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We Didn't Know Any Better Defense: The Eighth Circuit's View of Qualified Immunity for Jail Officers Who Detain Arrestees - Hill v. McKinley, The

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The "We Didn't Know Any Better" Defense: The Eighth Circuit's View of Qualified Immunity for Jail Officers Who Detain Arrestees

Hill v. McKinley[1]

I. INTRODUCTION

In the early morning hours of August 18, 1996, Robin Hill found herself strapped to a table, face down, spread-eagled, and completely naked, in full view of the guards at the jail where she was being held for public intoxication. If this is a constitutional violation, then what is the remedy? At first glance, it would appear that Congress has given Hill a cause of action against her captors for violation of her Fourth Amendment right to privacy. About a half-century ago, however, the Supreme Court imparted old common-law immunity to law-enforcement officers in actions for violations of constitutional rights. This immunity has since evolved into a form that calls for no consideration whatsoever of the defendants' state of mind at the time of their action. Simply put, defendants no longer have to stand trial on a federal claim for damages based on their unconstitutional actions unless a court has previously established with sufficient clarity and particularity that such actions are indeed a constitutional violation. In *Hill v. McKinley*, the Eighth Circuit applied this immunity to deny Hill a federal cause of action, even though it is difficult to imagine a justification for the failure to respect her privacy once she was completely immobilized and no longer presented a threat to herself or anyone else. This case is a clear example of the degree to which "qualified immunity" is beginning to appear less "qualified" and more absolute.

II. FACTS AND HOLDING

Law enforcement officers arrested plaintiff Robin Hill on August 17, 1996 for public intoxication as she walked home from a bar in Nevada, Iowa.[2] Hill was highly intoxicated, registering a blood alcohol content of .306 g/dL more than three hours after her arrest.[3] When the police brought Hill to the jail, defendants Michael Miller and Jennifer Holmes were on duty.[4] The arresting

1. 311 F.3d 899 (8th Cir. 2002).

2. *Id.* at 901.

3. *Id.* Hill's blood alcohol content ("BAC") falls in the range generally regarded as "severe intoxication." 13 ROSCOE N. GRAY & LOUISE J. GORDY, ATTORNEY'S TEXTBOOK OF MEDICINE § 134A.84 (3d ed. 2003).

4. *Hill*, 311 F.3d at 901.

officers told Miller and Holmes that Hill had assaulted another officer.[5] During the booking process, Hill yelled and cursed at Miller and Holmes and was generally uncooperative.[6] When Holmes and Miller placed Hill in a holding cell, she repeatedly pounded and kicked at the cell door.[7]

Holmes and Miller decided to place Hill in the jail's padded cell.[8] Although Hill cooperated and did not resist the transfer, Holmes and Miller, in accordance with written jail policy, ordered Hill to remove her clothing before entering the padded cell.[9] Holmes testified that she ordered Hill to disrobe and offered her a paper gown before the transfer, but Hill refused it.[10] Hill maintained that Miller ordered her to remove her clothing, watched her while she disrobed, and never offered her the gown.[11] While in the padded cell, completely naked, Hill alternated between periods of quiet and periods during which she screamed and banged against the cell door.[12] Miller and Holmes later claimed that they became worried that Hill would hurt herself if she were allowed to continue.[13]

Defendant jail guards Tim Shoppe, Kevin McKinley, and Barry Thomas and defendant jail matron Michelle Bahr arrived at the jail for the 11:00 p.m. shift change, and spoke with Holmes and Miller regarding Hill.[14] The defendants decided to transfer Hill from the padded cell to a restraining board.[15] The jail officers claimed that they made the decision out of concern for Hill's safety, and that they decided to move Hill right away because there were a greater number of guards available during the shift change.[16] Jail policy required the guards to make the transfer quickly and without regard to the prisoner's state of dress.[17] The jail officers did close the windows and food slots on nearby cells before making the transfer.[18]

The officers then removed Hill from the padded cell, and walked her down the hall and into another room.[19] All six guards participated in the transfer of

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5. *Id.* The case does not discuss the details of the alleged assault.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 903.

11. *Id.* The court concluded that the jury was entitled to believe Hill's account. *Id.*

12. *Id.* at 901.

13. *Id.*

14. *Id.* at 901-02.

15. *Id.* at 902.

