## Definition/Background

#### Qualified immunity is a defense against standing in a *civil trial, normally against police*

Tim Miller, JD, Federal Law Enforcement Training Centers, Part IX, Qualified Immunity, <https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf> DOA: 10-1-16

If sued by a plaintiff for a constitutional violation, the officer may request qualified immunity. Qualified immunity is a defense to standing civil trial. It’s raised by the officer well in advance of the actual trial on the merits. If granted, the plaintiff’s claim of excessive force against the officer is dismissed. But dismissal is qualified, however, by the officer’s use of force being objectively reasonable.

#### QI only protects against *suits of individuals*, not against suits against the government for damages

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” [*Pearson v. Callahan*](http://www.law.cornell.edu/supct/html/07-751.ZS.html#content) (07-751). Specifically, it protects government officials from lawsuits alleging that they violated plaintiffs’ rights, only allowing suits where officials violated a “clearly established” statutory or constitutional right. When determining whether or not a right was “clearly established,” courts consider whether a hypothetical reasonable official would have known that the defendant’s conduct violated the plaintiff’s rights. Courts conducting this analysis apply the law that was in force at the time of the alleged violation, not the law in effect when the court considers the case.

Qualified immunity is not immunity from having to pay money damages, but rather immunity from having to go through the costs of a trial at all. Accordingly, courts must resolve qualified immunity issues as early in a case as possible, preferably before discovery.

Qualified immunity only applies to suits against government officials as individuals, not suits against the government for damages caused by the officials’ actions.

#### QI does protect other government actors as well

Although qualified immunity frequently appears in cases involving police officers, it also applies to most other executive branch officials. While judges, prosecutors, legislators, and some other government officials do not receive qualified immunity, most are protected by other immunity doctrines.

#### Qualified immunity doesn’t protect municipalities or police departments from suits

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2202388

p. 277

Qualified immunity analysis is confined to suits under § 1983 for money damages and offers a defense only to individual officer defendants, not municipalities or police departments. n203

#### What qualified immunity protects

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Civil rights doctrine2 relies heavily on the assumption that police officers pay settlements and judgments out of their own pockets. Qualified immunity protects a law enforcement officer from liability, even if he has violated the plaintiff’s constitutional rights, if he did not violate “clearly established law”3—a standard that, according to the Supreme Court, protects “all but the plainly incompetent or those who knowingly violate the law.”4

#### Local governments can still be sued

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 277-80

In addition to injunctive relief under § 1983, suits against municipalities under Monell v. Department of Social Services of New York are an alternative to individual suits against police officers for money damages. n210 Monell holds that local governments can be liable for constitutional violations committed pursuant to official policy or custom.

#### Qualified immunity protects all but the plainly incompetent who knowingly violate the law

Tim Miller, JD, Federal Law Enforcement Training Centers, Part IX, Qualified Immunity, <https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf> DOA: 10-1-16

The rationale behind qualified immunity for police officers is two-fold. First, it permits officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages. Second, it allows the public to recover damages when a reasonable officer would know that the officer unreasonably violated a plaintiff’s constitutional or federal legal rights. Qualified immunity is designed to protect all but the plainly incompetent or those who knowingly violate the law. B. G

#### Qualified immunity is based on what a “reasonable” officer thinks

Tim Miller, JD, Federal Law Enforcement Training Centers, Part IX, Qualified Immunity, <https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf> DOA: 10-1-16

Law enforcement officers are entitled to qualified immunity when their actions do not violate a clearly established statutory or constitutional right. The objective reasonableness test determines the entitlement. The officer is judged from the perspective of a reasonable officer on the scene, rather than with the vision of 20/20 hindsight.

#### Two standards to determine qualified immunity

Tim Miller, JD, Federal Law Enforcement Training Centers, Part IX, Qualified Immunity, <https://www.fletc.gov/sites/default/files/PartIXQualifiedImmunity.pdf> DOA: 10-1-16

Qualified immunity has two elements.

1. Did a Constitutional Violation Occur? The first element is whether the officer violated a constitutional right, under the plaintiff’s version of the facts.1 If no violation occurred, there is obviously no basis for the lawsuit, and the suit is dismissed.

2. Was the Right “Clearly Established?” Assuming the court finds that the officer violated the Fourth Amendment, the court examines the second element: Was the right clearly established by law? To deny the officer qualified immunity, the court must find a constitutional violation that was clearly established by law. The Supreme Court stated: “Clearly established” for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent. If the law was not clearly established at the time an action occurred, an officer could not be reasonably expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful.2

Sometimes after examining both elements, the court finds a constitutional violation, but that the law was not clearly established at the time. Brooks v. City of Seattle is an example. The Ninth Circuit held that in the specific context of that case, it was constitutionally excessive to tase a pregnant woman three times in less than one minute. However, the officers still received qualified immunity because the law was not sufficiently clear so that every reasonable officer would have understood that what he was doing violated that right.

And sometimes the court simply holds that the law is not clearly established without addressing whether or not the officer violated the constitution. The Supreme Court held that courts do not have to address the elements in any particular order. In Cockrell v. City of Cincinnati, the court refused to decide whether a misdemeant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right not to be tased. The court expressed no opinion on the matter. It held that the law was not clearly established and the officer received qualified immunity.

#### Police can make reasonable mistakes

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E. Reasonable Mistakes Can be Made

An officer can have a reasonable, but mistaken belief as to what the law requires, and still receive qualified immunity. Moreover, officers can have reasonable, but mistaken beliefs as to the facts. The following cases are illustrative:

1. Reasonable Mistakes About the Law

The case of Garner v. Memphis Police Department,3 was part of the litigation that eventually resulted in Tennessee v. Garner. The officer relied on a state statute that authorized all necessary force to stop a fleeing felon. The Supreme Court later declared the statute unconstitutional, in so much as it authorized deadly force to stop any fleeing felon, but the officer reasonably relied upon it at the time of the shooting.

2. Reasonable Mistakes About the Facts Officer may make reasonable, but mistaken beliefs about the facts. In Hudspeth v. City of Shreveport, for example, an officer mistook a silver object in the suspect’s hand for a handgun. It turned out to be a cell phone.

### Most Recent Critical Case –

Rieders, 2015, Delco Times, Letter to the Editor: Qualified Immunity: Has the Pendulum swung too far?, December 27

Clifford A. Rieders, Esq., Rieders, Travis, Humphrey, Waters & Dohrmann, Williamsport, Pa. Rieders, who practices law in Williamsport, is past president of the Pennsylvania Trial Lawyers Association and a member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.

In the evening hours of March 23, 2010, Sgt. Randy Baker of the Tulia Police Department in Texas followed a man to a drive-in restaurant with a warrant for his arrest. When the police officer approached the car and informed the suspect that he was under arrest, the driver sped off. The trooper gave chase, and quickly was joined by other police. Like a bad B-grade movie, the suspect led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. The suspect driver even called the police dispatcher, claiming to have a gun and threatening to shoot the police officers if they did not cease their pursuit. Those threats were made known to the officers involved in the chase.

The police set up tire spikes on the roadway in three locations. One of the police officers decided to shoot at the car’s tires to disable the vehicle. The police officer had not received any training in this tactic, and had not attempted it before. Before receiving any response from other officers, Mullenix exited his vehicle, armed with a service rifle, and took a shooting position on an overpass. He was also listening to his radio to see what the response would be to his request and if the spikes worked first.

As the fleeing suspect approached the overpass, Mullenix fired six shots. The speeding vehicle engaged the spikes, hit the median and rolled over. It was later determined that the driver had been killed by Mullenix’s shots, four of which struck his upper body.

 lawsuit ensued, in which the police officer was charged by the suspect’s family with violating the Fourth Amendment by using excessive force. The United States Supreme Court said that the police officer had qualified immunity.

“The doctrine of qualified immunity shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” A clearly established right is one that is “sufficiently clear that every reasonable official would have understood what he is doing violates that right.” Put simply, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 106 S. Ct. 1092 (1986).

The issue for the Supreme Court is whether the police officer acted unreasonably in these circumstances “beyond debate.” Excessive force cases involving car chases reveal the “hazy legal backdrop” against which Officer Mullenix acted. By the time Mullenix fired, the fleeing suspect had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer’s location. The United States Supreme Court has written on the subject of high-speed chases previously. In all the cases the United States Supreme Court has decided, a high standard was established for a fleeing car to be able to sue the police. “The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.” Mullenix v. Luna, at 310. The court is extremely reluctant to find that the Constitution is violated when a police officer chases someone who is fleeing.

The court simply could not say that Mullinex was plainly incompetent or knowingly violated the law. The dissent looked at the availability of spike strips as an alternative means of terminating the chase. There were judges on the court who believed that deadly force was not required in the Mullenix situation. The majority obviously disagreed and had its way.

The case law has not clearly established deadly force as inapplicable in response to police chase cases. It almost appears to be the contrary; that deadly force will be permitted by police officers when fleeing drivers act crazy enough. Mullenix also decided there was no jury question. The case was dismissed on summary judgment because based upon the factual record developed, qualified immunity was granted to the police officer as a matter of law.

Qualified immunity is intended to protect police officers in the “hazy border between excessive and acceptable force.” Relying upon Brosseau v. Haugen, 543 U.S., at 201, 125 S. Ct. 596.

In police chase cases, the courts are clearly going to give the benefit of the doubt to the police officer, especially in extreme circumstances. Qualified immunity will be granted and the case will be thrown out. Qualified immunity, like absolute immunity for judges, is granted to officials who either acted within the bounds of the law or are reasonable in their conduct given the circumstances at issue. A majority of the United States Supreme Court clearly believes that when a driver endangers the police and the public by attempting to evade authorities, it is as though they assume the risk for their own demise or injuries.

### Section 1983

*42 U.S.C. § 1983* (2010) states: "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 ... ."

