquist in his dissenting opinion argued that protecting the freedom of action of high level executive officials required that such officials receive not just qualified, but absolute immunity. Justice Rhenquist believed that the application of the qualified immunity defense to all executive officials would lead to “a significant impairment of the ability of responsible public officials to carry out the duties imposed upon them by law.” *Id.* at 530.

33. *O’Connor v. Donaldson*, 422 U.S. 563, 577 (1975). *O’Connor* set the scope of immunity available to hospital officials. See also *Procunier v. Navarette*, 434 U.S. 555, 562, 566 (1978).

34. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982).

35. *Id.* at 815.

36. *Id.* at 817-18. *Harlow* also provided that discovery should be limited until the initial issue of qualified immunity is resolved. *Id.* at 18.  
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insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>37</sup>

This objective qualified immunity defense—liability only if an official violated clearly established constitutional rights of which a reasonable person would have known—was said by the Court in *Harlow* to represent the proper balance between conflicting interests.<sup>38</sup> Those conflicting interests included the following: the need to provide the compensation for violation of constitutional rights that Section 1983 requires; the need to deter unconstitutional behavior; the need to vindicate constitutional rights; the need to protect innocent defendants from frivolous claims; and the need to encourage vigorous enforcement of the law.<sup>39</sup> The qualified immunity defense, as articulated in *Harlow*, based on a balancing of interests, has remained essentially intact to the present.

In cases following *Harlow*, the qualified immunity defense increasingly came to provide not only immunity from liability, but also protection from the necessity of standing trial.<sup>40</sup> In order to ensure that defendants were not enmeshed in litigation if they were entitled to qualified immunity, *Mitchell v. Forsyth* established the immediate appealability of a pretrial denial of qualified immunity.<sup>41</sup> Thus, qualified immunity came to resemble absolute immunity in the scope of protection it provided defendants.<sup>42</sup> While not providing the complete defense that absolute immunity does, the goal was to as quickly as possible remove from the government official the necessity of participation in the lawsuit. The defense was broad enough to “provide[] ample protection to all but the plainly incompetent or those who knowingly violate the law.”<sup>43</sup> And its procedural protections were meant to avoid even the necessity of participation in lengthy litigation by most defendants.

As the contours of the objective qualified immunity defense evolved, it became clear that qualified immunity was a completely new species of defense, quite unfettered from the tort origins that were the original basis of the judicially

37. *Id.*

38. *Id.* at 813. “The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.” *Id.* at 813-14.

39. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PENN. L. REV. 23, 73 (1989). Rudovsky argues that the interest in ensuring effective law enforcement has become the dominant interest served in the qualified immunity defense. *Id.* at 36.

40. See *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

41. *Mitchell*, 472 U.S. at 524. See also *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996) (permitting two interlocutory appeals on denial of qualified immunity); cf. *Johnson v. Fankell*, 117 S. Ct. 1800, 1806 (1997) (holding no federal right to interlocutory appeal on denial of qualified immunity in state court).

42. See *Siegert*, 500 U.S. at 232.

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

created defense. In *Wyatt v. Cole*, the Court explained that the qualified immunity defense was quite distinct from the original “good faith and probable cause” defense first articulated in *Pierson*.<sup>44</sup> The qualified immunity defense was now a “wholly objective standard” that provided an “immunity from suit rather than a mere defense to liability.”<sup>45</sup> This type of defense is based “on principles not at all embodied in the common law.”<sup>46</sup> The origins and justification for the qualified immunity defense, *i.e.*, that Congress in 1871 must have meant to incorporate existing common law defenses into Section 1983, had been replaced by a new policy-based rationale for the defense.<sup>47</sup> The defense is meant to “strike a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”<sup>48</sup>

Over a thirty year period, the Court fashioned a defense which was justified by its balance of the competing interests of the plaintiff, the defendant, and the public at large in its interest in efficient and vigorous government.<sup>49</sup> The Court maintained that because qualified immunity allows for the possibility that some plaintiffs will be compensated for violations of constitutional rights, the defense does not subvert the remedy provided by Section 1983.<sup>50</sup> A defendant who acts in defiance of clearly established constitutional law of which a

44. 504 U.S. 158, 165-66 (1992).

45. *Id.* at 166 (quoting *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985)).

46. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). The adoption of a qualified immunity defense that goes beyond that available under common law is discussed extensively by Justice Kennedy in his concurring opinion in *Wyatt*. He suggests that the divergence from the common law in *Harlow* was motivated primarily by the difficulty under then current summary judgment law of resolving an intent issue without conducting a trial. *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring). Justice Kennedy cautions that since the Court is interpreting a remedial statute it does not have the freedom of action of a court interpreting common law and that “we may not transform what existed at common law based on our notions of policy or efficiency.” *Id.* at 171-72.

47. See Stephen J. Shapiro, *Public Official’s Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald And Its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REFORM 249, 266-67 (1989).

48. *Wyatt*, 504 U.S. at 167. *Wyatt* determined that because of the peculiarly governmental interests served by qualified immunity, it was not applicable to non-governmental defendants. *Id.* at 167-68. A private defendant may be entitled, however, to a good faith and probable cause defense. *Id.* at 169. See also *Richardson v. McKnight*, 117 S. Ct. 2100, 2108 (1997) (holding employees of a private prison not entitled to qualified immunity). Thus, while a private defendant may be able to assert the pre-*Harlow* type good faith defense, governmental defendants were entitled to a much more sweeping and effective defense.

49. Interestingly, the public’s general interest in a government that does not violate the civil rights of its citizens is not listed by the Court of one of the goals meant to be served by qualified immunity.

50. See *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982).

reasonable person should have known will be found liable under Section 1983.<sup>51</sup> Deterrence from unlawful activity by government officials is supposedly provided by this possibility of individual liability.

On the other side of the equation, the qualified immunity defense is meant to protect innocent defendants from frivolous claims. The Court maintained that because the qualified immunity defense is an objective one, it can be resolved at the outset of a lawsuit without extensive discovery.<sup>52</sup> Therefore, the aim is that frivolous lawsuits will be ended quickly without involving a defendant in protracted litigation.<sup>53</sup> Similarly, because only the “truly culpable,” those who violate clearly established law, will be found liable, government officials will not be reluctant to vigorously exercise their official responsibilities, and the public will be served by bold and effective government. As described by the Court, the qualified immunity defense thus appears to balance competing interests; to punish only the truly guilty, not just the hapless; to provide a remedy to the worthy plaintiff; to protect the judicial system from being logjammed with frivolous claims; and to promote good government. Qualified immunity seemingly tempers what would otherwise be a broad and unwieldy right to compensation.

These laudable goals notwithstanding, the judicial creation and modification of the qualified immunity defense gave the courts broad discretion to determine whether a particular civil rights claim would go forward. Whether certain types of claims would result in judgments for plaintiffs or summary judgments for defendants was now firmly in the control of the judiciary. This placement of control in the hands of the courts through the mechanism of qualified immunity has led to the development of a canon of civil rights law that

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51. The qualified immunity defense also applies to civil rights actions brought against federal officials under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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

53. The Court recently revisited the question of what evidence must be adduced by the plaintiff to defeat a motion for summary judgment on the issue of qualified immunity. See *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998). In *Crawford-El*, the Court rejected a heightened burden of proof for opposing motions for summary judgment based on qualified immunity that was developed by the Court of Appeals for the District of Columbia Circuit. *Id.* at 1594. The District of Columbia Circuit had required that a plaintiff produce clear and convincing evidence of improper motive to defeat a motion for summary judgment. *Id.* at 1588. The Court made clear that when the intent of the defendant is an element of the underlying constitutional claim, there should be no heightened burden of proof required for the plaintiff to establish his claim. *Id.* at 1593-94. This means that with respect to some constitutional claims, discovery concerning the defendant's state of mind may be necessary before the issue of qualified immunity can be resolved. For a further discussion of heightened pleading requirements, see Cory T. Way, *In Defense of Executive Branch Defendants: The Case for Heightened Protection Requirements in Actions for Damages Against Public Servants*, 83 VA. L. REV. 1225 (1997).

is apparently driven by a focus on the reasonableness of the defendant. This emphasis on the defendant removes the spotlight from the impact of civil rights law on the plaintiff and on broader societal concerns about the enforcement of civil rights.