16. *Id.*

17. *Id.* Thomas and McKinley also claimed that they had been injured in the past while attempting to restrain a prisoner. *Id.*

18. *Id.*

19. *Id.*

Hill, who was highly intoxicated and weighed approximately 110 pounds.[20] Next, they strapped Hill face-down, spread-eagled, and completely naked to the restraining board, where she remained for approximately three hours.[21] Only Holmes, Miller, Bahr, Shoppe, McKinley, and Thomas observed Hill while she was naked,[22] but Hill was completely unable to shift her body or cover herself in any way while strapped to the restraining board.[23] At trial, the parties disagreed regarding the amount of time that elapsed before one of the defendants finally covered Hill. Bahr asserted that he covered Hill with a towel "almost immediately," but Hill contended that she was not covered until her three hour confinement on the board was nearly over.[24] The court of appeals noted that the jury's verdict indicated that it had credited Hill's account over that of Bahr.[25]

Hill subsequently brought suit under 42 U.S.C. Section 1983 in the United States District Court for the Southern District of Iowa[26] against the jail officers and Story County Sheriff Paul Fitzgerald, alleging that the defendants deprived her of her Fourth Amendment right to privacy while she was in their custody.[27] Hill also brought a claim under state law on a theory of "intrusion upon seclusion."[28] In particular, Hill asserted that the defendants violated her right to privacy by (1) requiring her to undress in the presence of a male guard, (2) requiring her to walk down the jail hallway naked in the presence of male guards, and (3) leaving her exposed on the restraining board in view of male guards.[29]

In their answer to Hill's complaint, the defendants raised the defense of qualified immunity to the federal civil rights claim.[30] The district judge, however, deferred ruling on the issue of qualified immunity until after the trial.[31] The jury found for Hill on both counts, awarding $2,500 in damages.[32] Following the jury verdict, the district judge granted Sheriff Fitzgerald's claim for qualified immunity and dismissed the suit against Bahr based on the statute of limitations, but denied the remaining defendants' motions.[33] On the question of qualified immunity, the judge relied on Eighth Circuit precedent stating that

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20. *Id.* at 910 (Hansen, J., dissenting).
21. *Id.* at 902.
22. *Id.*
23. *Id.* at 904.
24. *Id.* at 903.
25. *Id.*
26. 42 U.S.C. § 1983 (2000); *Hill*, 311 F.3d at 899.
27. *Hill*, 311 F.3d at 901.
28. *Id.* at 905.
29. *Id.* at 903.
30. *Id.* at 901.
31. *Id.*
32. *Id.*
33. *Id.*

the courts should take a "broad view" of what rights are "clearly established law."[34] The judge held that a reasonable officer should have known that leaving Hill unclothed and uncovered while she was on the restraining board was not constitutionally permissible, citing several cases "indicating that prison officials must balance an inmate's right to privacy with the security needs of the institution."[35] The court also awarded Hill's attorney fees pursuant to 42 U.S.C. Section 1988 which grants trial judges discretion to award reasonable fees to the prevailing party in an action under Section 1983.[36]

The defendants who remained in the suit appealed the district court's denial of judgment as a matter of law, the jury's damage award on Hill's state tort claims, the denial of qualified immunity, and the award of attorney fees.[37] A panel of the Eighth Circuit Court of Appeals[38] affirmed the denial of judgment as a matter of law and the award of damages with respect to the state tort claims.[39] The panel, however, reversed the district court's denial of qualified immunity on the Section 1983 claims, and consequently the award of attorney fees under Section 1988 because it was "dependent on [the Section 1983] claim."[40]

Considering the Section 1983 claim, the court first analyzed whether the actions cited by Hill were actually constitutional violations. With respect to Hill's first asserted constitutional violation, arising from the fact that the defendants required Hill to disrobe in the presence of a male officer, the court concluded that Hill's Fourth Amendment privacy rights were not violated.[41] The court also concluded that moving Hill down the hallway unclothed in the

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34. *Id.* at 904. The district court cited *Burnham v. Ianni*, 119 F.3d 668, 677 (8th Cir. 1997) (noting that the court takes a "broad view" of what constitutes clearly established law).

35. *Hill*, 311 F.3d at 904 (citing Bell v. Wolfish, 441 U.S. 520, 529 (1979); Chapman v. Nichols, 989 F.2d 393, 395-97 (10th Cir. 1993); Jones v. Edwards, 770 F.2d 739, 741-42 (8th Cir. 1985)).

36. 42 U.S.C. § 1988 (2000); *Hill*, 311 F.3d at 905.

37. *Id.* at 901.

38. The panel included Chief Judge Wollman and Judges Fagg and Hansen. *Id.* at 811.

39. *Id.* at 901.