### History/Background

#### QI was first established in Pierson v. Ray in 1967 but substantially expanded to provide a lot of protection for police against lawsuits

Bernick, 2015,

Evan is the Assistant Director of the Center for Judicial Engagement at the Institute for Justice, a libertarian public interest law firm, To Hold Police Accountable, Don’t Give them Immunity, <https://fee.org/articles/to-hold-police-accountable-dont-give-them-immunity/> DOA: 10-1-16

The sad fact is that is often effectively impossible to hold police officers accountable for unconstitutional acts. That fact is attributable in large part to a potent well of unchecked power that many Americans have never heard of.

You will not find it in the Constitution. You will not find it in any federal law. It is a judge-made doctrine, invented by the Supreme Court. It is called qualified immunity. And if those charged with enforcing the law are to be kept within the bounds of their rightful authority, it must be abolished.

[Section 1983](https://www.law.cornell.edu/uscode/text/42/1983), the federal law that allows citizens to sue for constitutional violations, is broad, unequivocal, and unambiguous. It says that “every person” who is acting “under color of” law who causes a “deprivation of any rights… secured by the Constitution and laws” “shall be liable to the party injured.” Section 1983 embodies a foundational principle of justice that resonates with Americans who have never heard of [*Marbury v. Madison*](http://scholar.google.com/scholar_case?case=9834052745083343188&q=marbury+v+madio&hl=en&as_sdt=6,47): where there is a right, there is a remedy.

But for decades, we have had rights without remedies.

In the 1967 case of [*Pierson v. Ray*](http://scholar.google.com/scholar_case?case=4871005922110746242&q=pierson+v+ray&hl=en&as_sdt=6,47), the Supreme Court held that police officers sued for constitutional violations can raise “qualified immunity” as a defense, and thereby escape paying out of their own pockets, even if they violated a person’s constitutional rights.

This decision was unabashedly policy-oriented: it was thought that government officials would not vigorously fulfill their obligations if they could be held accountable for actions taken in good faith. Under current law, the general rule is that victims of rights violations pay the costs of their own injuries.

In practice, qualified immunity provides a near-absolute defense to all but the most outrageous conduct. The Ninth Circuit has [held](http://scholar.google.com/scholar_case?case=9359102228224258186&q=boyd+v+benton+county&hl=en&as_sdt=6,47) that throwing a flash-bang grenade “blindly” into a house, injuring a toddler, isn’t outrageous enough. Just last year, in [*Plumhoff v. Rickard*](http://scholar.google.com/scholar_case?case=17750181401591044185&q=plumhoff+v+rickard&hl=en&as_sdt=6,47), the Supreme Court decided that firing 15 bullets at a motorist is a reasonable method to end the driver’s flight from the police. So much for “every person” “shall be liable.”

### Extends to Private Actors

#### QI extends to private actors when they are working for the government

Alexander Volokh, 2013, Supreme Court clarifies standards for qualified immunity in civil rights cases – or does it? <http://reason.org/news/show/privatization-qualified-immunity> DOA: 10-1-16

Qualified immunity is usually given to public employees. But § 1983 is broader than that: private parties, for instance corrections officers at private prisons, can also act under color of state law, and thus can also be liable. Are these private parties entitled to claim qualified immunity? Yes they can, in many cases, said the Supreme Court on April 17, 2012 in *Filarsky v. Delia*. But reconciling *Filarsky* with previous decisions isn’t necessarily easy, and the availability of qualified immunity in the privatization context will probably continue to be confusing.

### Basic Pros and Cons

#### Basic pros and cons of QI

Alexander Volokh, 2013, Supreme Court clarifies standards for qualified immunity in civil rights cases – or does it? <http://reason.org/news/show/privatization-qualified-immunity> DOA: 10-1-16

Qualified immunity is a well-established part of civil rights law, though it remains controversial among scholars. On the one hand, a general rule that holds officials liable would better compensate victims, and may also lead to greater accountability. On the other hand, the fear of liability might make officials overly timid and might make it hard to recruit competent people for government work; moreover, courts might shy away from recognizing constitutional violations if they were concerned that doing so would excessively burden government functions.

Because the §1983 statutory text is silent with respect to immunities, the creation of qualified immunity is controversial. Courts recognized that officers make "split-second decisions" while facing imminent harm in dangerous situations without time to consult legal counsel. Without some immunity, officers may be hyper-cautious and hesitant to act quickly as needed out of fear of possible legal liability for a mistaken judgment. Accordingly, courts made available a doctrine of qualified immunity to insulate certain actors to allow for execution of duties with the decisiveness and judgment required by the public good. Qualified immunity also bars potentially frivolous suits and resolves them quickly and efficiently (immunity provides [Rule 12(b)(6)](http://www.law.cornell.edu/rules/frcp/rule_12)dismissal from suit - not merely freedom from liability).

Nevertheless, critics of qualified immunity point to several downfalls. First, they assert qualified immunity runs counter to the purpose of §1983 to compensate monetarily people whose rights were violated. Second, by granting immunity, actors may be reckless in ensuring their conduct is indeed lawful; as Justice Stevens[articulated](http://www.law.cornell.edu/supct/pdf/98-83P.ZX), until a right is "clearly established" there is a "one free violation" for constitutional harms. Third, because immunity bars suits even when a constitutional violation in fact occurred, not only are courts denying compensation for constitutional injuries, it is a symbolic denial—as if those rights do not matter.

## Affirmative

## Expansion of Qualified Immunity How

### Expansion of qualified immunity now – And Specific Court Cases

#### Decades of legal precedent protects the expansion of qualified immunity

ACLU Of Massachusetts, 2016, February 21, Federal appeals court’s ruling put a dent in police officers “qualified immunity” defense, https://www.aclu.org/blog/speak-freely/federal-appeals-courts-ruling-put-dent-police-officers-qualified-immunity-defense

Unfortunately, the ruling stands out. Decades of [federal court precedent](http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html) has made it increasingly difficult for people to hold police officers and departments accountable for actions that imperil public safety and endanger human life. That’s because of the courts’ expansion of a legal doctrine called “qualified immunity,” which holds that police officers cannot be punished — either in criminal courts or in civil litigation — when they kill or injure someone, as long as the police officer didn’t intentionally violate “clearly established law.”

#### In Mullenix v. Luna, the Supreme Court ruled that in order not to claim qualified immunity it would have to be established “Beyond Debate” that an officer’s action clearly violated constitutional law

Richards, Watson, and Gershon, December 7, 2015, Police officer entitled to qualified immunity unless it is “beyond debate” that conduct violated clearly established law, http://rwglaw.com/news/ealerts/ealert-71.aspx

A police officer accused of using excessive force is entitled to qualified immunity for the use of force unless it is “beyond debate” that the officer’s conduct violated clearly established law. Qualified immunity is an affirmative defense that protects police officers, and other public employees, from liability when they allegedly violate civil rights under 42 USC §1983. To defeat this important defense of qualified immunity, the United States Supreme Court has recently ruled, a plaintiff must demonstrate that the official’s action was prohibited by clearly established law. In Mullenix v. Luna, police officers in Texas attempted to execute an arrest warrant. The suspect refused to surrender and led police on a high-speed chase reaching speeds of 110 miles per hour. During the chase, the suspect told a police dispatcher that he would shoot at police officers if the officers did not abandon the pursuit. Trooper Mullenix of the Texas Department of Public Safety was one of the officers who responded. He positioned himself on an overpass. Other officers placed tire spikes on the road below. Mullenix then asked a supervisor for permission to fire at the vehicle. The supervisor replied that firing “was worth doing.” It was not clear from the evidence whether Mullenix heard the supervisor later tell him to fire only if the tire spikes did not work. Mullenix fired at the suspect’s vehicle 6 times. No shot hit the engine block of the vehicle, but 4 shots hit the suspect’s upper body and killed him. The estate of the suspect sued under 42 USC § 1983, alleging that Mullenix violated the Fourth Amendment because he used excessive force. Mullenix claimed he was entitled to qualified immunity because he did not violate “clearly established statutory or constitutional law.” The Supreme Court found Mullenix was entitled to qualified immunity from liability for the use of force. The Court noted that “when Mullenix fired, he reasonably understood [the suspect] to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit…” The Court rejected the claim that a police officer may not “use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.” The Court found that uncertainty existed as to whether an officer in Mullenix’s position could use deadly force. In order to defeat qualified immunity, the plaintiff would have to prove that a reasonably competent officer would realize that their actions were illegal “beyond debate.” In this instance, however, the Supreme Court found that there was uncertainty in the law, and appellate decisions involving vehicular pursuits provided, at best, a “hazy legal background.”

#### Since Fourth Amendment law is not clearly defined, it is easy for the police to be protected by qualified immunity

Jason Lee Storts, August 27, 2015, The Atlantic, When Should Cops be able to use deadly force? http://www.theatlantic.com/politics/archive/2015/08/use-of-deadly-force-police/402181/

But there will be limits to what legal reforms can accomplish. In criminal law, proof beyond reasonable doubt establishes a suitably high bar for prosecutors to clear. And in civil law, the doctrine of qualified immunity shields officers from liability for violating people’s constitutional or statutory rights—and usually entitles them to summary judgment in their favor—if it can be shown that the legal standard was not clearly defined. In the murky, context-dependent area of Fourth Amendment case law, it often isn’t. This makes it very hard to impose on police officers any form of accountability between criminal guilt and full exoneration.