### III. THE APPLICATION OF QUALIFIED IMMUNITY

A close look at the way in which the qualified immunity defense operates reveals that the primary value of the defense is the process it supplies for the resolution of civil rights claims. Since there seems to be almost universal discontent with some aspects of the substantive outcome when qualified immunity is applied, it is clear that the tenacity of the defense is based on the method of resolving civil rights claims that it provides, rather than on general agreement with the justice of the outcome of those claims. Qualified immunity makes the result of each civil rights claim appear to be based on the particular facts of each case, rather than based on the appropriateness of providing relief for a violation of the constitutional right in question. Perhaps the greatest appeal of the qualified immunity defense is that it seemingly provides for varied results. This flexibility allows the defense to be perceived as having contradictory qualities. It has been described as both unfair to plaintiffs and defendants and as beneficial to plaintiffs and defendants, as well as either a boon to societal interests or a hindrance to the furtherance of those interests. And while the defense may at some level displease all players in the civil rights litigation arena, it provides a seemingly fair mechanism to resolve a highly charged conflict between the rights of a plaintiff and the legitimate need for protection of the defendant. The problem with this method of resolving civil rights disputes is the high cost in clarity and coherence we pay for using it.

#### *A. Qualified Immunity as a Legal Standard*

To understand the impact of a legal directive's form on the outcome of disputes and on the process of dispute resolution, legal scholars have contrasted the categories of rule and standard as the two poles used to express legal directives.<sup>54</sup> Duncan Kennedy describes a rule as a legal directive that "requires [the judge] to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way."<sup>55</sup> In contrast, a standard is a legal directive that "requires the judge both to discover the facts of a particular situation and to assess them in terms of the

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54. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV L. REV. 1685, 1687-88 (1976); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-58 (1992).

55. Kennedy, *supra* note 54, at 1687-88.  
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purposes or social values embodied in the standard.”<sup>56</sup> The qualified immunity defense is a standard and thus shares the qualities of other legal standards.

The same policy can be promoted by either a standard or a rule. For example, the directive that no one under the age of twenty-one may drink alcohol is a rule.<sup>57</sup> A standard aimed at accomplishing roughly the same purpose would be: no one may drink who is not mature enough to understand the risks inherent in the consumption of alcohol. While both directives may aim to accomplish similar goals, substantive consequences flow from the form in which a legal directive is placed. Rules are thought to create more certainty; there is little ambiguity about how a rule applies to a particular fact situation.<sup>58</sup> At the same time, rules can be unjust because they are under or over inclusive.<sup>59</sup> Rules punish some behavior which is not inconsistent with the goal of the directive and allow other behavior to go unfettered which, given the goal of the directive, ought to be corrected. For example, if the goal of the legal directive is to prevent the immature from drinking alcohol, an age limit is both under and over inclusive. An age limit does not prevent those over twenty-one whose judgment is not sound from drinking; others who are under twenty-one and quite capable of handling the decision of whether to drink are prevented from drinking. Thus, a rule may prevent both more and less than would be ideal.

If a legal directive is in the form of a standard, there is much less certainty in the outcome. Casting a legal directive in the form of a standard allows the

56. Kennedy, *supra* note 54, at 1688.

57. That the drinking age prohibition is an archetypal rule seems to be a widely held belief, see Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 795-96 (1989), rivaled only by the example of the speed limit. See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 282 (1995).

58. Some would argue that indeterminacy is not limited to standards and that any attempt to determine a legal right based on the balancing of interests “produce[s] no determinate results.” Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1372 (1984). However, notwithstanding this general critique concerning the indeterminacy of legal rules, different levels of certainty can be obtained by use of different directives.

59. Kennedy writes:

The use of rules, as opposed to standards, to deter immoral or antisocial conduct means that sometimes perfectly innocent behavior will be punished, and that sometimes plainly guilty behavior will escape sanction. The cost of mechanical over- and under-inclusion are the price of avoiding the potential arbitrariness and uncertainty of a standard.

Kennedy, *supra* note 54, at 1695.

decision maker relatively more discretion, while a rule allows for less.<sup>60</sup> Because a standard allows for more discretion, a legal decision in which a standard was applied has less precedential value. The process of applying a standard is one which

allow[s] the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.<sup>61</sup>

Thus, one of the reasons one might choose to embody a directive in the form of a rule, in spite of the imprecision that will result, is to avoid uncertainty and arbitrariness that may result from a relatively uncontrolled decision maker. "Rules embody a distrust of the decisionmaker they seek to constrain."<sup>62</sup>

The adoption of a standard reflects a decision to place trust in the ability of the decisionmaker to come to a just conclusion with little binding guidance. Standards allow for flexible application and for the development of the standard as circumstances change.<sup>63</sup> Standards place the responsibility for any given outcome squarely in the hands of the decisionmaker, not in the rigid application of a rule.<sup>64</sup> Thus, an unpopular decision made under a directive formed as a standard will be blamed on the judge, while an unpopular decision made under a rule will be attributed to the rule.

### *B. Qualified Immunity Standard In Action*

To analyze the application of the qualified immunity standard as it is currently being applied on the front lines of civil rights litigation, I reviewed recent cases in which the defendant sought the protection of the qualified immunity defense.<sup>65</sup> The courts have taken the standard created by the United

60. Sullivan, *supra* note 54, at 57-58.

61. Sullivan, *supra* note 54, at 59. Professor Sullivan contrasts the constitutional methodologies of rule-like categories and standard-like balancing. Sullivan, *supra* note 54, at 69-94.

62. Sullivan, *supra* note 54, at 64.

63. See Sullivan, *supra* note 54, at 66.

64. See Chen, *supra* note 57, at 263; Sullivan, *supra* note 54, at 69.

65. I have reviewed United States District Court and United States Court of Appeals cases for the past two years as a basis of surveying the current application of qualified immunity. Most of the determinations of whether qualified immunity will be applied are made as a result of motions for summary judgment. The issue of qualified immunity is first dealt with in the district court with defendant's motion for summary judgment. If this motion is denied, it is reviewed *de novo* by the court of appeals. Accordingly, my review attempted to gather summary judgment decisions rather than <https://scholarship.law.missouri.edu/mlr/vol64/iss1/9>

States Supreme Court and applied it to a broad range of situations. The standard is applied in a several step process, each step requiring the court to make a fact-based determination of whether the defense is appropriate. What emerges from this analysis is that the process provides several points at which the court's almost unfettered judgment determines the outcome of the application of the defense. What also emerges is that the cases taken as a whole do establish categorical results based on the underlying constitutional claim. That is, some kinds of constitutional wrongs are more likely to result in compensation for the plaintiff than others.

### 1. Qualified Immunity Granted

Focusing first on cases in which qualified immunity is granted, I have outlined examples of typical reasoning used by courts in making their determinations.

The threshold step in applying the qualified immunity defense is determining whether the facts the plaintiff has asserted establish the violation of a constitutional right.<sup>66</sup> The court addresses this question before moving on to the more nuanced analysis of the remainder of the standard: "In analyzing qualified immunity claims, we first ask if a plaintiff has asserted the violation of a constitutional right at all, and then assess whether the right was clearly established at the time of the defendant's actions."<sup>67</sup> In *Barney v. Pulsipher*,<sup>68</sup> for example, the court considered whether the defendant's actions violated the Eighth Amendment or the Equal Protection Clause. If the plaintiff's claims do not state a violation of the law, the court need not reach the issue of whether clearly established law was violated.<sup>69</sup>

The next step, which clearly allows the judge a great deal of latitude, is to decide whether the constitutional right was clearly established at the time the alleged offense occurred.<sup>70</sup> This can be a subtle and complex question where

post trial decisions.

66. See, e.g., *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998); *Mace v. City of Akron*, 989 F. Supp. 949, 960 (N.D. Ohio 1998).

67. *Barney*, 143 F.3d at 1309 (internal quotations and citations omitted).