40. *Id.*

41. *Id.* at 903. The Eighth Circuit panel cited three cases as precedent. Timm v. Gunter, 917 F.2d 1093, 1102 (8th Cir. 1990) (holding that opposite-sex surveillance performed on the same basis as same-sex surveillance is reasonable where justified by safety and equal employment concerns); Franklin v. Lockhart, 883 F.2d 654, 656-57 (8th Cir. 1989) (holding visual body cavity searches in view of other prisoners valid absent evidence of exaggerated response to security concerns); Lee v. Downs, 641 F.2d 1117, 1120-21 (4th Cir. 1981) (upholding search of inmate's vagina in the presence of two male guards).

presence of male guards was not a violation of her privacy rights because the transfer was ordinary practice, there were not enough female guards to effectuate the transfer safely, and the transfer was "otherwise justified."[42] As to the third alleged violation, however, the court sided with Hill and concluded that, assuming Hill's version of events was correct, continuing to leave Hill's genitals exposed *after* she had been secured to the table was not justified by the asserted safety interest.[43]

Although the court of appeals found that Hill's privacy rights had in fact been violated, two of the three panel members concluded that the defendants were protected by qualified immunity. Citing, among other precedent, the Supreme Court's decision in *Saucier v. Katz*,[44] the court stated that while "a precedential case need not be on all fours to clearly establish a constitutional violation . . . it must be sufficiently analogous to put a reasonable officer on notice that his conduct was unconstitutional."[45] While the court agreed with the general proposition that prison officials must balance security concerns with privacy rights of detainees, it held that no prior cases had clearly established that this specific behavior violated a detainee's Fourth Amendment rights.[46]

Judge Hansen dissented from the portion of the opinion holding that the officers were protected by qualified immunity and reversing the award of attorney fees under Section 1988.[47] Unlike the majority, Judge Hansen argued that the constitutional violation began before the defendants strapped Hill to the table while she was naked and left her there uncovered. In Judge Hansen's view, the violation began when the defendants removed the naked Hill from the padded cell and marched her down the hallway in the presence of male jail guards.[48] Judge Hansen distinguished the cases the majority cited, which dealt with the rights of convicts, by pointing out that Hill was an arrestee who had been convicted of nothing, and who therefore "fully retained her Fourth Amendment right to privacy, subject only to such reasonable constraints as must be imposed in the interest of safety or security."[49]

Judge Hansen wrote that the cases cited by the majority also made clear that exposure of a detainee's genitals would constitute a violation of the Fourth Amendment right to privacy when not "reasonably necessary in maintaining her

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42. *Hill*, 311 F.3d at 903.

43. *Id.* at 904.

44. 533 U.S. 194 (2001). In *Saucier*, the Supreme Court stated that inquiry into whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201.

45. *Hill*, 311 F.3d at 904.

46. *Id.* at 904-05.

47. *Id.* at 907.

48. *Id.*

49. *Id.* at 908.

otherwise legal detention."[50] He further wrote that, regardless of precedent, "a common notion of ordinary human decency" should have prevented the officers from invading Hill's privacy in such a manner.[51] According to Judge Hansen's dissent, a balancing test that weighed the invasion into Hill's privacy against the need for such actions should have provided notice that failure to cover Hill after she had been restrained was indeed a constitutional violation.[52]

III. LEGAL BACKGROUND

The statute under which Hill brought suit, 42 U.S.C. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . . .[53]

Section 1983 is derived from Section (a) of the Ku Klux Klan Act of April 20, 1871, which Congress enacted in an effort to give effect to the Fourteenth Amendment and to provide a remedy for violation of the rights it guaranteed.[54]

Initially, however, Section 1983 was not an important factor in the development of civil rights litigation. One treatise, collecting the work of various researchers, found that between 1871 and 1920, only twenty-one cases

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50. *Id.* at 910 (Hansen, J., dissenting) (quoting Fisher v. Wash. Metro. Area Transit Auth., 690 F.2d 1133, 1142 (4th Cir. 1982)).

51. *Id.* at 910-11 (Hansen, J., dissenting).

52. *Id.* at 907 (Hansen, J., dissenting) (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

53. 42 U.S.C. § 1983 (2000). The statute contains an exception that injunctive relief shall not be granted against a judicial officer acting in his official capacity, unless the judicial officer violated a declaratory decree or declaratory relief was not available. *Id.*

54. Cristine Kuhn, *Between Scylla and Charybdis: Can the Supreme Court Rescue the Inimical Qualified Immunity Doctrine?*, 43 DRAKE L. REV. 681, 683-84 (1995). Although Section 1983 does not apply to deprivation of constitutional rights by federal officials, the Supreme Court has effectively created a cause of action (the *Bivens* action) against federal officials. *Id.* at 684 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)).

were decided under Section 1983.[55] Another fifty-three cases appear between 1951 and 1967.[56]