#### Expansion of QI

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16, p. 78

In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of de- scribing the defense in increasingly generous terms and qualifying and deviating from past precedent—without offering any justification or even acknowledgement of the Court’s departure from prior case law. These gratuitous, seemingly off-the-cuff remarks have then taken on a life of their own and have been reiterated in later opinions, often issued summarily without the benefit of briefing and oral argument. The clandestine manner in which this retreat has been accomplished is especially troubling because, despite the fact that constitutional tort suits against state officials are based on federal statute, qualified immunity is a doctrine—and a limitation on that statute—that is entirely the Court’s creation, devoid of support in § 1983’s legislative history. Perhaps most problematic are the caveats in recent decisions that could conceivably set the stage for a ruling that § 1983 plaintiffs can avoid qualified immunity only if they can point to Supreme Court precedent supporting the constitutional right they are asserting. An outright holding that only the Su- preme Court can create clearly established law would obviously be binding on lower courts and would prove fatal to many constitutional tort suits. But terminology and tone matter as well, and the increasingly broad brush the Supreme Court uses in characterizing the qualified immunity defense is not likely to escape the attention of government actors seeking immunity or the lower courts tasked with resolving their claims.

#### In Messerchmidt v. Melinder, the Court ruled officers were protected unless they acted in away that was “plainly incompetent.”

Michael Smith, 2012, Opinion Analysis: Court gives police officers qualified immunity, http://www.scotusblog.com/2012/02/opinion-analysis-court-gives-police-officers-qualified-immunity/

A Los Angeles sheriff’s detective and his supervisor may have erred in executing a search warrant that lacked probable cause, but they were not “plainly incompetent” so as to be denied qualified immunity.  That was the Court’s holding Wednesday in [*Messerschmidt v. Millender*](http://www.scotusblog.com/case-files/cases/messerschmidt-v-millender/?wpmp_switcher=desktop). The Court’s divided ruling declined to make any obvious sweeping revisions to its nearly thirty-year-old jurisprudence regarding immunity for officers who execute warrants lacking probable cause, although Orin Kerr [*here*](http://www.scotusblog.com/?p=139509) suggests at least one aspect in which the opinion could prove significant.

#### Harlow’s expansion of QI makes it easier to dismissal claims on summary judgment, protecting executive branch officials even from court costs

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16 p. 62

The qualified immunity defense available to most executive branch officials in § 1983 cases is a creature of policy constructed by the Supreme Court for the express purpose of “shield[ing] [government actors] from undue interference with their duties and from potentially disabling threats of liability.” In contrast to the absolute immunity accorded to legislators, judges, and prosecutors, the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congressional intent underlying § 1983. In its 1982 decision in *Harlow v. Fitzgerald*, the Supreme Court openly refashioned the definition of qualified immunity in the interest of sparing public officials not only from liability, but also from the costs of litigation, “permit[ting] the resolution of many insubstantial claims on summary judgment.” *Harlow* eliminated the subjective prong of the Court’s prior two-part definition of qualified immunity and rewrote the objective prong to provide that executive-branch officials are safeguarded from liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

#### Supreme Court expanding the QI doctrine

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16 p. 62-3

The qualified immunity defense available to most executive branch officials in § 1983 cases is a creature of policy construct- ed by the Supreme Court for the express purpose of “shield[ing] [government actors] from undue interference with their duties and from potentially disabling threats of liability.” In contrast to the absolute immunity accorded to legislators, judges, and prosecutors, the Court no longer engages in any pretense that its qualified immunity rulings are interpreting the congres- sional intent underlying § 1983. In its 1982 decision in *Harlow v. Fitzgerald*, the Supreme Court openly refashioned the definition of qualified immunity in the interest of sparing public officials not only from liability, but also from the costs of litigation, “permit[ting] the resolution of many insubstantial claims on summary judgment.”*Harlow* eliminated the subjective prong of the Court’s prior two-part definition of qualified immunity and rewrote the objective prong to provide that executive-branch officials are safeguarded from liability so long as “their conduct does not violate clearly established statutory or constitutional rights of which a rea- sonable person would have known.” the Court has continued to refine the defense and expand the protection it affords government officials At the same time, the breadth of the defense has become apparent in the Supreme Court decisions applying the *Harlow* standard. During the past fifteen years, the Court has issued eighteen opinions addressing the question whether a particular constitutional right was clearly established. In sixteen of those eighteen cases, the Court found the governmental defendants were entitled to qualified immunity on the grounds that, whether or not they acted in contravention of the Constitution, they did not violate clearly established law. The Court has not ruled in favor of a § 1983 plaintiff on this question in more than a decade. Interestingly, more than one-third of these sixteen defend- ant-friendly rulings came in summary reversals, including at least one in each of the past four years. These cases represent about one of every seven opinions the Court issued without briefing and oral argument during that four-year period.

#### Court broadening QI protection

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16 p. 64-5

But my purpose here is not to criticize the Court for its selective use of summary reversals or for decisions like *Harlow* that transparently alter precedent. Instead, my focus is on the Supreme Court’s qualified immunity opinions that have made a *sub silentio* assault on constitutional tort suits. In a number of recent rulings, the Court has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own. This pattern began in 2011 with *Ashcroft v. al-Kidd* and continued with last Term’s decisions in *City and County of San Francisco v. Sheehan* and *Heien v. North Carolina*. In making this claim, I explore three different issues: (1) how the Court characterizes the standard governing the qualified immunity defense; (2) whether lower court opin ions can create clearly established law; and (3) how qualified immunity compares to Fourth Amendment principles. As de- tailed below, in each of these areas the Court haswithout of- fering any explanation, and without even acknowledging it is doing sobroadened the protection qualified immunity offers government officials in § 1983 litigation.

#### In Ascroft, the Court said *every* reasonable person would have had to conclude there was an obvious error

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16, pp. 66

The *Harlow* formulation of the qualified immunity defense set out above focused on what “a reasonable person” would have known about the constitutional status of the right assert- ed by the plaintiff. The Court has adhered to that description of the standard in a long line of cases, noting in *Anderson v. Creighton*, for example, that the relevant question is whether the law is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”

In 2011, in *Ashcroft v. al-Kidd*, Justice Scalia’s majority opinion quoted this portion of *Anderson v. Creighton* in intro- ducing the Court’s discussion of qualified immunity and laying out the rules governing the defense. But Justice Scalia’s quota- tion broke up the *Anderson* language, asserting that qualified immunity protects government officials unless the law is “‘sufficiently clear’ that *every* ‘reasonable official would have under- stood that what he is doing violates that right.’” The Court did not explain, or even acknowledge, the substitution of “every” for “a,” but later opinions have picked up on *al-Kidd*’s modifica- tion of *Anderson*.

#### Status quo protection very broad

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16, p. 68

The Court’s tendency in recent cases to use a different ten- or in describing the qualified immunity standardwithout ex- planation or acknowledgementmay seem to be just a subtle shift in tone, but it signals a potentially significant alteration in the Justices’ views of the relative weight owed to the inter- ests of plaintiffs and defendants in § 1983 litigation. In *Mullenix v. Luna*, the most recent decision in this line of cases, the Court’s entire description of the controlling standard reads as follows: The doctrine of qualified immunity shields officials from civil liability so long as their conduct “does not vi- olate clearly established statutory or constitutional rights of which a reasonable person would have known.” A clearly established right is one that is “suffi- ciently clear that *every* reasonable official would have understood that what he is doing violates that right.” “We do not require a case directly on point, but existing precedent must have placed the statutory or constitu- tional question *beyond debate*.” “Put simply, qualified immunity protects all but the *plainly incompetent* or those who *knowingly violate* the law.

#### Supreme Court will find QI where any court has interpreted the law that way

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16 p. 69-70

The *Harlow* Court did not attempt to apply its newly for- mulated qualified immunity standard to the facts of that case, and expressly left open the question whether rights can be “clearly established” by lower court case law. In denying quali- fied immunity to Alabama state prison officials in *Hope v. Pelzer*, however, the Court cited “binding Eleventh Circuit precedent” as well as a State Department of Corrections regu- lation and a United States Department of Justice Report to support the conclusion that the officials acted in violation of clearly established law.Two years ago, in *Lane v. Franks*, the Court likewise observed that, had two earlier Eleventh Circuit precedents still been “controlling” in that jurisdiction, the Court “would agree [the defendant] . . . could not reasonably have believed that it was lawful to fire [the plaintiff] in retalia- tion for his testimony.” Given a later circuit court opinion, however, the Supreme Court explained that, “[a]t best,” the plaintiff could “demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity.” Moreover, in other cases concluding that government officials are entitled to qualified immunity, the Court has relied on binding state and federal precedent, finding it significant both that the defendants’ conduct was “lawful ac- cording to courts in the jurisdiction where [they] acted and that the plaintiffs were unable to identify “any cases of control- ling authority in their jurisdiction.” Thus, the Court has re- peatedly looked beyond its own case law in assessing whether a constitutional right is clearly established.

#### In Sheehan the Court ruled that a plaintiff would have to show clear violation of a *right clearly defined by the Supreme Court* in order to defeat a claim of qualified immunity

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16m, p. 71-2

The retreat from *al-Kidd* on this front began three years later. In *Plumhoff v. Rickard*, Justice Alito’s majority opinion gratuitously recharacterized *al-Kidd*’s statement as a descrip- tion of what a § 1983 plaintiff “at a minimum” must show. Writing again for the Court last Term in *City and County of San Francisco v. Sheehan*, Justice Alito quoted *al-Kidd*’s “ro- bust consensus” language, but did so in a way that suggested— contrary to *al-Kidd*—that whether such a consensus suffices to overcome a claim of qualified immunity is an open question. Joined by the five other Justices who took a position on quali- fied immunity, Justice Alito’s opinion in *Sheehan* branded qual- ified immunity an “exacting standard” and then said: “[f]inally, to the extent that a ‘robust consensus of cases of persuasive authority’ could itself clearly establish the federal right respond- ent alleges, no such consensus exists here.”40 The Court went on to repeat *Sheehan*’s equivocal “consensus” statement in its per curiam ruling in *Taylor v. Barkes*. In none of these three opin- ions did the Court offer a rationale for its caveats or even recognize that it was departing from precedent.