68. 143 F.3d 1299 (10th Cir. 1998).

69. The court determined that the sexual assault of an inmate by a prison guard was not a violation of her Eight Amendment or Equal Protection rights. *Id.* at 1309-10.

70. See, e.g., *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (granting qualified immunity where clearly established due process right not violated by state social services worker); *Greer v. Shoop*, 141 F.3d 824, 827 (8th Cir. 1998) (granting qualified immunity where no clearly established due process right to warn girlfriend of parolee's HIV status); *Wilson v. Layne*, 141 F.3d 111, 115 (4th Cir. 1998) (granting qualified immunity where no clearly established Fourth Amendment right violated by police); *Redd v. City of Enterprise*, 140 F.3d 1378, 1384 (11th Cir. 1998) (granting qualified immunity where no clearly established Fourth or First Amendment rights violated by police); *Rowe v. Schreiber*, 139 F.3d 1381, 1384 (11th Cir. 1998) (granting



the project is to reconstruct the state of the law some years earlier and then determine what it clearly established. In considering whether defendants were entitled to qualified immunity when they allowed newspaper reporters and photographers to be present during the execution of an arrest warrant within the plaintiffs' house, the court in *Wilson v. Layne* described the clearly established standard as one that

protects law enforcement officials from "bad guesses in gray areas" and ensures that they are liable only "for transgressing bright lines." Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest . . . . The law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.<sup>71</sup>

Analyzing the extant law at the time of the incident concerning the photographing of police activities, the court maintained that because the United

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qualified immunity where no clearly established Sixth Amendment right violated by public defender); *Sanchez v. Swyden*, 139 F.3d 464, 468 (5th Cir. 1998) (granting qualified immunity because no clearly established due process rights were violated in detention of criminal suspect); *Brown v. Ives*, 129 F.3d 209, 212 (1st Cir. 1997) (granting qualified immunity when labeling of plaintiff as "sex offender" did not violate clearly established due process rights); *Whalen v. County of Fulton*, 126 F.3d 400, 404 (2d Cir. 1997) (granting qualified immunity where no clearly established right violated by social services agency in failure to facilitate communication between adoptive siblings); *Walker v. McClellan*, 126 F.3d 127, 130 (2d Cir. 1997) (granting qualified immunity where no clearly established due process right violated at prison disciplinary hearing); *Soto v. Flores*, 103 F.3d 1056, 1965 (1st Cir. 1997) (granting qualified immunity where no clearly established due process right violated by failure to protect children from abusive father); *Brinson v. McKeeman*, 992 F. Supp. 897, 909 (W.D. Tex. 1997) (granting qualified immunity where failure to provide inmate with filing forms does not violate clearly established First Amendment right); *K.U. v. Alvin Indep. Sch. Dist.*, 991 F. Supp. 599, 608 (S.D. Tex. 1998) (granting qualified immunity where no clearly established equal protection or First Amendment right violated by school officials); *Price v. County of San Diego*, 990 F. Supp. 1230, 1244 (S.D. Cal. 1998) (granting qualified immunity where no clearly established Fourth Amendment right violated by sheriff); *Lynch v. City of Boston*, 989 F. Supp. 275, 289 (D. Mass. 1997) (granting qualified immunity where no clearly established First Amendment right violated); *McGrail & Rowley v. Babbit*, 986 F. Supp. 1386, 1398 (S.D. Fl. 1997) (granting qualified immunity where no clearly established right violated); *Spencer v. Lavoie*, 986 F. Supp. 717, 721 (N.D.N.Y. 1997) (granting qualified immunity where no clearly established due process right violated by removal of children from parental control).

71. *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (internal citations omitted). <https://scholarship.law.missouri.edu/mlr/vol64/iss1/9>

States Supreme Court had held that “seizure occurs only when there has been a meaningful interference with an individual’s possessory interests in property,”<sup>72</sup> the photographs taken by the newspaper at the time of the attempted execution of the warrant did not violate a clearly established Fourth Amendment right. The court further determined that “there was no clear law from the Supreme Court, this court, or the Court of Appeals of Maryland establishing that permitting reporters to observe and photograph the events surrounding the execution of an arrest warrant may not serve a legitimate law enforcement purpose related to the execution of warrants.”<sup>73</sup> In *Wilson*, the court did not reach the issue of whether the actions alleged would have violated Fourth Amendment rights, but only “whether the legal landscape when these events occurred was sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment.”<sup>74</sup>

Surveying the same legal landscape, the dissent in *Wilson* determined that the defendants’ actions had violated clearly established law.<sup>75</sup> The dissent argued that the core values of the Fourth Amendment were clearly implicated when the police officers allowed the newspaper reporters to view and photograph the plaintiffs in their home, undressed, in a confrontation with the police.<sup>76</sup> In reaching this conclusion, the dissent relied upon general Fourth Amendment principles concerning the limitations on the government’s right to intrude into the privacy of the home and general prohibitions against police intrusions beyond the scope of those authorized by a warrant, which in this case did not authorize the presence of reporters.<sup>77</sup> In a strongly worded expression of its concerns, the dissent concluded that “by holding the innocent occupants of the home at gunpoint while members of the media photographed them in their underwear . . . [t]he officers could hardly have done more violence to the well-established Fourth Amendment principles recounted above.”<sup>78</sup>

These two approaches to the same set of facts illustrate the ability of the qualified immunity standard to result in widely different outcomes. The court in *Wilson* looks for a specific, factually similar case from an authoritative court as evidence that the right was clearly established. The dissent relies on general legal principles that it believes ineluctably lead to the conclusion that the conduct at issue violates a constitutional right. Both approaches can be encompassed under the big tent of the clearly established standard, giving the decisionmaker considerable range in fashioning an outcome. Depending on the

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72. *Id.* at 115 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

73. *Id.* at 116.

74. *Id.* at 118.

75. *Id.* at 119 (Murnaghan, J., dissenting).

76. *Id.* at 122 (“Today’s majority opinion undermines the right at the very core of the Fourth Amendment and sanctions an ‘unreasonable governmental intrusion.’”).

77. *Id.* at 115.

78. *Id.* at 125 (Murnaghan, J., dissenting).

decisionmaker's view of appropriate policy concerning, for example, the autonomy that should be accorded the police or the role of the media in law enforcement, what is "clearly" established may not be that clear.

In another approach to the clearly established element of the defense, the court in *Campbell v. Burt* determined that even though the defendant knew that his actions were unlawful, he nonetheless did not violate a clearly established federal right.<sup>79</sup> In *Campbell*, the defendant, an employee of Hawaii's Child Protective Service, took emergency custody of plaintiff's child but failed to file a petition for temporary custody until seven days later.<sup>80</sup> State law required that such a petition be filed within two days.<sup>81</sup> The plaintiff claimed that the defendant's actions violated his procedural due process rights.<sup>82</sup> The court concluded that the right to have a hearing on the issue of the state's temporary custody before seven days after removal of the child was not a clearly established due process right even though the right to have a hearing within two days was established by state law.<sup>83</sup> The court reasoned that the state law did not create an interest that must be protected by due process.<sup>84</sup> Moreover, there was no case interpreting federal due process law to require that a hearing in a temporary custody case be granted within seven days.<sup>85</sup>

The *Campbell* case further illustrates the range of possibilities open to a court determining whether a law was clearly established. In *Campbell*, rather than extrapolating from the general requirements of due process which are implicated when a child is removed from its home, the court looked for a precise fit and distinguished law contrary to its conclusion. Using the same materials—the requirements of state law and the general mandates of due process—the court could have found quite plausibly that clearly established law was violated.

In some areas of constitutional rights, the courts have come close to saying that law could never be clearly established. In *Lynch v. City of Boston*, the court addressed the question of whether certain First Amendment rights, which are determined by a balancing of factors, could ever be clearly established for

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79. 141 F.3d 927, 929-30 (9th Cir. 1998).

80. *Id.* at 928.

81. *Id.*

82. *Id.* at 929.

83. *Id.* Similarly, in *Spencer v. Lavoie*, 986 F. Supp. 717, 721 (N.D.N.Y. 1997), the court granted qualified immunity to a caseworker who had removed children from their parents' custody regardless of whether the defendant's actions violated state law.