In 1961, however, the Supreme Court's decision in *Monroe v. Pape*[57] helped spur a dramatic rise in the use of Section 1983 in civil rights cases.[58] In *Monroe*, the Supreme Court helped clarify the application of Section 1983 to actions under state law, holding that a plaintiff's allegation that an official acting "under color of *state* authority" deprived the plaintiff of a right protected by the Fourteenth Amendment was sufficient grounds for a Section 1983 claim, whether or not the official actually acted in accordance with his or her authority or abused it.[59] In that case, the Court held that city police officers who were authorized by state statute to conduct a search that the Court held unreasonable were acting "under color of law" for purposes of Section 1983.[60] The Court also held that the plaintiff need not show that the official specifically intended to deprive the plaintiff of a federal right.[61] The Court stated that the statute should be "read against the background of tort liability," including the mantra that "a man [is] responsible for the natural consequences of his actions."[62] Ultimately, *Monroe* appears to have breathed life into civil rights litigation under Section 1983. In 1980, Justice Powell noted in a dissenting opinion in *Maine v. Thiboutot*[63] that the number of civil rights actions brought under Section 1983 had increased dramatically; from 296 in 1961 (when *Monroe* was decided) to 13,113 in 1977.[64] Other commentators, however, claim that *Monroe* was only part of the cause of this explosion of litigation, and also credit such developments as the Court's evolution toward applying the federal Bill of Rights to the states via the Fourteenth Amendment.[65]

In time, however, the Supreme Court would interpret Section 1983 in a manner that would diminish citizens' ability to hold public officials liable. Section 1983 contains no provision extending immunity to law enforcement or other public officials under any particular circumstances. The Supreme Court, however, examined Section 1983 in *Pierson v. Ray*[66] and concluded that when

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55. CYRIL D. ROBINSON, LEGAL RIGHTS, DUTIES, AND LIABILITIES OF CRIMINAL JUSTICE PERSONNEL: HISTORY AND ANALYSIS 21 (2d ed.1992).

56. *Id.*

57. 365 U.S. 167 (1961).

58. ROBINSON, *supra* note 55, at 22 (citing *Monroe*, 365 U.S. at 167).

59. *Monroe*, 365 U.S. at 171 (emphasis added).

60. *Id.* at 187.

61. *Id.*

62. *Id.*

63. 448 U.S. 1 (1980).

64. *Id.* at 27 n.16 (Powell, J., dissenting).

65. *See, e.g.*, Jack M. Beerman, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1003 (2002).

66. 386 U.S. 547 (1967).

Congress originally passed what would later become Section 1983, it intended to leave intact immunities that existed at common law.[67] The Court then noted that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . . [e]ven when the judge is accused of acting maliciously and corruptly."[68] With respect to law enforcement officers, however, the common law had never granted absolute immunity, but instead granted a qualified immunity based on "good faith and probable cause."[69] The Court held that this immunity was to be applied to protect a law enforcement officer from liability when "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied."[70]

In the years following *Pierson*, however, the Supreme Court reformulated the qualified immunity for public officials into a form that critics have alleged "more resembles absolute immunity."[71] First, in *Harlow v. Fitzgerald*,[72] the Supreme Court eliminated the subjective "good faith" element of the test for qualified immunity, holding that officials were immune from damage liability for constitutional violations so long as their conduct "[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[73] In *Davis v. Scherer*[74] the Supreme Court further clarified its new standard for determining the applicability of qualified immunity. The Court disapproved of the "totality of circumstances" test used by the district court.[75] The Court reiterated that it had forbidden all inquiry into the actual state of mind of the officer who committed the violation in favor of a "wholly objective standard," which the Court defined as the "reasonableness of [the officer's] conduct as measured by reference to clearly established law."[76] In the Supreme Court's view, "[n]o other 'circumstances' [were] relevant to the issue of qualified immunity."[77]

The Court then added an element of particularity to the inquiry into whether or not a right was "clearly established" for purposes of qualified immunity in

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67. *Id.* at 554-55.

68. *Id.* at 553-54.

69. *Id.* at 557.

70. *Id.* at 555.

71. *See, e.g.*, 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, 252 (1989).

72. 457 U.S. 800 (1982). *Harlow* was brought under the judicially created *Bivens* cause of action instead of Section 1983. *Id.* at 805; *see also supra* note 54.

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

74. 468 U.S. 183 (1984).

75. *Id.* at 191.

76. *Id.* (quoting *Harlow*, 457 U.S. at 818).

77. *Id.*

Anderson v. Creighton.[78] In *Anderson*, the court of appeals determined that the defendant officials had violated the plaintiff's clearly established Fourth Amendment right to be free from warrantless searches without probable cause.[79] The Supreme Court reversed, holding that although the plaintiff's right to be free from warrantless searches and seizures was clearly established, this right was not sufficiently "particularized" to the actual circumstances of the case.[80] In order for a right to be "clearly established," the Court held, "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[81] Justice Scalia, writing for the Court, further stated that "the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed" was the relevant inquiry, and that the subjective intent of the officer was irrelevant.[82]

In part, the elimination of the subjective element of qualified immunity was motivated by the desire to encourage speedy resolution of claims. Questions of subjective state of mind prevented many defendants from obtaining summary judgments, as there were often disputed questions of fact as to the violator's motivation.[83] As a result, the Supreme Court also determined that denials of qualified immunity at pre-trial stages were immediately appealable; the defendant need not wait until the outcome of the action.[84] The Court stated that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."[85]