As a matter of substance, the Court’s recent hints that § 1983 plaintiffs may need controlling Supreme Court prece- dent to defeat a claim of qualified immunity are troubling be- cause the Court is much less likely to grant review in the ab- sence of a conflict among the lower courts. As the majority pointed out in *Safford Unified School District #1 v. Redding*, “[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that ‘[t]he easiest cases don’t even arise.’” As a matter of process, the Court’s retreat on this issue is subject to criticism as another example of its tendency to qualify and depart from its precedents without explanation or acknowledgement, and thereby to covertly extend the reach of the qualified immunity defense.

#### In Hein v. NC, the Court extended QI even further

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16, p. 72-4

The final illustration of the Court’s pattern of silently expanding the qualified immunity defense can be found in last Term’s brief description in *Heien v. North Carolina* of the rela- tionship between qualified immunity and Fourth Amendment standards. Although *Heien* is a criminal case and not a § 1983 suit, the Justices’ opinions describe qualified immunity in very generous terms reminiscent of the qualified immunity decisions analyzed above in Part I. In prior cases that have addressed the relationship be- tween the Fourth Amendment and qualified immunity, the Court has long equated the qualified immunity inquiry with the analysis used in applying the good-faith exception to the exclusionary rule recognized in *United States v. Leon* and its progeny. Since its 1986 ruling in *Malley v. Briggs*, the Court has taken the position that “the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an uncon- stitutional arrest.” Adopting different standards of reasona- bleness in these two contexts “would be incongruous,” the *Malley* Court explained, given that the exclusionary rule im- poses “a considerable cost to society” by suppressing relevant evidence, whereas a § 1983 suit “imposes a cost directly on the officer responsible . . . without the side effect of hampering a criminal prosecution,” and is therefore more likely to aid indi- viduals “who in fact ha[ve] done no wrong.” The Court has re- iterated the analogy on several occasions, most recently in 2012 in *Messerschmidt v. Millender*. In *Heien v. North Carolina*, the Court concluded that the reasonable suspicion necessary to justify a stop may be based on a police officer’s reasonable mistake of law. In response to the concern that the Court’s holding would create an incentive for police to remain ignorant about the law, Chief Justice Rob- erts’ opinion for the majority remarked that “[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mis- takes—whether of fact or of law—must be *objectively* reasona- ble.” On its face, this standard of objective reasonableness seems to resemble *Harlow*’s definition of qualified immunity, but the Chief Justice went on to add that the Fourth Amend- ment “inquiry is not as forgiving” as the one used in “the dis- tinct context” of qualified immunity and “[t]hus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws.” Although the Court’s warning may seem in tension with *Malley*’s description of the relationship between the Fourth Amendment and qualified immunity, the majority opinion in *Heien* distinguished both its qualified immunity precedents and the good-faith exception cases on the ground that in those con- texts the Court “had already found or assumed a Fourth Amendment violation” and was “considering the appropriate remedy.” By contrast, *Heien* involved “the antecedent ques- tion” whether “there was a violation of the Fourth Amendment in the first place.” Even accepting the Court’s distinction be- tween constitutional rights and remedies, the substantive Fourth Amendment question at issue in *Heien*—whether a po- lice officer had the requisite reasonable suspicion to stop Heien’s car—did not turn on the officer’s understanding of Fourth Amendment principles. Rather, the mistake of law there involved a matter of state criminal law: whether North Carolina required vehicles to have two functioning brake lights. In fact, all nine Justices seemed to agree in *Heien* that a mis- take about Fourth Amendment doctrine would have been irrel- evant in that case “no matter how reasonable.” But if the gov- ernment actor’s understanding of federal constitutional principles, which forms the core of the inquiry in cases involv- ing qualified immunity and the good-faith exception, was in- consequential in *Heien*, it is not apparent that the *Heien* dic- tum has much to say about the scope of the qualified immunity defense.

## Police Brutality/Racism Advantage

### Police Not Held Accountable in Suits

#### Individual police not held responsible

Robert Hennelly, May 13, 2015, Slate, Poisonous Cops, Total Immunity: Why an epidemic of police abuse is actually going unpunished, http://www.salon.com/2015/05/13/poisonous\_cops\_total\_immunity\_why\_an\_epidemic\_of\_police\_abuse\_is\_actually\_going\_unpunished/

No matter how big the settlement might be, Schwartz notes that police officers enjoy a qualified immunity that shields them from personal liability for whatever actions they take while on the job. Schwartz asked 70 of the nation’s largest police departments to submit the total amount they paid out to settle police misconduct cases from 2006 to 2011. [Forty-four of the 70 agencies responded](https://mail.google.com/mail/u/0/?tab=wm&pli=1#search/schwartz%40law.ucla.edu/14813767d214973a?projector=1). All told, they paid out $730 million to settle 9,225 civil rights suits. Yet in just one half of one percent of those settlements were officers required to pay anything.

### Police Brutality Widespread

#### Comprehensive statistics demonstrate that blacks and Latinos are targeted

Bonnie, Kristian, 2014, Seven Reasons Police Brutality is Systemic, Not Anecdotal, American Conservative, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/> *Bonnie Kristian is a writer who lives in the Twin Cities. She is a communications consultant for Young Americans for Liberty and a graduate student at Bethel Seminary*

“Simply put,” [says](http://www.amazon.com/Police-Brutality-Anthology-Norton-Paperback/dp/0393321630/ref=sr_1_1?) University of Florida law professor Katheryn K. Russell, “the public face of a police brutality victim is a young man who is Black or Latino.” In this case, [research](http://www.amazon.com/Race-Police-Brutality-Dilemma-Deviance/dp/0791476197) [suggests](http://www.jstor.org/discover/10.1525/sp.2013.12056?uid=3739736&uid=2&uid=4&uid=3739256&sid=21104260832903) [perception](http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo17.htm) matches reality. To give a particularly striking example, one Florida city’s “stop and frisk” policy has been [explicitly aimed](http://www.theatlantic.com/national/archive/2014/05/where-blacks-suffer-under-stop-and-frisk-on-steroids/371869/) at all black men. Since 2008, this has led to 99,980 stops which did *not* produce an arrest in a city with a population of just 110,000. One man alone was stopped 258 times at his job in four years, and arrested for trespassing while working on 62 occasions. Failure to address this issue communicates to police that minorities are a safe target for abuse.

#### Police acknowledge police brutality is widespread

Bonnie, Kristian, 2014, Seven Reasons Police Brutality is Systemic, Not Anecdotal, American Conservative, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/> *Bonnie Kristian is a writer who lives in the Twin Cities. She is a communications consultant for Young Americans for Liberty and a graduate student at Bethel Seminary*

Here’s the real clincher. A Department of Justice [study revealed](https://www.ncjrs.gov/pdffiles1/nij/181312.pdf) that a whopping 84 percent of police officers report that they’ve seen colleagues use excessive force on civilians, and 61 percent admit they don’t always report “even serious criminal violations that involve abuse of authority by fellow officers.” This self-reporting moves us well beyond anecdote into the realm of data: Police brutality is a pervasive problem, exacerbated by systemic failures to curb it. That’s not to say that every officer is ill-intentioned or abusive, but it is to suggest that the common assumption that police are generally using their authority in a trustworthy manner merits serious reconsideration. As John Adams wrote to Jefferson, “Power always thinks it has a great soul,” and it cannot be trusted if left unchecked.

#### 1,100 people per year are killed by police

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

As 2014 drew to a close, according to the most detailed account based on publicly published sources, a total of 1,100 people had been killed by the police in the United States.”[4](http://www.internationalist.org/killercopswstalkblackamerica1507.html" \l "footnote_4) The actual numbers may be much higher, and there are no official figures since the government relies on very partial voluntary reporting by police departments. But the stark reality is that at least three individuals a day had their lives terminated by the forces of “law and order.” The last to die that year was Kevin Davis, a 44-year-old black worker who lived on the outskirts of Decatur, Georgia. Davis had called the police after being stabbed with a knife by an assailant who fled. When the police arrived, first they shot Davis’ dog and then him. When he was taken to the hospital, police refused to let his family have contact with him until he “expired” two days later (Alternet, 27 January).

### Racism in Police Brutality

#### Blacks disproportionately killed by police

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

This tells us that 29% of those killed by police as of June 1 were black, although African Americans are only 13% of the U.S. population; that one-third of the black victims were unarmed, and two-thirds of unarmed people killed by police were members of minorities; that the average age of a person killed by police was 37, that 27% had mental health issues and 95% were men. One-third of the women were killed by police in their own home, as was Tanisha Anderson, killed by Cleveland cops only days before they shot Tamir Rice.

#### Massive police racism for which there is no accountability

Ta-Nehisi Coates, author, July 2015, Between the World and Me, Kindle edition, page number at end of card

I write you in your fifteenth year. I am writing you because this was the year you saw Eric Garner choked to death for selling cigarettes; because you know now that Renisha McBride was shot for seeking help, that John Crawford was shot down for browsing in a department store. And you have seen men in uniform drive by and murder Tamir Rice, a twelve-year-old child whom they were oath-bound to protect. And you have seen men in the same uniforms pummel Marlene Pinnock, someone’s grandmother, on the side of a road. And you know now, if you did not before, that the police departments of your country have been endowed with the authority to destroy your body. It does not matter if the destruction is the result of an unfortunate overreaction. It does not matter if it originates in a misunderstanding. It does not matter if the destruction springs from a foolish policy. Sell cigarettes without the proper authority and your body can be destroyed. Resent the people trying to entrap your body and it can be destroyed. Turn into a dark stairwell and your body can be destroyed. The destroyers will rarely be held accountable. Mostly they will receive pensions. And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detainings, beatings, and humiliations. All of this is common to black people. And all of this is old for black people. No one is held responsible. Coates, Ta-Nehisi (2015-07-14). Between the World and Me (p. 9). Random House Publishing Group. Kindle Edition.