84. While the state law that mandated a hearing within two days did not create a constitutional interest in such a hearing, the court explained that a state law allowing prisoners to have access to telephones did create such a right. *Campbell v. Burt*, 141 F.3d 927, 930 (9th Cir. 1998).

85. *Id.* at 929. The court reached this conclusion despite citing a court of appeals decision which confirmed that due process required prompt post-deprivation process after the emergency removal of a child from its home. *Id.* (citing *Jordan v. Jackson*, 15 F.3d 333, 334 (4th Cir. 1994)).

purposes of qualified immunity.<sup>86</sup> There, the plaintiff, an independent contractor for the City of Boston, claimed that her First Amendment rights were violated when her contract was not renewed based on the exercise of her free speech rights.<sup>87</sup> In order to determine whether the plaintiff's First Amendment rights were violated in this context, a three-part balancing test was applied.<sup>88</sup> The court stated that, because an official could never know with certainty the outcome of a balancing test, many courts had determined that "when a balancing test is to be applied, the right is not clearly established."<sup>89</sup> This conclusion is based on the premise that "where a balancing test is required, reasonable public officials cannot be expected to know what the outcome of application of the test will be, and therefore cannot be expected to know that what is being done will be a violation of a 'clearly established' right."<sup>90</sup> This raises the prospect that whenever the underlying constitutional right is determined by a balancing test, as many are,<sup>91</sup> the court could take the position that there can be no civil rights claim that would not be defeated by the qualified immunity defense.

Finally, if the law is clearly established, the court applying the qualified immunity defense again gets the opportunity to apply a standard by determining if a reasonable official would have known that he was violating this clearly established right.<sup>92</sup> Here, if the right itself is sufficiently broadly stated, courts

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86. 989 F. Supp. 275, 288 (D. Mass. 1997). *But see, e.g.*, *Metro Display Adver. v. City of Victorville*, 143 F.3d 1191 (9th Cir. 1998) (denying qualified immunity where claim is based on First Amendment).

87. *Lynch*, 989 F. Supp. at 287.

88. *Id.* at 287.

89. *Id.* at 288.

90. *Id.*

91. *See Sullivan*, *supra* note 54, at 61.

92. *See, e.g.*, *Gravely v. Madden*, 142 F.3d 345, 346 (6th Cir. 1998) (granting qualified immunity to prison official where reasonable official would not have known that fatally shooting an escaped inmate in an effort to apprehend him would be a violation of the prisoner's Eighth Amendment rights); *Manetta v. Macomb County Enforcement Team*, 141 F.3d 270, 275 (6th Cir. 1998) (extending qualified immunity to prosecutor against claim that he violated plaintiff's Fourth Amendment right to be free from arrest without probable cause as a reasonable prosecutor would not have known that arrestee's conduct did not constitute extortion); *DeCarlo v. Fry*, 141 F.3d 56, 63 (2d Cir. 1998) (conferring qualified immunity on social service agency employees who reasonably relied on their supervisor's instructions in processing a day care license application); *Jackson v. Everett*, 140 F.3d 1149, 1152 (8th Cir. 1998) (granting qualified immunity to prison official because a reasonable prison official would not have known that additional security measures were necessary, under the Eighth Amendment deliberate indifference standard, in order to prevent the stabbing of an inmate by his cellmate); *Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir. 1997) (granting qualified immunity to police officer who arrested plaintiff without probable cause in violation of the Fourth Amendment because a reasonable officer would have arrested plaintiff given wife's complaint of abuse and state law requiring an arrest in domestic violence situations);

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Danahy v. Buscaglia, 134 F.3d 1185, 1193 (2d Cir. 1998) (allowing qualified immunity where reasonable officials could have concluded that plaintiffs were within the policy maker exemption of the First Amendment right to association and therefore could be terminated from their state employment); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 102 (2d Cir. 1998) (granting qualified immunity where a reasonable official could have concluded that denying brewery's application to use the image of a frog giving a well known insulting gesture would not violate the brewery's First Amendment rights); *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998) (extending qualified immunity to police officers against claim that they violated plaintiffs' due process and Fourth Amendment rights by entering their home without warrant and using excessive force to subdue plaintiffs involved in a domestic dispute because a reasonable officer would have acted similarly faced with similar circumstances); *Varrone v. Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997) (granting qualified immunity to prison guards who subjected prison visitor to a strip search allegedly in violation of the Fourth Amendment where reasonable officials would have complied with a facially valid policy requiring such action); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 7 (1st Cir. 1997) (granting qualified immunity to police officer because warrantless arrest was objectively reasonable); *Joyce v. Town of Tewksbury*, 112 F.3d 19, 22 (1st Cir. 1997) (extending qualified immunity to police officers because it was objectively reasonable for the police to enter the parent's home and arrest the con without an arrest warrant); *Frane v. Kijowski*, 992 F. Supp. 985, 991 (N.D. Ill. 1998) (allowing qualified immunity for police officers who shot plaintiff as their action was objectively reasonable given that the plaintiff was holding a gun to his wife's head even though the gun later turned out to be a dart gun); *Ivester v. Lee*, 991 F. Supp. 1113, 1126 (E.D. Mo. 1998) (granting qualified immunity to officers in claim that they gave false evidence to obtain search warrant and thus made false arrest in violation of the Fourth Amendment where reasonable officers could conclude that warrant was facially valid); *Bessman v. Powell*, 991 F. Supp. 830, 839 (S.D. Tex. 1998) (granting qualified immunity as a reasonable official would not realize that changing professor's conclusions in a quality assurance report would violate the professor's First Amendment rights); *Rappa v. Hollins*, 991 F. Supp. 367, 382 (D. Del. 1997) (extending qualified immunity to county council members as a reasonable official could not have known that defamatory remarks in response to prospective candidate's speech would have violated the candidate's First Amendment rights); *Riggs v. City of Pearland*, 177 F.R.D. 395, 405 (S.D. Tex. 1997) (allowing qualified immunity for police officer and EMS worker in claim that they violated plaintiff's Fourth Amendment rights where actions of officials in subduing plaintiff were objectively reasonable); *Schwimmer v. Kaladjian*, 988 F. Supp. 631, 641 (S.D.N.Y. 1997) (granting qualified immunity to official who removed child from parents' home and administered physical exam without parental consent as a reasonable official would not realize this violated parents procedural due process rights); *Anonymous v. Kaye*, 987 F. Supp. 131, 136 (N.D.N.Y. 1997) (granting qualified immunity to board of law examiners as it was objectively reasonable for them to conclude that denying plaintiff and opportunity to take bar exam would not violate applicant's constitutional right of due process and equal protection); *Spencer v. Lavoie*, 986 F. Supp. 717, 722-23 (N.D.N.Y. 1997) (granting qualified immunity to social services agency care worker who removed children from mother's control without her consent because a reasonable officials could have concluded that action was warranted by allegations of abuse); *Gomez v. Pellicone*, 986 F. Supp. 220, 227 (S.D.N.Y. 1997) (granting qualified immunity to school officials

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often determine that it is not reasonable that the government actor would know that the exact factual scenario presented would violate that law. The reasonableness question is closely linked to the clearly established question, but nonetheless has been treated as a separate inquiry which must be satisfied even if the right that was allegedly violated was clearly established.<sup>93</sup> The court must look at the circumstances surrounding the incident to determine whether the defendant acted reasonably and is thus entitled to qualified immunity. "A public official must not simply violate plaintiff's rights; rather the violation of plaintiff's rights must be so clear that no reasonable public official could have believed that his actions did not violate plaintiff's rights."<sup>94</sup>

This reasonableness inquiry can be a complicated one because it involves the imposition of the reasonableness standard on a variety of constitutional rights, some of which contain a reasonableness element of their own, or as in the case of the Eighth Amendment, contain a contrasting intent requirement such as a reckless disregard.<sup>95</sup> The question of whether the defendant's belief that he was not violating a constitutional right was reasonable can thus become quite entangled with the question of whether the underlying constitutional right was violated. As with the first two prongs of the qualified immunity standard, the court's consideration of the reasonableness prong provides ample opportunity for wide discretion in the imposition of this element of the defense.