The Supreme Court had not yet finished its transformation of qualified immunity. In *Saucier v. Katz*,[86] the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to a defendant accused of using excessive force in making an arrest.[87] The district court and the court of appeals held that the law governing excessive force was clearly established at the time of the plaintiff's arrest.[88] In reversing these decisions, the Supreme Court indicated that the

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78. 483 U.S. 635 (1987).
79. *Id.* at 638.
80. *Id.* at 640.
81. *Id.*
82. *Id.* at 641.
83. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 130 (1999).
84. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).
85. *Id.* at 526.
86. 533 U.S. 194 (2001).
87. *Id.* at 200.
88. *Id.* at 199.

qualified immunity inquiry should be conducted in two steps. The first step is to determine whether the facts, viewed in the light most favorable to the plaintiff, show a constitutional violation. If no constitutional violation occurred based on these facts, there is no need to proceed.[89] If a violation could be made out on the alleged facts, however, the next step is to determine whether the right was clearly established.[90] In *Saucier*, the Court concluded that the defendant was entitled to qualified immunity, even though the analysis of whether the force used was excessive required its own subjective inquiry.[91] The plaintiff argued that the reasonableness inquiry used to determine whether the force the defendant used was excessive rendered the *Harlow* analysis unnecessary.[92] The Court rejected this argument, stating, "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."[93]

In 2002, however, the Supreme Court reversed a grant of qualified immunity in *Hope v. Pelzer*.[94] In *Hope*, the plaintiff accused the defendant official of violating the Eighth Amendment's prohibition of cruel and unusual punishment.[95] The plaintiff, a former prison inmate in Alabama, complained that he had been handcuffed to a "hitching post"[96] for refusing to work, for failing to leave the prison bus with appropriate promptness, and for fighting with guards. On one occasion, the plaintiff was required to stand handcuffed to the apparatus for seven hours, shirtless in the sun, and was denied water.[97] Although the court of appeals found that the Eighth Amendment prohibited handcuffing the plaintiff to the hitching post for purposes of punishment, it extended qualified immunity

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89. *Id.* at 201. Critics of the Supreme Court's standard in *Harlow* had asserted that a district court could avoid the issue of whether or not an action was constitutional altogether by simply issuing summary judgment in favor of the defendant based on qualified immunity. Hence, violations of the Constitution would never become "clearly established" for the purpose of future cases. *See* Shapiro, *supra* note 71, at 264-65. The two step analysis required by the Supreme Court in *Saucier* should remedy this problem by requiring the court to determine the constitutionality of the action prior to any determination of immunity.

90. *Saucier*, 533 U.S. at 201.

91. *Id.* at 205.

92. *Id.*

93. *Id.* Hence, the Court appears to have found that it is possible to use unreasonable force with the reasonable belief that the force is reasonable.

94. 536 U.S. 730 (2002).

95. *Id.* at 733.

96. According to the dissent, the proper term was "restraining bar." *Id.* at 749 n.1 (Thomas, J., dissenting).

97. *Id.* at 734-35.

to the guards because the precedents relied on by the plaintiff were not "materially similar" to the situation at hand.[98]

The Supreme Court reversed six to three. Writing for the majority, Justice Stevens cited *United States v. Lanier*,[99] in which the Supreme Court held that a defendant in a *criminal* prosecution for violation of constitutional rights was entitled to "fair warning" that his or her actions violated the Constitution.[100] According to Justice Stevens, the *Lanier* Court had also determined that the "fair warning" standard was the same as the "clearly established" standard used to determine qualified immunity.[101] Justice Stevens continued by saying, "[O]ur opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances."[102] Hence, "the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional."[103]

The majority then analyzed three sources that gave the defendants notice. The Court cited a Fifth Circuit case holding that handcuffing inmates to fences and forcing them to stand for long periods of time was a violation of the Eighth Amendment.[104] The Court also cited a warning that the Department of Justice had issued to the Alabama Department of Corrections that their use of the hitching post was unconstitutional.[105] Furthermore, the Court referred to dicta from the Eleventh Circuit stating that denial of water to an inmate violated the Eighth Amendment if done solely for the purpose of punishment, even though such actions were permissible if done as a coercive measure to gain compliance.[106] Although the Fifth Circuit's holding and the Alabama Department of Justice's warning clearly established the plaintiff's right, the Court made clear that the dicta from other cases in the circuit was also sufficient to establish the right.[107]

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98. *Id.* at 736.

99. 520 U.S. 259 (1997).

100. *Id.* at 270-71.

101. *Hope*, 536 U.S. at 739-40.

102. *Id.* at 741.