#### Law enforcement targeting blacks with no justification

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But even in Giuliani’s hometown, the relationship between crime and policing is not as clear as the mayor would present it. After Giuliani became mayor, in 1994, his police commissioner William Bratton prioritized a strategy of “order maintenance” in city policing. As executed by Bratton, this strategy relied on a policy of stop-and-frisk, whereby police officers could stop pedestrians on vague premises such as “furtive movements” and then question them and search them for guns and drugs. Jeffrey Fagan, a Columbia University law professor, found that blacks and Hispanics were stopped significantly more often than whites even “after adjusting stop rates for the precinct crime rates” and “other social and economic factors predictive of police activity.” Despite Giuliani’s claim that aggressive policing is justified because blacks are “killing each other,” Fagan found that between 2004 and 2009, officers recovered weapons in less than 1 percent of all stops—and recovered them more frequently from whites than from blacks. Yet blacks were 14 percent more likely to be subjected to force. In 2013 the policy, as carried out under Giuliani’s successor, Michael Bloomberg, was ruled unconstitutional.

If policing in New York under Giuliani and Bloomberg was crime prevention tainted by racist presumptions, in other areas of the country ostensible crime prevention has mutated into little more than open pillage. When the Justice Department investigated the Ferguson police department in the wake of Michael Brown’s death, it found a police force that disproportionately ticketed and arrested blacks and viewed them “less as constituents to be protected than as potential offenders and sources of revenue.” This was not because the police department was uniquely evil—it was because Ferguson was looking to make money. “Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs,” the report concluded. These findings had been augured by [the reporting of The Washington Post](http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/) , which had found a few months earlier that some small, cash-strapped municipalities in the St. Louis suburbs were deriving 40 percent or more of their annual revenue from various fines for traffic violations, loud music, uncut grass, and wearing “saggy pants,” among other infractions. This was not public safety driving policy—it was law enforcement tasked with the job of municipal plunder.

#### Whites and Blacks use drugs at the same rates, but Blacks are more likely to be imprisoned

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In 2013, the ACLU published a report noting a 10-year uptick in marijuana arrests. The uptick was largely explained as “a result of the increase in the arrest rates of Blacks.” To reiterate an important point: Surveys have concluded that blacks and whites use drugs at roughly the same rates. And yet by the close of the 20th century, prison was a more common experience for young black men than college graduation or military service.

### Qualified Immunity Destroys Suits Against the Police

#### QI has made it effectively impossible to sue police for misconduct, creating a police state

Norm Pattis, attormey, Qualified Immunity and the Police State, http://www.pattisblog.com/index.php?article=Qualified\_Immunity\_And\_The\_Police\_State\_2675

I get many calls each week from people who believe they have been abused by the police. That is because for many years I was at the forefront of police misconduct litigation. But these days I rarely file a complaint against police officers. It is not that I have become a police groupie. Rather, I've read the handwriting on the wall. In the past decade, there has been a silent coup d' etat. Our courts have transformed themselves into the guardians of a police state in a stunning, and largely unnoticed, act of judicial activism. Their primary tool was a tricky legal doctrine known as qualified immunity.

This coup has gone unnoticed by the general public. Even academics seem blind to its import. Practitioners know better.

Consider the following fact pattern: A man calls to complain that his son was brutalized by local law enforcement officers. He was hit with fists, kicked and subjected to high-voltage shock by a police officer using a Taser. The man is angry. How could police do this?

I ask what crime the boy was charged with. The man seems surprised by the question. How had I known his son had been arrested? I know the boy must have been charged with interfering with a police officer, a charge that makes it a misdemeanor to obstruct, hinder or delay an officer in the performance of his lawful duty. Just what does this mean? The statute is so broad that almost anything other a supine bending of the knee is a crime. Police routinely charge the crime when force is used to take a person into custody. It is the first line of defense against a charge of unreasonable force: We needed to use force against resistance.

The boy's father did not want to hear a word of it. How can a boy in handcuffs resist arrest?, he asks with scorn. I tell him about cases I have seen. Young men in handcuffs who kicked out windows of police cruisers, in one case kicking so hard as to dislodge a car door from its joints. I try to explain that the law permits the police to use reasonable force to overcome a person's resistance. There are many judges who would conclude that the use of a Taser is justified against a person wildly kicking while cuffed. Bringing a civil action against the police carries with it a substantial risk that the case will be thrown out by a judge granting the police officers qualified immunity.

By now the caller has transferred his anger against the police to me. The police were wrong, he tells me. The case is a slam dunk, he insists. I tell him to take the slam dunk elsewhere. There is no such thing in the world of police misconduct. The call ends with the man no doubt wondering whether I am defending police officers. I hate fielding such calls.

We boast about the rule of law, saying that no one is beyond the law's reach. That's not quite true. The law recognizes broad immunities. If life is a board game, the rule of law defines what pieces on the board can do to one another. An immunity removes a piece from the board, placing it beyond the reach of the law. Thus, a lawmaker trashing a person on the floor of a legislative chamber is absolutely immune from a suit for defamation. We say the lawmaker is immune by operation of law: In other words, any person who knows the law knows that the lawmaker cannot be sued.

A qualified immunity is one that a judge is free to impose or not, depending on the facts presented to the judge. In the context of police misconduct litigation, judges are free to grant a police officer immunity from suit if the officer's conduct does not violate clearly established law or if reasonable police officers could disagree about whether the alleged conduct violated the law. Translated into lay terms, police officers are given the benefit of the doubt in close cases. But judges, not juries, make this call. That's the coup.

Qualified immunity is a prime example of judicial activism, yet no one on the right seems very concerned when judicial activism narrows the rights of ordinary Americans. Fifteen years ago, the courts rarely granted qualified immunity to police officers; now it happens with a regularity that makes it pointless to file suit against police officers in all but the most egregious cases. In other words, a powerful legal doctrine created by judges has declared broader and broader ranges of police conduct beyond the reach of the law. Police misconduct cases rarely it to juries any longer. Judges, not the people, decide what is reasonable for police to do.

The judiciary is self-satisfied about this, and why not? Throwing a case out of court is a whole lot less trouble than going to trial. But it comes at a cost. The cost is a police state. Officers are free to act with impunity, their conduct beyond the review of ordinary citizens so long as it satisfies the jaundiced eye of a judiciary free to decided without real review what is and is not reasonable.

I read these judicial decisions and although I do not weep, I heed what they teach. There is little point in filing a suit that will simply be tossed from court. I send most callers away these days. There are a lot of angry people out there who aren't getting justice in the courts. I suppose when there are enough of them out there someone will listen. But the listeners aren't on the bench; the nation's judges have become accomplices in a police state; most of them don't even realize it.

#### Qualified immunity means the police are never deterred from bad conduct

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

One is called qualified immunity, and it is a protection for government officials, such that even if they have violated a plaintiff’s constitutional rights, they will be immune from liability if that right was not clearly established. The way that the Supreme Court has instructed lower courts to assess that question is to look at other published decisions by the Supreme Court or other courts, and to look to see whether the constitutional violation in question has previously been declared unlawful. And if it hasn’t, the officer will be immune from suit. This is a protection that is a very strong one. The Supreme Court has said that the qualified immunity standard protects “all but the plainly incompetent, or those who knowingly violate the law.” It’s a very strong protection. It’s premised on the notion that if you expose police officers and other government officials to liability, it will over-deter them. People won’t apply to become police officers, or when they’re on the street they won’t vigorously enforce the law. But if officers are not subject to financial liability, or if judgments and settlements against them are indemnified by their employers, then there is not that kind of financial pressure that’s assumed by the court in that qualified immunity doctrine. So that’s one area of the law.

#### Police can claim QI unless they violate clearly established law

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

The Court first balanced these competing interests by allowing dismissal on qualified immunity grounds—even if a defendant had violated the plaintiff’s constitutional rights—if the defendant could show both that his conduct was objectively reasonable and that he held a “good-faith” belief that his conduct was proper.30 The Court later eliminated the subjective element for fear that a defendant’s good faith could not be resolved without discovery.31 Now, a defendant is entitled to qualified immunity unless his conduct violates “clearly established law.”32 A law is “clearly established” if there is controlling precedent or a consensus of cases with similar holdings,33 or, in limited circumstances, if the conduct is obviously unconstitutional.3

#### Application of QI law ambiguous

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Qualified immunity decisions have been described as “one of the most morally and conceptually challenging tasks federal appellate judges routinely face.”35 The law is not clear about how factually similar a prior decision must be to the instant case in order for the law to be “clearly established.”36 There is no clear guidance about whether and when judges should decide the merits of a plaintiff’s claim before assessing whether the defendant is entitled to qualified immunity. Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits, 106 NW. U. L. REV. 1883, 1914–15 (2012) (describing the increasing number of indemnification statutes since 1976)

### Answers to: People Win Lawsuits Against Cities

#### Difficult to find cities liable

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Another is what’s called municipal liability, which concerns the city or the county’s liability for the acts of individual officers. So if you or I was assaulted by private security guard at Wal-Mart, we could sue the guard individually, but we could also sue Wal-Mart, and through a notion of what’s called vicarious liability, or *respondeat superior*, Wal-Mart would be held responsible for the acts of its employees. That does not exist in the world of civil rights law violations. In order to hold a city or county liable for the acts of its officers, you have to show a custom, or a policy of unconstitutional practices by the city or county. It’s a very burdensome standard, and it’s justified in part by this notion that this has always been the case, that there hasn’t been this kind of municipal liability. But it doesn’t much make sense if officers in practice are being indemnified by their employers. So there is essentially de facto vicarious liability, because the cities and counties are already assuming the financial responsibilities of paying those bills.