The latitude provided to the court by the reasonableness standard is especially clear in the application of the defense to Fourth Amendment claims. In *Manetta v. Macomb County Enforcement Team*, for example, the court reviewed the denial of the defendant's motion for summary judgment based on qualified immunity where the underlying constitutional claim was a violation of the Fourth Amendment.<sup>96</sup> There, the court determined that the prosecutor's participation in the investigation and arrest of the plaintiffs on charges of extortion entitled him to qualified immunity because the defendant "reasonably could have believed that probable cause existed to justify his actions."<sup>97</sup> To arrive at this conclusion, the court reviewed the facts known to the defendant at

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where reasonable official would not know that following established disciplinary procedures was a violation of equal protection).

93. See, e.g., *Spencer*, 986 F. Supp. at 721 ("Qualified immunity also will protect a defendant, even where the right was clearly established, if the undisputed facts show that it was objectively reasonable for the defendant to believe the acts did not violate that right.").

94. *Gomez*, 986 F. Supp. at 226. See also, e.g., *Manetta*, 141 F.3d at 275; *Jackson*, 140 F.3d at 1151; *Danahy*, 134 F.3d at 1190; *Riggs*, 177 F.R.D. at 404; *Schwimmer*, 988 F. Supp. at 639-40.

95. See, e.g., *Manetta*, 141 F.3d at 275-76 (applying qualified immunity to Fourth Amendment claim); *Jackson*, 140 F.3d at 1152 (applying qualified immunity to Eighth Amendment claim).

96. 141 F.3d 270 (6th Cir. 1998).

97. *Id.* at 275.

the time of his participation in the events and concluded that, given those facts, his actions were reasonable.<sup>98</sup> Because the standard for a violation of the Fourth Amendment is based on whether the government official's actions were reasonable, what the court did, in effect, was apply the underlying Fourth Amendment standard to the qualified immunity question. So while the court concludes that the plaintiffs "[do] state a constitutional claim in alleging that their arrest . . . violated their Fourth Amendment rights," the defendant is entitled to qualified immunity "because, under the facts of this case and the law in existence at the time [the defendant] acted, a reasonable official could have believed that . . . [the plaintiffs] had committed extortion."<sup>99</sup> Because of the confluence of the two reasonableness standards, the result of the application of the qualified immunity standard appears to be indistinguishable from a decision on the merits of the Fourth Amendment claim. However, since two levels of reasonableness are being imposed, the behavior of the defendant necessary to receive qualified immunity must be different from that required to defeat a Fourth Amendment claim on the merits. The court then has the task of applying this conceptually difficult "reasonableness squared" standard to the behavior of the defendant.

When the underlying constitutional standard is not reasonableness, the task before the court is somewhat different. In *Jackson v. Everett*, the court stated that a violation of the Eighth Amendment prohibition against cruel and unusual punishment requires that the government officer act with "deliberate indifference" to the need to protect an inmate from violence.<sup>100</sup> When applying qualified immunity to an Eighth Amendment claim, therefore, the court maintained that the question is not whether the defendant acted reasonably, but rather whether he acted with reckless disregard of the safety of the prisoner.<sup>101</sup> The application of a reasonableness standard should only be used when negligence is the underlying intent requirement. Here, since the required intent is higher than that required by negligence, the qualified immunity test is adapted to conform with the Eighth Amendment's deliberate indifference requirement.<sup>102</sup> The court thus modified the threshold for application of the qualified immunity standard, making it easier to reach because of the high standard required by the underlying constitutional claim.

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98. *Id.* at 277.

99. *Id.* at 276. The court goes on to disapprove of the district court's application of case law that was decided after the incident in question to determine whether the defendants were entitled to qualified immunity. *Id.* The court maintained that this application was incorrect because the defendants' actions should be evaluated based on the law that existed at the time of the alleged violation. *Id.* This discussion leaves open the possibility that the court if deciding the issue based on current law may have come to a different conclusion on the qualified immunity issue.

100. 140 F.3d 1149, 1152 (8th Cir. 1998).

101. *Id.*

102. *Id.*

In another take on the same problem, the court in *Gravelly v. Madden* applied the qualified immunity standard to an Eighth Amendment claim based on the use of deadly force to prevent the escape of a fleeing inmate.<sup>103</sup> The court stated that the underlying constitutional standard in this situation is “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”<sup>104</sup> As in *Everett*, the court was applying the reasonableness standard to an underlying substantive claim that required more than unreasonableness to establish a violation. Nevertheless, in *Madden*, the court found no conflict between the requirements of the Eighth Amendment and the qualified immunity defense and addressed the question of whether “a reasonable officer in [the defendant’s] position [would] have deemed it permissible to use deadly force under the circumstances.”<sup>105</sup> The two circuit courts of appeals thus took different stances towards the meaning of reasonableness when applied to a higher intent substantive claim, one feeling the need to modify the requirement of reasonableness, the other gamely applying the reasonableness standard to a claim requiring malicious or sadistic intent.

As this brief survey of current case law concerning qualified immunity indicates, the qualified immunity standard provides a multi-tiered analysis requiring the court to make several determinations which are largely untethered from any controlling precedent. In deciding whether the law in question was clearly established, the court can take a narrow view requiring a factually on point controlling precedent, or it can take a general view of what the constitutional right in question requires. In determining whether the defendant’s actions were reasonable, the court may be guided by underlying substantive standards, or if the underlying standard does not contain the element of reasonableness, may hazard a guess as to what standard to apply. While all legal directives, both rules and standards, provide room for different approaches and results by different decisionmakers, the qualified immunity standard provides exceptionally loose parameters within which a court may frame its decision.

## 2. Qualified Immunity Denied

It is revealing to look at what is happening in cases in which qualified immunity is denied.<sup>106</sup> While the methodology is the same as that in cases in which qualified immunity is granted, in that the court determines that a clearly established right has been violated and then concludes that a reasonable official

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103. 142 F.3d 345, 348 (6th Cir. 1998).

104. *Id.* at 349 (citations omitted).

105. *Id.*

106. Of the cases reviewed, qualified immunity was denied in approximately 20% of the cases. I have excluded those cases where the court denied summary judgment on the issue of qualified immunity because of disputed issues of fact.



would have known the right was being violated, what is different is the type of underlying constitutional right asserted in cases where qualified immunity is denied. Whether qualified immunity is granted or denied appears to be linked to the type of underlying civil right that is claimed to be violated. The assertion of some types of civil rights are more likely to result in the denial of qualified immunity. The assertion of other civil rights, especially if the alleged violation takes place in a confrontation with law enforcement officials, will rarely result in the denial of qualified immunity. This pattern suggests that the results of the application of the qualified immunity defense are not haphazard. Certain types of constitutional wrongs are more likely to survive the rigors of the application of the defense than others.

Certain generalizations can be made about the type of government actions that will likely result in a denial of qualified immunity. Claims involving the denial of due process or the violation of First Amendment rights are likely to be well represented in the group of claims that survive a motion for summary judgment based on qualified immunity.<sup>107</sup> Another type of case that appears frequently in the group in which qualified immunity is denied is an attack on the established policies or procedures of a governmental institution such as a prison or police department.<sup>108</sup> In those cases, the constitutionality of large institutional policies are challenged through the device of a suit against individual employees who implement the policy.<sup>109</sup>

What is largely absent when qualified immunity is denied are situations that involve direct confrontations between government officials and the public in exigent circumstances. Fewer denials of qualified immunity occur when violations of the Fourth Amendment are alleged. Even when qualified immunity is denied in cases that do involve police behavior, it is in a setting that is less volatile than the typical excess force or unlawful seizure claim. In *Norwood v. Bain*, for example, the plaintiff claimed a violation of the Fourth Amendment based on a police decision to search those entering a motorcycle rally.<sup>110</sup> This alleged Fourth Amendment violation involved the deliberate and

107. See *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191 (9th Cir. 1998); *Lickiss v. Drexler*, 141 F.3d 1220 (7th Cir. 1998); *Catanzaro v. Weiden*, 140 F.3d 91 (2d Cir. 1998); *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997); *Mathews v. High Island Ind. Sch. Dist.*, 991 F. Supp. 840 (S.D. Tex. 1998); *Avellino v. Herron*, 991 F. Supp. 722 (E.D. Pa. 1997); *Malik v. Arapahoe County Dept. of Soc. Servs.*, 987 F. Supp. 868 (D. Colo. 1997).