103. *Id.*

104. *Id.* at 742 (citing Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974)). The Court also noted that Fifth Circuit cases dated prior to 1981 were binding precedent in the Eleventh Circuit. *Id.* (citing Bonner v. City of Pritchard, 661 F.2d 1206, 1211 (11th Cir. 1981)).

105. *Id.* at 741-42.

106. *Id.* at 743 (citing Ort v. White, 813 F.2d 318, 325-26 (11th Cir. 1987)).

107. *Id.* ("*Ort* . . . gave fair warning to the respondents that their conduct crossed the line of what is constitutionally permissible.").

IV. INSTANT DECISION

Because *Hill* was an appeal of a post-trial rejection of qualified immunity, the Eighth Circuit was obligated to view the evidence in the light most favorable to Hill.[108] The court noted that the instant case was unusual in that the defendants raised qualified immunity in their answer to Hill's complaint, but did not follow the usual practice of moving for summary judgment.[109] As a result, the case went to trial on the merits, and the defendants therefore did not benefit from their entitlement not to stand trial.[110] The court also noted, however, that the defense of qualified immunity is not waived by failure to assert it prior to trial.[111]

All three panel judges agreed that the guards violated Hill's Fourth Amendment right to privacy, based on the jury's determination that Hill was left on the restraining board for three hours face down, in a spread-eagle position with her genitals exposed.[112] According to the majority, while safety and security interests justify restraining an unruly prisoner, even when the prisoner is a naked female and male guards are required to effectuate the restraint, those interests no longer applied in this case once Hill was secured to the restraining board.[113] The court was particularly troubled by the guard's failure to cover Hill in light of the fact that Hill was unable to turn or otherwise shield herself.[114]

In spite of the clear constitutional violation involved, the court gave the guards immunity from the Section 1983 claim, and reversed the district court's award of attorney fees to Hill under Section 1988 because Hill could not

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108. Hill v. McKinley, 311 F.3d 899, 902 (8th Cir. 2002) (citing Iacobucci v. Boulter, 193 F.3d 14, 23 (1st Cir. 1999); Thompson v. Mahre, 110 F.3d 716, 721 (9th Cir. 1997)).

109. *Id.*

110. *Id.*

111. *Id.* (citing Goff v. Bise, 173 F.3d at 1072).

112. *Id.* at 904; *id.* at 908-09 (Hansen, J., dissenting).

113. *Id.* at 904.

114. *Id.* In fact, Hill's asserted damages in her state tort claim were not based on emotional distress, but for injuries that she allegedly suffered while straining against the restraining straps as a result of her embarrassment at being exposed. *Id.* at 906. The panel affirmed this portion of the judgment, holding that a reasonable juror could have concluded that it was the invasion of Hill's privacy and the "anger and anguish" that it created that caused Hill to injure herself by straining against the straps. *Id.* at 907. In its analysis of the state tort claim for invasion of privacy, the majority also held that there was sufficient evidence to conclude that it was "unnecessary and unreasonable for the defendants not to immediately cover [Hill] after they restrained her." *Id.* at 906. Judge Wollman, writing for the majority, said that "[t]here is no question that being marched down a hallway by several persons, including members of the opposite sex, and then being strapped face-down to a board in a spread-eagle position, all while completely naked, would be considered highly offensive by ordinary persons." *Id.*

establish the second prong of the test, that the constitutional right that the defendants violated was clearly established.[115] The majority noted that precedent "need not be on all fours" to clearly establish a constitutional violation, but that a case "must be sufficiently analogous to put a reasonable officer on notice that his conduct was unconstitutional."[116] The court also relied on the Supreme Court's statement in *Hope* that the "clearly established" requirement does not demand that "the very action in question has previously been held unlawful; but . . . in the light of preexisting law the unlawfulness must be apparent."[117]

The majority characterized the qualified immunity issue very narrowly. According to the majority opinion, the court must find that "it was clearly established in 1996 that a highly intoxicated, loud and violent prisoner could not constitutionally be restrained naked outside the view of all but a small number of guards."[118] The majority held that the cases cited by the district court[119] gave a "general statement of the law" that the interests in maintaining security must be balanced against the inmate's right to privacy, but they did not clearly establish that the particular actions in question were unconstitutional.[120] The court characterized inmate privacy rights as existing within "very narrow zones," and noted that precedent allowed even the most invasive measures under certain circumstances.[121]

In dissent, Judge Hansen characterized the qualified immunity issue more broadly. Judge Hansen seized upon cases that the majority had relied upon in holding that moving Hill down the hallway did not violate her constitutional rights, and that no qualified immunity inquiry was therefore necessary.[122] Although *Lee v. Downs*,[123] a Fourth Circuit case cited by the majority,[124] had upheld viewing of naked prisoners by guards of the opposite sex, Judge Hansen

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115. *Id.* at 904-05.

116. *Id.* at 904 (citing Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002)).

117. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

118. *Id.* at 905.

119. *See supra* note 35 and accompanying text.

120. *Hill*, 311 F.3d at 904.

121. *Id.* at 905. The court cited three cases to bolster this finding. Somers v. Thurman, 109 F.3d 614, 619-22 (9th Cir. 1997) (holding no clearly established right to be free of opposite-sex body cavity searches); Johnson v. Phelan, 69 F.3d 114, 146 (7th Cir. 1995) (holding opposite-sex monitoring of naked prisoners permissible); Timm v. Gunter, 917 F.2d 1093, 1101-02 (8th Cir. 1990) (holding pat down searches and monitoring of inmates while naked by opposite-sex guards not violation of Fourth Amendment).

122. *See supra* text accompanying notes 41-42.

123. 641 F.2d 1117 (4th Cir. 1981).

124. The majority cited *Lee* in support of its holding that requiring Hill to disrobe in the presence of a male officer did not violate her constitutional rights. *Hill*, 311 F.3d at 903.

noted that it had also warned that "involuntary exposure of a detainee's genitals in the presence of people of the other sex may, when not reasonably necessary, constitute a violation of constitutionally protected rights."[125] Judge Hansen also referred to other dicta from the Fourth Circuit that a pretrial detainee has a "general right, constitutionally protected, not to be subjected by state action to involuntary exposure in a state of nakedness to members of the opposite sex unless the exposure was *reasonably necessary* in maintaining her otherwise legal detention."[126]

In addition to Fourth Circuit precedent, Judge Hansen also cited the Eighth Circuit's decision in *Franklin v. Lockhart*.[127] In *Lockhart*, the court upheld visual bodily cavity searches of inmates in administrative segregation in order to combat the presence of weapons and drugs in the prison.[128] The *Lockhart* court, however, limited its holding to the facts of the particular case, and noted that the ruling would not give officers "carte blanche" or apply to "exaggerated" responses.[129] In Judge Hansen's view, the combined precedent from the Fourth and Eighth Circuits was sufficient to establish "fair warning" that the guards had crossed into territory forbidden by the Fourth Amendment right to privacy.[130]

V. COMMENT

In certain circumstances, qualified immunity prevents courts from holding government officials personally liable for their actions in violation of federal constitutional rights. For that reason, the doctrine is not without its critics. In particular, the Supreme Court's decision in *Harlow* eliminating the subjective element of qualified immunity has spawned criticism that the qualified immunity doctrine has become more and more like the absolute immunity afforded to judges, rather than the more limited protection for law enforcement officers that the Court originally imported from the common law.[131] Furthermore, critics note that the Court initially reasoned that Congress, in remaining silent on the issue of immunity, intended for Section 1983 to retain the immunities available at common law.[132] According to these critics, this decision should have constrained

125. *Id.* at 910 (Hansen, J., dissenting) (citing *Lee*, 641 F.2d at 1119).

126. *Id.* (Hansen, J., dissenting) (quoting Fisher v. Wash. Metro. Area Transit Auth., 690 F.2d 1133, 1142 (4th Cir. 1982)).

127. 883 F.2d 654 (8th Cir. 1989); *see also supra* note 41 and accompanying text.

128. *Franklin*, 883 F.2d at 656.

129. *Id.* at 657.

130. *Hill*, 311 F.3d at 910 (Hansen, J., dissenting) (citing Hope v. Pelzer, 536 U.S. 730, 740 (2002)).

131. Shapiro, *supra* note 71, at 252; *see also supra* note 69 and accompanying text.

132. Shapiro, *supra* note 71, at 268; *see also supra* notes 66-70 and accompanying text.

the Court to go no farther than the common law in granting such immunities. Whether or not Congress intended to preserve immunities available at common law, the commentators reason, the text of Section 1983 certainly did not grant any *new* immunities.[133] The Eighth Circuit's decision in *Hill* lends credence to the criticisms of these commentators that qualified immunity is hardly "qualified" at all.

Indeed, the departure from the original common law "good faith and probable cause" defense is striking. Whether the defendants actually did neglect to cover Hill is no longer an issue. The jury obviously believed that the defendants failed to cover Hill, and the Eighth Circuit panel conceded that it was entitled to do so.[134] Under the common law, the defendant jail officers' "good faith" would have been a relevant part of the determination of whether to allow the defendants to stand trial or to cloak them with immunity from suit.[135] As the qualified immunity inquiry currently stands, the question of whether these defendants failed to cover Hill out of mere indifference or outright depravity is not to be considered in determining whether to insulate the officers from Section 1983 liability. This state of affairs is well beyond the immunity that the common law envisioned, and Congress obviously did not anticipate such immunity in 1871.[136]