### A2: Black-on-Black Crime

#### Notions of “Black-on-Black” crime cover up the crimes committed by Whites against blacks

Ta-Nehisi Coates, author, July 2015, Between the World and Me, Kindle edition, page number at end of card

A legacy of plunder, a network of laws and traditions, a heritage, a Dream, murdered Prince Jones as sure as it murders black people in North Lawndale with frightening regularity. “Black-on-black crime” is jargon, violence to language, which vanishes the men who engineered the covenants, who fixed the loans, who planned the projects, who built the streets and sold red ink by the barrel. And this should not surprise us. The plunder of black life was drilled into this country in its infancy and reinforced across its history, so that plunder has become an heirloom, an intelligence, a sentience, a default setting to which, likely to the end of our days, we must invariably return.

The killing fields of Chicago, of Baltimore, of Detroit, were created by the policy of Dreamers, but their weight, their shame, rests solely upon those who are dying in them. There is a great deception in this. To yell “black-on-black crime” is to shoot a man and then shame him for bleeding. And the premise that allows for these killing fields— the reduction of the black body— is no different than the premise that allowed for the murder of Prince Jones. The Dream of acting white, of talking white, of being white, murdered Prince Jones as sure as it murders black people in Chicago with frightening regularity. Do not accept the lie. Do not drink from poison. The same hands that drew red lines around the life of Prince Jones drew red lines around the ghetto. Coates, Ta-Nehisi (2015-07-14). Between the World and Me (p. 111). Random House Publishing Group. Kindle Edition.

### A2: Obama Is President, Disproves Racism

#### Racism is systemic, Obama doesn’t overcome that

Jeffrey A. Baltimore is a member of the Harrisburg City Council, Patriot News, August 13, 2015, Whites Must be Include in Racism’s Remedy,

I am usually, if only momentarily, encouraged when I read or hear white people acknowledging their privilege. A recent letter to the editor did that again for me, and I wanted to personally and publicly thank the writer for her honesty and courage.

It takes bravery for someone white to stand up and admit that she knows she is treated differently than someone black, in any number of situations, simply because of the hue of her skin.

In Tim Wise's 2009 book, "Between Barack and a Hard Place, Racism and White Denial in the Age of Obama," the author issues a call for white responsibility in race matters.

Wise recognizes, as do many of us, that President Barack Obama's ascension to the White House does not mean that we as a nation are suddenly now postracial, a ridiculous term in my opinion.

Obama is not the fulfillment of the Rev. Martin Luther King Jr.'s dream. King's dream was not individualistic or limited to the success of one or two black folks.

King's dream has been scrubbed to be more palatable to white people.

King called the U.S. the "greatest purveyor of violence in the world today," and he called for hundreds of billions of dollars in reparations, not only for blacks but for the poor of all colors who have been victimized by racial injustice in these United States.

He believed our system of capitalism is inherently destructive and inconsistent with democracy, and that it is based on the economics of exploitation.

American racism is systemic, evinced in every facet of black American life. But if I or any other black person talks about it, we are called whiners or told to "forget about it," "get over it" or "walk it off."

It's tragic that, on the first attempt to cross the Edmund Pettus Bridge in Selma, Ala., the all-black crowd was horrifically attacked. But when whites joined the march on the second attempt, they were allowed to protest peacefully and cross without incident. Tragic, but poignant.

White folks have to be part of the remedy for racism. They surely are the major part of the sickness.

### A2: American Blacks Better Off than Blacks in Other Countries

#### Red herring – the experience of blacks in other countries is not relevant

Samuel Williams, Phd Philosophy, 2011, FROM OPPRESSION TO DEMOCRACY: AN ARGUMENT FOR REPARATIONS FOR AFRICAN AMERICANS FROM A DISCOURSE ETHICS PERSPECTIVE

<http://etd.lib.msu.edu/islandora/object/etd%3A1110/datastream/OBJ/view> DOA: 6-27-15

He alludes to the fact that Blacks have a higher quality of life than most other descendents of Africans in other countries. The hidden argument from this statement would be that Blacks do not deserve reparations because Blacks in other countries have suffered more than Blacks in the United States. This is a red herring argument. Nothing turns on the quality of life of anyone in any other country. The relevant premises that ought to be considered are that Blacks are citizens of the United States, and Blacks suffer the effects of a history of oppression. The fact that Blacks also benefit from their labor, though true, is irrelevant. The relevant point to be made is that the degree that Blacks benefit from society should not depend on race or a history of oppression.

### Racism Impacts -- Consequential

#### Racism necessitates genocide and multiple forms of oppression.

Katz 97 - Katheryn Katz, Professor of Law, 1997, "The Clonal Child: Procreative Liberty and Asexual Reproduction," Lexis-Nexis

It is undeniable that **throughout human history dominant and** oppressive **groups have committed unspeakable wrongs against those viewed as inferior. Once a person (or a people) has been characterized as sub-human, there appears to have been no limit to the cruelty that was or will be visited upon him.** For example, in almost all wars, **hatred** towards the enemy **was inspired to justify the killing and wounding by separating the enemy from the human race, by casting them as unworthy of human status. This** same **rationalization has supported: genocide, chattel slavery, racial segregation, economic exploitation, caste and class systems, coerced sterilization of social misfits and undesirables, unprincipled medical experimentation, the subjugation of women, and the social Darwinists' theory justifying indifference to the poverty and misery of others.**

#### Racism causes structural violence, leading to genocide.

Vorster 2 - J.M. Vorster 2 (Prof. of Ethics, writer on religious fundamentalism and human rights, Advisor to the U.N. Human Rights Council, “Racism, xenophobia, and Human Rights,” The Ecumenical Review

Although these three causes of racism can be logically distinguished, they are mostly inter-related. Ideology can be the basis of fear, and greed can be justified by ideology and even fear. **One of the major manifestations of racism is structural violence. State-organized genocide was a well-known phenomenon** in the centuries of colonialism. Several nations disappeared altogether, or were reduced to tiny minorities, during the 19th century by the United States and by European powers in Africa, Latin America, Australia and New Zealand. (16) Nowadays the international community witnesses state organized "ethnic" cleansing in Central Africa and Eastern Europe. (17) This "ethnic cleansing" includes methods such as deportation, terror and so-called "legal forms" of exclusion from the state concerned. However, structural violence based on racism can have a more subtle form than state-organized terror and genocide. The philosophy of liberation proved in the 1960s that **systems--even democratic systems--can become inherently violent**. (18) **In the maintenance of law and order, and sometimes even under the guise of human rights, a political and economic structure can exert violence to its subjects or a group of them.** This usually happens when the system is one-dimensional, that is, when the system controls all spheres of life. The South African system in the period 1948-94 is a good example of a one-dimensional state. All spheres of life (even morality, sexuality and marital life) were controlled by the state. This provides the authorities with the means to discriminate in a "legitimate" way by introducing social stratification. This concept, and the usual pattern of its development, require further reflection**. Social stratification is a system of legitimated, structured social inequality in which groups receive disproportionate amounts of the society's wealth, power and prestige and are socially ranked accordingly**. (19) Social stratification flows from the supposition that society consists of irreconcilable groups and the premise that a unitary government with a general franchise cannot govern these groups. The maintenance of division is, according to this view, necessary for good and orderly government. The viewpoint in South Africa since colonization in the 17th century was that whites and blacks should be kept "apart" in order to have peace and prosperity for all. In this case the dividing principle was along racial lines, but it can also, in other cases and regions, be along ethnic, cultural, linguistic or religious lines. This premise denies the fact that pluralism can be maintained in a unitary state (in South Africa a unitary state was seen as a danger for white and indigenous futures), and is based on the conviction that nation-states are the only way to deal with pluralism. **The dialectical principle must lead to the "us-them" social attitude and structure, with** (as has been proven historically) **total division and conflict developing according to a particular pattern.** In the "us-zone" the uniqueness of the own group is idolized, and maintenance of one's own uniqueness is then of absolute importance. To stimulate the "we feeling" and maintain a strong sense of solidarity, a community will start with a reconstruction of its own history. (20)

#### **People of Color are the victims of perpetual holocausts.**

Omolade, 89 - (Barbara, 1989. 'We Speak for the Planet', in Adrienne Harris and Ynestra King (eds.), Rocking the Ship of State: Toward a Feminist Peace Politics, pp. 171-89.Boulder, CO: Westview Press)//AK

People of color were and are victims of holocausts-that is, of great and widespread destruction, usually by fire. The world as we knew and created it was destroyed in a continual scorched earth policy of the white man. The experience of Jews and other Europeans under the Nazis can teach us the value of understanding the totality of destructive intent, the extensiveness of torture, and the demonical apparatus of war aimed at the human spirit. A Jewish father pushed his daughter from the lines of certain death at Auschwitz and said, "You will be a remembrance--You tell the story--You survive." She lived. He died. Many have criticized the Jews for forcing non-Jews to remember the 6 million Jews who died under the Nazis and for etching the names Auschwitz and Buchenwald, Terezin and Warsaw in our minds. Yet as women of color, we, too, are "remembrances" of all the holocausts against the people of the world. We must remember the names of concentration camps such as Jesus, Justice, Brotherhood, and Integrity, ships that carried millions of African men, women, and children chained and brutalized across the ocean to the "New World." We must remember the Arawaks, the Taino, the Chickasaw, the Choctaw, the Narragansett, the Montauk, the Delaware, and the other Native American names of thousands of U.S. towns that stand for tribes of people who are no more. We must remember the holocausts visited against the Hawaiians, the aboriginal peoples of Australia, the Pacific Island peoples, and the women and children of Hiroshima and Nagasaki. We must remember the slaughter of men and women at Sharpeville, the children of Soweto, and the men of Attica. We must never, ever, forget the children disfigured, the men maimed, and the women broken in our holocausts-we must remember the names, the numbers, the faces, and the stories and teach them to our children and our children's children so the world can never forget our suffering and our courage. Whereas the particularity of the Jewish holocaust under the Nazis is over, our holocausts continue. We are the madres locos (crazy mothers) in the Argentinian square silently demanding news of our missing kin from the fascists who rule. We are the children of El Salvador who see our mothers and fathers shot in front of our eyes. We are the Palestinian and Lebanese women and children overrun by Israeli, Lebanese, and U.S. soldiers. We are the women and children of the bantustans and refugee camps and the prisoners of Robbin Island. We are the starving in the Sahel, the poor in Brazil, the sterilized in Puerto Rico. We are the brothers and sisters of Grenada who carry the seeds of the New Jewel Movement in our hearts, not daring to speak of it with our lips—yet.