108. See *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998); *Farmer v. Hawk*, 991 F. Supp. 19 (D.D.C. 1998); *Cunningham v. Gates*, 989 F. Supp. 1262 (C.D. Cal. 1997); *Rouse v. Plantier*, 987 F. Supp. 302 (D.N.J. 1997).

109. In some circumstances the plaintiff may be able to sue a government entity directly for violations of constitutional rights. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). This option, however, is not available with respect to federal agencies.

110. 143 F.3d 843, 845 (4th Cir. 1998).  
<https://scholarship.law.missouri.edu/mlr/vol64/iss1/9>

calm implementation of a policy concerning crime control at a rally. There was no split second thinking involved. Similarly, in *Davis v. Brady*, where the claim was based on substantive due process, the police actions in question took place in an atmosphere of deliberation and calm, not in response to any threatened serious crime or violence.<sup>111</sup>

While this review of cases represents too small a sample to make any definite conclusions, the types of cases where qualified immunity is denied suggest that categorical decisions based on the underlying substantive claim are being made. Furthermore, these decisions determine which claims will result in compensation for a plaintiff and which will not. It appears that government actors will be given more latitude when they are taking actions in potentially dangerous situations. Less discretion will be given to the government employer who imposes unfair procedures or makes unlawful decisions. These may well be sensible lines to draw in determining which civil rights violations justify the imposition of a civil remedy and which must go uncompensated. What is apparent, however, is that whether a claim will go forward depends very little on the strictures imposed by the qualified immunity defense. Judges are being asked, in effect, to do what they think is right with very little clear cut guidance. While making the decision about what would be just, judges must dress up their conclusions in the complicated costume of qualified immunity. Because they appear clothed in the qualified immunity doctrine, the policy choices being made about the underlying constitutional rights are hidden.

### 3. Impact of the Standard

Qualified immunity is clearly a standard.<sup>112</sup> The test the courts must apply in determining whether a defendant is entitled to qualified immunity is whether the defendant violated a clearly established right of which a reasonable person would have known. This test provides for fact-based assessment of circumstances surrounding the alleged violation of constitutional rights. First, an inquiry must be made into whether, with respect to the particular situation confronted by the defendant, the right allegedly violated was clearly established. Then the court can look to the facts surrounding the actions of the government employee to determine whether a reasonable person in his position would have known of this right. This analysis provides a wide range of discretion and flexibility on the part of the judge.

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111. 143 F.3d 1021, 1023 (6th Cir. 1998). In *Brady*, the police officers, after arresting the plaintiff for intoxication and disorderly conduct, drove the plaintiff out of town and left him on the side of a high speed limit road. *Id.* The plaintiff was subsequently hit by a car and suffered serious injuries. *Id.*

112. Chen, *supra* note 57, at 263, 291.

Decisions articulating the application of qualified immunity necessarily will be tied to the particular facts of the case. No binding statements about the contours of qualified immunity will be articulated. The case, instead, will be decided on the specific facts of the encounter between the citizen and the government official.<sup>113</sup> Thus, a decision will state that this particular officer is entitled to qualified immunity, not that qualified immunity will or will not be available with respect to certain claims. By couching decisions in qualified immunity terms, it is more difficult to accurately track the expansion or retraction of the remedy available for violation of a constitutional right. The use of the standard form thus hides the doctrinal reality of civil rights litigation.<sup>114</sup>

The fact that the qualified immunity standard hides the ball, that is, hides the fact that certain rights have been curtailed and that others are more likely to be vindicated, is not just an unfortunate side effect of the defense.<sup>115</sup> Rather, this ability to obfuscate provides a basic element of its appeal as a doctrine. The formulation of qualified immunity as a multi-tiered standard is the form which allows for the perpetuation of the illusion of an even-handed application of the defense to all civil rights claims.

#### IV. THE COST OF QUALIFIED IMMUNITY

Qualified immunity has not been universally admired. A large body of literature critiques the defense and calls for its modification, elimination, or expansion. While these critiques serve to illuminate some fundamental problems with the qualified immunity doctrine, they do not address the central problem with qualified immunity—its camouflaging effect. By camouflaging effect, I mean the ability of qualified immunity to make the underlying pattern of civil rights doctrine indiscernible. The existing critical focus on the strengths and weaknesses of qualified immunity fails to uncover the underlying patterns in the availability of Section 1983 remedies.

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113. Professor Chen has suggested that one danger of qualified immunity is that it “masks the courts’ decisions behind policy choices irrelevant to, or at least removed from, the substantive constitutional policy concerns.” Chen, *supra* note 57, at 316. Professor Chen goes on to argue that the use of the qualified immunity standard in conjunction with a substantive constitutional law standard distorts the meaning and application of the constitutional law standard. See Chen, *supra* note 57, at 324.

114. See Chen, *supra* note 57, at 316.

115. For a discussion of the usefulness of baseball metaphors, such as “hiding the ball,” in legal discourse, see Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff,”* 28 CONN. L. REV. 813, 813 n.1 (1996). As Professor Yelnosky explains, hiding the ball “is a trick play in which an infielder pretends to give the ball to the pitcher, but in fact keeps the ball. When the runner takes a lead off a base, the infielder tags the runner out. It is one of the oldest tricks in baseball.” *Id.* at 813 n.1.

### A. Current Critiques

There are vociferous critics of the qualified immunity doctrine who attack the doctrine as a whole. This commentary suggests that the problem with the qualified immunity doctrine is that it is applied to the wrong group of defendants or that it should be eliminated entirely. Those who believe that it should be eliminated entirely generally seek to substitute governmental liability for that of individual government officials.<sup>116</sup> Others believe that the problem is not with the defense but that its application should be available only to a certain small group of government officials.<sup>117</sup>

The bulk of the criticism of qualified immunity looks closely at the structure of the defense and argues that it is internally contradictory or should be modified to provide better results. This criticism breaks into two main areas: the problems inherent in the “reasonableness” element<sup>118</sup> of the qualified immunity defense and the difficulties that result from the attempt to define “clearly established”<sup>119</sup> law.

The complaints concerning the “reasonableness” element note that while the objective reasonableness element is designed to protect the defendant from protracted litigation, the defense does not really quickly resolve a lawsuit.<sup>120</sup>

116. In his call for reform of the current interpretation of the Fourth Amendment, Professor Akhil Amar proposes that immunity for individual government employees be eliminated, stating that such immunity would have been found “a shocking violation of first principles” by the framers of the Constitution. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994). He goes on to suggest that governmental entities be directly liable for violation of the Fourth Amendment rights. *Id.* See generally SCHUCK, *supra* note 6, at 182-98.

117. See Evan J. Mandarey, *Qualified Immunity or Absolute Immunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL’Y 479, 513-15 (1994). Professor Mandarey proposes that only high level employees receive qualified immunity and that low level employees should be subject to strict liability. *Id.* at 513-15. See John D. Kirby, Note, *Qualified Immunity For Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 479 (1990); see also Shapiro, *supra* note 47, at 270-74; Janell M. Byrd, Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1727 (1983) (arguing that government employees should not receive immunity for malicious or reckless acts).

118. The reasonableness element establishes that the defendant’s actual knowledge of the lawfulness of his action is irrelevant and that the question is whether a reasonable official would have known that his actions violated a clearly established constitutional law.

119. The clearly established element of qualified immunity requires that the law allegedly violated by the defendant was clearly established at the time the actions in question took place.