Because the case law has removed the issue of malice from consideration,[137] the only question left to consider is whether the plaintiff's right is "clearly established." Commentators have noted that despite efforts by the Supreme Court to define some sort of standard to guide qualified immunity decisions, the circuits, as well as judges within the same circuit, continue to quarrel over the appropriate way to define the right that must be "clearly established."[138] Some judges define the issue in a very narrow, fact-specific fashion, placing an almost impossible burden on Section 1983 plaintiffs to come up with a case that sufficiently parallels the issue at hand.[139] Other judges place less emphasis on analogous facts. Instead, they stress general principles laid out in cases not factually analogous, then hold these general principles sufficient to clearly establish the right asserted by the plaintiff for purposes of the qualified immunity inquiry.[140] The panel's decision in *Hill* reflects this disagreement over how to define the issue in qualified immunity analysis. While the dissent argued that the

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133. Shapiro, *supra* note 71, at 268.

134. *See supra* note 25 and accompanying text.

135. *See supra* notes 69-70 and accompanying text.

136. *See supra* notes 68-70 and accompanying text.

137. *See supra* notes 75-77 and accompanying text.

138. Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 459 (2000).

139. *Id.*

140. *Id.*

plaintiff's rights had been clearly established in a general sense, the majority appears to have demanded precedent based on very similar facts, thus dooming the plaintiff's claim.[141]

The majority relied in part on *Saucier*, stating that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[142] More recently in *Hope*, however, the Supreme Court reiterated that defendants could violate clearly established constitutional rights "even in novel factual circumstances."[143] The majority in *Hill* also concedes that precedent "need not be on all fours" so long as it is "sufficiently analogous to put a reasonable officer on notice that his conduct was unconstitutional." One of the bases on which the Supreme Court relied in *Hope* was precedent that had *upheld* an action by law enforcement officers (denial of water to coerce a prisoner to cooperate), but warned in dicta that in different circumstances the same action would be unconstitutional (i.e., if the same action were taken to *punish* an individual for past insubordination).[144]

As the dissent points out in *Hill*, previous cases from the Fourth Circuit warn in dicta that subjecting an inmate to observation of his or her naked body by members of the opposite sex constitutes a constitutional violation if not reasonably necessary under the circumstances.[145] Clearly, once Hill was so tightly secured to a restraining board that she could not even move to shield her body from view, she no longer presented a security risk. At first glance, Judge Hansen's argument that Fourth Circuit precedent provides fair warning that such actions are unconstitutional appears persuasive. However, Judge Hansen's argument suffers from a serious flaw. In *Hope*, the Supreme Court, in reaching the conclusion that a right was "clearly established," relied upon cases from the same circuit as that from which the case had originated.[146] In *Hill*, Judge Hansen relies primarily on Fourth Circuit precedent to determine that a right is clearly established in the Eighth Circuit. The Eighth Circuit precedent that Judge Hansen cites, holding that visual body cavity searches are permissible if reasonably necessary and not "exaggerated," is substantially less than a definitive statement of the line between permissible activity and constitutional violation.[147] The majority, therefore, was probably correct in determining that there was not enough authority *within the circuit* to clearly establish the plaintiff's rights. Even though the defendants would have been hard pressed to explain why the security

141. *See supra* notes 118-121 and accompanying text.

142. Hill v. McKinley, 311 F.3d 899, 904 (2002) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

143. *See supra* note 102 and accompanying text.

144. *See supra* notes 104-107 and accompanying text.

145. *See supra* notes 123-126 and accompanying text.

146. *See supra* notes 104-107 and accompanying text.

147. *See supra* notes 122-129 and accompanying text.

of Hill and others mandated that Hill remain nude while restrained in a prone position, they were spared this difficulty and relieved from the federal claim against them.

VI. CONCLUSION

Hill v. McKinley illustrates the workings of qualified immunity, as well as the deficiencies that inspire its critics to question whether qualified immunity is just. In order to give effect to the concept that qualified immunity should insulate a defendant even from standing trial, the Supreme Court has taken the state of mind of the state actor out of the equation entirely. Regardless of whether the individual defendant believed what he or she was doing was constitutional, the plaintiff cannot take the defendant before a jury on a Section 1983 claim if the defendant convinces the court that there is no precedent clearly establishing the unconstitutionality of the defendant's action. Indeed the fact that conduct may be so blatantly unconstitutional that no officer has ever dared to attempt it before may actually benefit the defendant who commits such conduct in the context of a Section 1983 claim, as no "fair warning" precedent will exist in such a case. As it now stands, the "qualified immunity" doctrine may cause the practicing lawyer to seriously question whether Section 1983 is still useful as a tool for vindication of constitutional rights absent "slam dunk" precedent from the same circuit holding the same or highly similar conduct unconstitutional. In the future, Congress may have to revisit qualified immunity to determine whether the good faith, or lack thereof, of a law enforcement officer is truly irrelevant when that officer violates a citizen's constitutional rights.

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