#### Peace is not the absence of a nuclear conflict for the comfort of the white middle class—People of Color face the holocaust daily

Omolade, 89 - (Barbara, 1989. 'We Speak for the Planet', in Adrienne Harris and Ynestra King (eds.), Rocking the Ship of State: Toward a Feminist Peace Politics, pp. 171-89.Boulder, CO: Westview Press)//AK

Pacifists such as Martin Luther King, Jr. and Mahatma Gandhi who have used nonviolent resistance charged that those who used violence to obtain justice were just as evil as their oppressors. Yet all successful revolutionary movements have used organized violence. This is especially true of national liberation movements that have obtained state power and reorganized the institutions of their nations for the benefit of the people. If men and women in South Africa do not use organized violence, they could remain in the permanent violent state of the slave. Could it be that pacifism and nonviolence cannot become a way of life for the oppressed? Are they only tactics with specific and limited use for protecting people from further violence? For most people in the developing communities and the developing world consistent nonviolence is a luxury; it presumes that those who have and use nonviolent weapons will refrain from using them long enough for nonviolent resisters to win political battles. To survive, peoples in developing countries must use a varied repertoire of issues, tactics, and approaches. Sometimes arms are needed to defeat apartheid and defend freedom in South Africa; sometimes nonviolent demonstrations for justice are the appropriate strategy for protesting the shooting of black teenagers by a white man, such as happened in New York City. Peace is not merely an absence of 'conflict that enables white middleclass comfort, nor is it simply resistance to nuclear war and war machinery. The litany of "you will be blown up, too" directed by a white man to a black woman obscures the permanency and institutionalization of war, the violence and holocaust that people of color face daily. Unfortunately, the holocaust does not only refer to the mass murder of Jews, Christians, and atheists during the Nazi regime; it also refers to the permanent institutionalization of war that is part of every fascist and racist regime. The holocaust lives. It is a threat to world peace as pervasive and thorough as nuclear war.

#### Racism make nuclear war inevitable

KOVEL 1988 (Joel, Distinguished Professor of Social Studies at Bard University, White Racism: A Psychohistory, 1988, p. xxix-xxx)

As people become dehumanized, the states become more powerful and warlike. Metaracism signifies the triumph of technical reasoning in the racial sphere. The same technocracy applies to militarization in general, where it has led to the inexorable drive toward thermonuclear weaponry and the transformation of the state into the nuclear state. There is an indubitable although largely obscure, link between the inner dynamic of a society, including its racism, and the external projection of social violence. Both involve actions taken toward an Other, a term we may define as the negation of the socially affirmed self. Communist, black, Jew—all have been Other to the white West. The Jew has, for a while at least, stepped outside of the role thanks to the integration of Israel within the nations of the West, leaving the black and the Communist to suffer the respective technocratic violences of metaracism and thermonuclear deterrence. Since the initial writing of WHITE RACISM, these closely linked phenomena have grown enormously. Of course, there is a major, cataclysmic difference between the types of technocratic domination. Metaracism can be played out quite a while longer. Indeed, since it is a racism that proceeds on the basis of anti-racism, it appears capable of a vastly greater degree of integration than either dominative or aversive racism, at least under the firmly entrenched conditions of late capitalist society. Thermonuclear deterrence, on the other hand, has already decayed into the apocalyptic logic of first-strike capability (or counterforce means of pursing nuclear war), which threatens to put an end to history itself. Thus the nuclear crisis is now the leading item on the global agenda. If it is not resolved civilization will be exterminated while if it is resolved, the terms of society and the state will undoubtedly be greatly altered. This will of course profoundly affect the racial situation. At the same time the disposition of racism will play a key role in the outcome of the nuclear crisis. For one thing, the effectiveness of an antinuclear movement will depend heavily on its ability to involve people of all races—in contrast to its present makeup, which is almost entirely white and middle class. To achieve such mobilization and carry it through, however, the movement will have to be able to make the linkages between militarization and racial oppression very clearly and forcefully. For if the third, and last world war becomes thermonuclear, it will most likely be in a place defined by racial oppositions.

### Racism Impacts -- Moral

#### No moral order is possible while racism is tolerated—ethics are meaningless without a prior rejection of it

**Memmi 2K** (Albert, Professor Emeritus of Sociology @ U of Paris, Naiteire, Racism, Translated by Steve Martinot, p. 163-165)

The struggle against racism will be long, difficult, without intermission, without remission, probably never achieved. Yet, for this very reason, it is a struggle to be undertaken **without** surcease and without **concessions**. One cannot be indulgent toward racism; one **must not** even **let the monster in the house, especially** **not in a mask**. To give it merely a foothold means to augment the bestial part in us and in other people, which is to diminish what is human. T**o accept the racist universe to the slightest degree is to endorse fear, injustice, and violence**. It is to accept the persistence of the dark history in which we still largely live. it is to agree that the outsider will always be a possible victim (and which man is not himself an outsider relative to someone else?. Racism illustrates, in sum, the inevitable negativity of the condition of the dominated that is, it illuminates in a certain sense the entire human condition. The anti-racist struggle, difficult though it is, and always in question, is nevertheless one of the prologues to the ultimate passage from animosity to humanity. In that sense, we cannot fail to rise to the racist challenge. However, it remains true that one’s moral conduit only emerges from a choice: one has to want it. **It is a choice** among other choices, and always debatable in its foundations and its consequences. Let us say, broadly speaking, that the choice to conduct oneself morally is the condition for the establishment of a human order, for which racism is the very negation. This is almost a redundancy. **One cannot found a moral order, let alone a legislative order, on racism, because racism signifies the exclusion of the other**, and his or her subjection to violence and domination. From an ethical point of view, if one can deploy a little religious language, racism is ‘the truly capital sin. It is not an accident that almost all of humanity’s spiritual traditions counsels respect for the weak, for orphans, widows, or strangers. It is not just a question of theoretical morality and disinterested commandments. Such unanimity in the safeguarding of the other suggests the real utility of such sentiments. All things considered, we have an interest in banishing injustice, because injustice engenders violence and death. Of course, this is debatable. There are those who think that if one is strong enough, the assault on and oppression of others is permissible. Bur no one is ever sure of remaining the strongest. One day, perhaps, the roles will be reversed. All unjust society contains within itself the seeds of its own death. It is probably smarter to treat others with respect so that they treat you with respect. “Recall.” says the Bible, “that you were once a stranger in Egypt,” which means both that you ought to respect the stranger because you were a stranger yourself and that you risk becoming one again someday. It is an ethical and a practical appeal—indeed, it is a contract, however implicit it might be. In short, the refusal of racism is the condition for all theoretical and practical morality because, in the end, **the ethical choice commands the political choice**, **a just society must be** a society **accepted by all**. If this contractual principle is not accepted, then only conflict, violence, and destruction will be our lot. If it is accepted, we can hope someday **to live in peace**. True, it is a wager, but the stakes are irresistible.

#### There is no value to life in a racist society.

Mohan ‘93 - (Brij, Professor at LSU, Eclipse of Freedom: The World of Oppression, Praeger Publishers p. 3-4)

Metaphors of existence symbolize variegated aspects of the human reality. However, words can be apocalyptic. "There are words," de Beauvoir writes, "as murderous as gas chambers" (1968: 30). Expressions can be unifying and explosive; they portray explicit messages and implicit agendas in human affairs and social configurations. Manifestly the Cold War is over. But the world is not without nuclear terror. Ethnic strife and political instabilities in the New World Order -- following the dissolution of the Soviet Union -- have generated fears of nuclear terrorism and blackmail in view of the widening circle of nuclear powers. Despite encouraging trends in nuclear disarmament, unsettling questions, power, and fear of terrorism continue to characterize the crisis of the new age which is stumbling at the threshold of the twenty-first century. The ordeal of existence transcends the thermonuclear fever because the latter does not directly impact the day-to-day operations if the common people. **The fear of crime, accidents, loss of job, and health care on one hand; and the sources of racism, sexism, and ageism on the other hand have created a counterculture of denial and disbelief that has shattered the façade of civility. Civilization loses its significance when its social institutions become counterproductive**. It is this aspect of the mega-crisis that we are concerned about

### Racism Outweighs Other Impacts

#### Racism transcends physical murder, it destroys the spirit.

**Williams 87** – Associate Professor of Law at City University of New York  
[Patricia, “Spirit-murdering the messenger: the discourse of finger-pointing as the law’s response to racism,” *University of Miami Law Review*, Sep, 42 U. Miami L. Rev. 127, http://repository.law.miami.edu/cgi/viewcontent.cgi?article=2092&context=umlr