120. Qualified immunity “stands as a legal principle defined primarily by the Court’s own policy judgment that an individual’s right to compensation for constitutional

The fact issues raised by the reasonableness element of the defense require a fact-finding hearing which makes it difficult to end lawsuits prior to trial.<sup>121</sup> In a contradictory approach, the objectively reasonable element also has been described as being essentially a bar to judgment for the plaintiff in a civil rights action. Because qualified immunity is designed to protect defendants not just from liability, but from participation in litigation, some argue that qualified

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violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs.” Rudovsky, *supra* note 39, at 36. However, the effectiveness of this benefit seems to be in doubt. See William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L. J. AM. U. 1105, 1143 (1996). Professor Kratzke maintains that governmental liability should be substituted for individual liability, using the respondeat superior model from private tort law. *Id.* at 1152, 1164. He concludes that while it is almost impossible for a plaintiff to succeed in a Section 1983 suit, the lawsuit also needlessly harasses the governmental official. *Id.* at 1150. This harassment seems especially wasteful when there is little benefit to plaintiffs from the system. “Since the 1980s, it has become very difficult for plaintiffs . . . to win a *Bivens* case. The lawsuit itself, on the other hand, can annoy, harass, or even terrorize defendants to the point that they are afraid of effectively performing their duties.” *Id.* at 1143.

121. Despite the stated intentions of the Court in *Harlow*, where it eliminated the subjective component of the qualified immunity defense, there are often fact issues that must be resolved before a ruling can be made on the application of the defense. David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W.L. REV. 201 (1994). For example, there could be a dispute as to the underlying facts or the intention of the defendant, which prevent a determination of whether a clearly established right was violated thus requiring the case go to trial. See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgement and the Role of Facts In Constitutional Tort Law*, 47 AM. U.L. REV. 1, 6 (1997). Professor Chen argues that because the application of the qualified immunity defense inherently involves fact questions, it is difficult to resolve on summary judgment. *Id.* at 81-88. He suggests that the Court had set up an internally contradictory standard when it suggests that qualified immunity issues should be resolved quickly before trial and then defines the standard as a “reasonable” one the application of which will inevitably necessitate the resolution of factual issues. *Id.* at 96-99. The contradictory nature of the qualified immunity defense had caused lower courts to distort the summary judgment process in order to attempt to resolve the defense issue prior to trial. Professor Ignall proposes, as a solution to the lack of protection provided by the defense, a heightened burden of establishing a disputed issue of fact for the plaintiff:

[T]he plaintiff should have to produce evidence that, if uncontroverted, would support judgment as a matter of law as the law existed at the time of the alleged violation. If the plaintiff’s evidence would be sufficient simply to create a question for the trier of fact as to the merits, the defendant should be entitled to summary judgment because reasonable minds could differ as to the legality of the defendant’s conduct.

immunity has become essentially indistinguishable from absolute immunity.<sup>122</sup>

The objectively reasonable standard is also seen as a mechanism for the distortion of constitutional law. The focus on the question of what a reasonable official would have understood the law to require leads to a “redefining of the substantive constitutional law” in a way that gives little clear guidance as to what the constitution requires and thus provides little guidance for future actions.<sup>123</sup> Commentators similarly claim that the impact of the clearly established element of the qualified immunity defense is inefficient, distorts the law, and is too difficult a standard for plaintiffs to overcome. It is inefficient and distorting because courts spend their time reconstructing what the law was in the past rather than setting forth clear guidance as to what the law requires.<sup>124</sup>

122. See Alfredo Garcia, *The Scope of Police Immunity From Civil Suit Under Title 42 Section 1983 And Bivens: A Realistic Appraisal*, 11 WHITTIER L. REV. 511, 534 (1989). “[T]he individual citizen who seeks redress for a constitutional violation faces a formidable obstacle. That obstacle is the doctrine of qualified immunity for police officers as it had been developed by the United States Supreme Court.” *Id.* See also Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 68 (1997). Freiman asserts that “only plaintiffs bringing suit against the most egregious flouters of the Constitution have any possibility of surviving a motion for summary judgment. . . . [Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through.” *Id.* This limitation on claims against individuals is particularly troubling because it has not been accompanied by an expansion of governmental liability. See Laura Oren, *Immunity and Accountability in Civil Rights Legislation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 939 (1989).

123. Rudovsky, *supra* note 39, at 27. For example, in analyzing a Fourth Amendment claim, which contains a reasonableness standard within its substantive requirements, the qualified immunity question will be: Was it reasonable for a government official to believe that his action was reasonable? This double reasonableness analysis is confusing, and perhaps distorting, to apply. It obscures the requirements of Fourth Amendment law and thus provides little guidance for government officials seeking to conform to constitutional requirements. See Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 460-61 (1978); Rudovsky, *supra* note 39, at 52-53.

124. The primary criticism of the clearly established standard is that it is inefficient. Courts’ time would be better spent explicating the contours of the underlying constitutional right rather than focusing on whether the law was clearly established at the time the acts complained of in the lawsuit took place. See Mandery, *supra* note 117, at 505; Heather Meeker, “Clearly Established” Law In *Qualified Immunity Analysis For Civil Rights Actions In the Tenth Circuit*, 35 WASHBURN L. J. 79, 84 (1995); Oren, *supra* note 122, at 1007; Shapiro, *supra* note 47 at 264-65. Oren writes:

When we talk about immunity doctrine, we are not talking about the merits of the constitutional claim. Rather, the defense obtains even if a wrong has been done. Perhaps we should be addressing the underlying claim instead of deflecting an apparent hostility to some kinds of lawsuits onto official

The qualified immunity defense has also been assailed because of its requirement that a constitutional right must be clearly established before any liability can attach. This is a difficult standard to overcome.<sup>125</sup> The difficulty in identifying clear legal authority establishing the unlawfulness of a particular official's act may be too difficult a task and thus exclude meritorious claims.<sup>126</sup>

There is then a body of literature examining the discrepancy between what the qualified immunity defense was meant to accomplish and how it actually works. The defense does not protect defendants in a meaningful way. At the same time, it makes a judgment for the plaintiff almost impossible to obtain. Therefore, the defense seems to be serving no one's interests. These well documented weaknesses suggest that qualified immunity's role is not to allow for just outcomes, but to provide some other service. What is missing from these critiques is an analysis of what function the current doctrine serves. In the next section, I explain that while qualified immunity often results in unfairness or inefficiency, the doctrine also provides a flexible mechanism by which divisive issues are seemingly resolved. This mechanism, however, has a cost.

### B. *Qualified Immunity as a Disguise*

The problem with qualified immunity is not so much that the outcomes are sometimes unfair but the fact that qualified immunity blocks a clear view of the real limitations that exist in civil rights law. Civil rights law is, in effect, being designed in the dark. Distinctions are being made about the types of cases that will receive compensation and the types that will not. These distinctions are not articulated as such; instead, the results are understood to be the result of the

immunity doctrine.

Oren, *supra* note 122, at 1007. See also Freiman, *supra* note 122, at 81.

The issue of the problems presented by the clearly established standard were recently addressed in *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998), where the Court determined that in applying the qualified immunity defense, the trial court should first "identify the exact contours of the underlying right said to have been violated." *Id.* The constitutional issue should not be avoided because if not addressed "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional." *Id.*

125. "If clearly established law is narrowly defined . . . it becomes nearly impossible to overcome qualified official immunity." Oren, *supra* note 122, at 982.

126. There are myriad factual scenarios that could give rise to, for example, a Fourth Amendment violation concerning an unreasonable seizure. If a plaintiff cannot point to a controlling case in the Supreme Court, the circuit court of appeals, or the highest court of the state declaring that a factual scenario similar to the one being challenged is a violation of the Constitution, the law may not be considered clearly established. Thus, the high threshold of identifying the right as "clearly established" has been critiqued as presenting an almost insurmountable barrier to the civil rights plaintiff. Oren, *supra* note 122, at 982, 992-95.

<https://scholarship.law.missouri.edu/mlr/vol64/iss1/9>

qualified immunity defense. As we have seen, for example, a procedural complaint in the context of an employment dispute is more likely to survive the qualified immunity defense than is a complaint about whether a police officer used excessive force in the arrest of a dangerous suspect. Rather than organizing civil rights law in these categorical ways, however, qualified immunity makes the civil rights remedial system appear to be about individual cases and the reasonableness of individual defendants.

Current qualified immunity doctrine serves as a means to diffuse conflict. Without a clear rule that some kinds of civil rights harms will not be redressed, there is minimal pressure for change. This “hiding of the ball” quality of qualified immunity is why, in spite of many expressions of dissatisfaction with the system, there had been little effective rallying for change. The reason the discontent of the participants in this system has not led to a significant change is that the terms of the debate are defined by the immunity system rather than by the fundamental question of the extent of rights and liabilities in civil rights actions. The civil rights remedial scheme organized around qualified immunity thus has an inherently self-preserving or stabilizing quality. It allows for tinkering at the margins, but fundamental recasting of the terms of the debate is unlikely.

My assertion that qualified immunity has a camouflaging effect on civil rights law is supported by a large body of scholarship that explores legal regimes that define reality in a way that limits the ability of the participants in the system to change it.<sup>127</sup> These scholars argue that when a legal system is accepted as being the only available way to organize an activity and thus seems inevitable, the legal system encourages acceptance of the status quo.<sup>128</sup> The

127. See, e.g., Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350-51 (1988); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L. REV. 84, 95-98 (1995).

128. This school of thought is largely influenced by Antonio Gramsci and his exploration of the concept of hegemony, that is, the idea that “that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.” Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281, 284-86, 287 (1982). See also Crenshaw, *supra* note 127, at 1351. Lawrence writes:

A considerable body of scholarship from the academic left has analyzed the law as a hegemonic tool of domination. According to one theory, domination occurs when the ruling class gains the consent of the dominated classes through a system of ideas that reinforces the morality or inevitability of the existing order. This “interest theory” sees ideology as a consciously wielded weapon, an intellectual tool that a group uses to enhance its political power by institutionalizing a particular view of reality.

Charles R. Lawrence, *The Id, The Ego, And Equal Protection: Reckoning With*



insights gained by scholars working in this area are helpful to apply to the qualified immunity standard in order to explore its hold on the civil rights imagination. This analysis maps out the way a doctrine such as qualified immunity can develop into an obstacle to the very aims it professes to accomplish.

Particularly apposite to an analysis of civil rights law is the work that has been done on the change-inhibiting impact of the development of antidiscrimination law.<sup>129</sup> In commenting on the effect of the adoption of equal rights rhetoric on the struggle to end racial inequality, Kimberle Crenshaw has concluded that “[s]ociety’s adoption of the ambivalent rhetoric of equal opportunity law ha[s] made it that much more difficult for Black people to name their reality. While equal employment opportunity law has been adopted, the material reality of most Black people has not improved.”<sup>130</sup> In fact, improvement may be hindered by the existence of the equal opportunity law since it may undermine the political consensus necessary for change.<sup>131</sup> Another commentator has suggested that “the language of rights undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse. The discourse abstracts real experience and clouds the ability of those who invoke rights rhetoric to think concretely about real confrontations and real circumstances.”<sup>132</sup> The existence of antidiscrimination law can thus create the appearance of improvements in racial equality while at the same time not encouraging fundamental change.<sup>133</sup>

The focus on the intent of the actor in equal protection claims rather than the impact on the person experiencing the discrimination has also been criticized as an inhibitor to the elimination of racial inequality.<sup>134</sup> By paying exclusive

*Unconscious Racism*, 39 STAN. L. REV. 317, 326 (1987). See also Allan C. Hutchinson & Patrick J. Monohan, *Law and Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 213-19 (1984).

129. See Crenshaw, *supra* note 127, at 1346-47; Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW 96, 96-97 (1982); Gordon, *supra* note 128, at 286-91.

130. Crenshaw, *supra* note 127, at 1347.

131. Crenshaw, *supra* note 127, at 1347.

132. Crenshaw, *supra* note 127, at 1347 (citing Tushnet, *supra* note 58, at 1382-84).

133. Freeman states:

The present goal would seem to be to legitimize the accomplishments of civil rights law by emphasizing and displaying a small but successful black middle class, and by seeking to gain its allegiance while ignoring the victim-perspective claims of the vast and disproportionate numbers of poor and unemployed black people.

Freeman, *supra* note 129, at 113-14. See also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1016, 1102 (1978).

134. Lawrence, *supra* note 128, at 324-25.

attention to the blameworthiness of the defendant, an examination of the impact of the challenged practice on those complaining about it is lost. Fairness to the defendant, rather than eliminating discriminatory effect, is the central concern.

These commentators suggest that the economic and social reality of race inequality is obscured by the existence of antidiscrimination law and by the success of a small exceptional group. As Derrick Bell has stated, "Discrimination claims when they are dramatic enough and do not threaten majority concerns, are given a sympathetic hearing, but there is a pervasive sense that definite limits have been set on the weight that minority claims receive when balanced against majority interests."<sup>135</sup> While it is unclear what the alternative to antidiscrimination law is, these critiques strongly argue that antidiscrimination law does not do what it suggests it will do and may, in fact, make a better system more difficult to imagine and thus to create.

This current critique of antidiscrimination law can be used to understand how the qualified immunity standard affects the system of compensation for constitutional wrongs. One major similarity is the way in which the existence of Section 1983 siphons off pressure to create some other system of redress. The open-ended language of the Section 1983 statute seems to promise a powerful remedy against governmental abuse. As we have seen, qualified immunity severely limits that remedy, but on a case-by-case basis. There is no general prohibition against certain types of civil rights claims, only the seemingly individualized application of the qualified immunity defense. The fact that some types of claims are destined to fail because of the type of claim they are, not because of the particularized behavior of the defendant, is hidden. Adding to the illusion of a generally available remedy is the spectacular success of a few high profile cases. A few large recoveries in cases that present particularly compelling facts obscure the reality of the fruitlessness of most claims.<sup>136</sup>

On the other side of the lawsuit, qualified immunity promises much more to the defendant than it delivers. The defense is supposed to protect government actors not only from liability but also from entanglement with litigation. The promise is often not kept because the qualified immunity defense presents a combination of fact and law questions that cannot be quickly disposed of prior to trial. However, the theoretical protection offered by the defense and the low incidence of actual judgments against government actors lulls government employees into acquiescence to the system.

The emphasis that qualified immunity places on the reasonableness of the defendant's actions rather than on whether a constitutional right was violated is

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135. Crenshaw, *supra* note 127, at 1349 (citing DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 9.11.3, at 117 (2d ed. Supp. 1984)).

136. For example, last year a plaintiff was awarded \$ 2 million for violation of his substantive due process rights. *Monfils v. Taylor*, 165 F.3d. 511 (7th Cir. 1998). This case involved a dramatic scenario in which the decedent was murdered after informing on another employee. *Id.* at 513.

another way in which qualified immunity distorts civil rights law. Qualified immunity makes the essential issue of a civil rights claim the question of whether it would be too much of an inhibitor of government action to require a particular defendant to pay damages to the plaintiff. The focus is not, at least initially, on whether the plaintiff's constitutional rights were violated. This emphasis also makes it difficult to discern and consider which rights are or should be protected and which we are content not to protect with monetary compensation.

Qualified immunity's harm is that it makes it difficult to see the policy choices made by courts in civil rights actions. Cloaking these policy choices in the qualified immunity doctrine avoids the possibility of an open debate concerning which civil rights should be protected and how.

## VI. CONCLUSION

Given its obvious flaws, the continuation of qualified immunity as the key legal issue in civil rights cases can only be explained by the hidden purpose it serves; it avoids the divisive and perhaps unresolvable conflicts among participants in civil rights litigation. Qualified immunity accomplishes this conflict-avoiding function by giving judges wide latitude in making determinations about its application and by couching the outcomes of civil rights litigation in terms that make the substantive results difficult to perceive. These qualities account for the faithful adherence to a doctrine that is regarded as so unsatisfactory to so many.

The problem with this conflict avoidance mechanism is that it allows unarticulated decisions to be made about the extent of liability for civil rights violations. Civil rights litigation does have limitations to it; every case is not given an opportunity to succeed. These determinations are being made; they are just not described as such. Using qualified immunity as a shield from the truth may buy us peace, but it keeps from us the tools required for reform.