**The** **second purpose of this article is to examine racism** as a crime, **an offense so deeply painful and assaultive as to constitute something I call "spirit-murder**." Society is only beginning to recognize that **racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same**. Racism resembles other offenses against humanity whose structures are so deeply embedded in culture as to prove extremely resistant to being recognized as forms of oppression. 7 It can be as difficult to prove as [\*130] child abuse or rape, where the victim is forced to convince others that he or she was not at fault, or that the perpetrator was not just "playing around." As in rape cases, victims of racism must prove that they did not distort the circumstances, misunderstand the intent, or even enjoy it. On October 29, 1984, Eleanor Bumpurs, a 270-pound, arthritic, sixty-seven year old woman, was shot to death while resisting eviction from her apartment in the Bronx. She was $ 98.85, or one month, behind in her rent. 8 New York City Mayor Ed Koch and Police Commissioner Benjamin Ward described the struggle preceding her demise as involving two officers with plastic shields, one officer with a restraining hook, another officer with a shotgun, and at least one supervising officer. All of the officers also carried service revolvers. According to Commissioner Ward, during the course of the attempted eviction Mrs. Bumpurs escaped from the restraining hook [\*131] twice and wielded a knife that Commissioner Ward says was "bent" on one of the plastic shields. At some point, Officer Stephen Sullivan, the officer positioned farthest away from her, aimed and fired his shotgun. It is alleged that the blast removed half of her hand, so that, according to the Bronx District Attorney's Office, "[I]t was anatomically impossible for her to hold the knife." 9 The officer pumped his gun and shot again, making his mark completely the second time around. 10 In the two and one-half year wake of this terrible incident, controversy raged as to whether Mrs. Bumpurs ought to have brandished a knife and whether the officer ought to have fired his gun. In February 1987, a New York Supreme Court justice found Officer Sullivan not guilty of manslaughter. 11 The case centered on a very narrow issue of language pitted against circumstance. District Attorney Mario Merola described the case as follows: "Obviously, one shot would have been justified. But if that shot took off part of her hand and rendered her defenseless, whether there was any need for a second shot, which killed her, that's the whole issue of whether you have reasonable force or excessive force." 12 My intention in the following analysis is to underscore the significant task facing judges and lawyers in undoing institutional descriptions of what is "obvious" and what is not, and in resisting the general predigestion of evidence for jury consumption. Shortly after Mr. Merola's statement, Officer Sullivan's attorney, Bruce Smiry, expressed eagerness to try the case before a jury. 13 Following the heavily publicized attack in Howard Beach, however, he favored a bench trial. In explaining his decision to request a nonjury trial, he stated: I think a judge will be much more likely than a jury to understand the defense that the shooting was justified. . . . The average lay person might find it difficult to understand why the police were there in the first place, and why a shotgun was employed. . . . Because of the climate now in the city, I don't want people perceiving this as a racial case. 14 Since 1984, Mayor Koch, Commissioner Ward, and a host of [\*132] other city officials repeatedly have described the shooting of Mrs. Bumpurs as completely legal. 15 At the same time, Commissioner Ward has admitted publicly that Mrs. Bumpurs should not have died. Mayor Koch admitted that her death was the result of "a chain of mistakes and circumstances" that came together in the worst possible way, with the worst possible circumstances. 16 Commissioner Ward admitted that the officers could have waited for Mrs. Bumpurs to calm down, and that they could have used teargas or mace instead of gunfire. According to Commissioner Ward, however, these observations are made with hindsight. As to whether this shooting of a black woman by a white police officer had racial overtones, he stated that he had "no evidence of racism." 17 Commissioner Ward pointed out that he is sworn to uphold the law, which is "inconsistent with treating blacks differently," 18 and that the shooting was legal because it was within the code of police ethics. 19 Finally, city officials have resisted criticism of the police department's handling of the incident by remarking that "outsiders" do not know all of the facts and do not understand the pressure under which officers labor. The root of the word "legal" is the Latin word lex, which means law in a fairly concrete sense -- law as we understand it when we refer to written law, codes, and systems of obedience. 20 The word lex does not include the more abstract, ethical dimension of law that contemplates the purposes of rules and their effective implementation. This latter meaning is contained in the Latin word jus, from which we derive the word "justice." 21 This semantic distinction is not insignificant. The word of law, whether statutory or judicial, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust. The result is compliance [\*133] with the letter of the law, but not the spirit. A sort of punitive literalism ensues that leads to a high degree of thoughtless conformity. This literalism has, as one of its primary underlying values, order -- whose ultimate goal may be justice, but whose immediate end is the ordering of behavior. Living solely by the letter of the law means living without spirit; one can do anything as long as it comports with the law in a technical sense. The cynicism or rebelliousness that infects one's spirit, and the enthusiasm or dissatisfaction with which one conforms is unimportant. Furthermore, this compliance is arbitrary; it is inconsistent with the will of the conformer. The law becomes a battleground of wills. The extent to which technical legalism obfuscates and undermines the human motivations that generate our justice system is the real extent to which we as human beings are disenfranchised. Cultural needs and ideals change with the momentum of time; redefining our laws in keeping with the spirit of cultural flux keeps society alive and humane. In the Bumpurs case, the words of the law called for nonlethal alternatives first, but allowed some officer discretion in determining which situations are so immediately life endangering as to require the use of deadly force. 22 This discretionary area was presumably the basis for the claim that Officer Sullivan acted legally. The law as written permitted shooting in general, and therefore, by extension of the city's interpretation of this law, it would be impossible for a police officer ever to shoot someone in a specifically objectionable way. [\*134] If our laws are thus piano-wired on the exclusive validity of literalism, if they are picked clean of their spirit, then society risks heightened irresponsibility for the consequences of abominable actions. Accordingly, Jonathan Swift's description of lawyers weirdly and ironically comes to life: "[T]here was a Society of Men among us, bred up from their Youth in the Art of proving by words multiplied for the Purpose, that White is Black and Black is White, according as they are paid. To this Society all the rest of the People are Slaves." 23 We also risk subjecting ourselves to such absurdly empty rhetoric as Commissioner Ward's comments to the effect that both Mrs. Bumpurs' death and racism were unfortunate, while stating "but the law says . . . ." 24 Commissioner Ward's sentiments might as well read: "The law says . . . and therefore the death was unfortunate but irremediable; the law says . . . and therefore there is little that can be done about racism." The law thus becomes a shield behind which to avoid responsibility for the human repercussions of both governmental and publicly harmful private activity. 25 A related issue is the degree to which much of the criticism of the police department's handling of this case was devalued as "noisy" or excessively emotional. It is as though passionate protest were a separate crime, a rudeness of such dimension as to defeat altogether any legitimacy of content. We as lawyers are taught from the moment we enter law school to temper our emotionalism and quash our idealism. We are taught that heartfelt instincts subvert the law and defeat the security of a well-ordered civilization, whereas faithful adherence to the word of law, to stare decisis and clearly stated authority, would as a matter of course lead to a bright, clear world like the Land of Oz, in which those heartfelt instincts would be preserved. Form is exalted over substance, and cool rationales over heated feelings. But we should not be ruled exclusively by the cool formality of language or by emotions. We must be ruled by our complete selves, by the intellectual and emotional content of our words. Governmental representatives must hear the full range of legitimate concerns, no matter how indelicately expressed or painful they may be to hear. [\*135] But undue literalism is only one type of sleight of tongue in the attainment of meaningless dialogue. Mayor Koch, Commissioner Ward, and Officer Sullivan's defense attorneys have used overgeneralization as an effective rhetorical complement to their avoidance of the issues. For example, allegations that the killing was illegal and unnecessary, and should therefore be prosecuted, were met with responses such as, "The laws permit police officers to shoot people." 26 "As long as police officers have guns, there will be unfortunate deaths." 27 "The conviction rate in cases like this is very low." 28 The observation that teargas would have been an effective alternative to shooting Mrs. Bumpurs drew the dismissive reply that "there were lots of things they could have done." 29 Privatization of response as a justification for public irresponsibility is a version of the same game. Honed to perfection by President Reagan, this version holds up the private self as indistinguishable from the public "duty and power laden" self. Public officials respond to commentary by the public and the media as though it were meant to hurt private, vulnerable feelings. Trying to hold a public official accountable while not hurting his feelings is a skill the acquisition of which would consume time better spent on almost any conceivable task. Thus, when Commissioner Ward was asked if the internal review board planned to discipline Officer Sullivan, many seemed disposed to accept his response that while he was personally very sorry she had died, he could not understand why the media was focusing on him so much. "How many other police commissioners," he asked repeatedly, "have gotten as much attention as I have?" 30 Finally, a most cruel form of semantic slipperiness infused Mrs. Bumpurs' death from the beginning. It is called victim responsibility. 31 It is the least responsive form of dialogue, yet apparently the [\*136] easiest to accept as legitimate. All these words, from Commissioner Ward, from the Mayor's office, from the media, and from the public generally, have rumbled and resounded with the sounds of discourse. We want to believe that their symmetrical, pleasing structure is the equivalent of discourse. If we are not careful, we will hypnotize ourselves into believing that it is discourse. In the early morning hours of December 20, 1986, three young black men left their stalled car on Cross Bay Parkway, in the New York City borough of Queens, and went to look for help. They walked into the neighborhood of Howard Beach, entered a pizzeria, ordered pizzas, and sat down to eat. An anonymous caller to the police reported their presence as "black troublemakers." A patrol car came, found no trouble, and left. After the young men had eaten, they left the pizzeria and were immediately surrounded by a group of eight to ten white teenagers who taunted them with racial epithets. The white youths chased the black men for about three miles, catching them at several points and beating them severely. One of the black men died as a result of being struck by a car as he tried to flee across a highway. Another suffered permanent blindness in one eye. 32 In the extremely heated public controversy that ensued, as much attention centered on the community of Howard Beach as on the assailants themselves. A veritable Greek chorus formed, comprised of the defendants' lawyers and resident after resident after resident of Howard Beach, all repeating and repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out. "They had to be starting trouble." 33 "We're a strictly white neighborhood." 34 "What were they doing here in the first place?" 35 [\*137] Although the immensely segregationist instincts behind such statements may be fairly evident, it is worth making explicit some of the presuppositions behind such ululations. Everyone who lives here is white. No black could live here. No one here has a black friend. No white would employ a black here. No black is permitted to shop here. No black is ever up to any good. These presuppositions themselves are premised on lethal philosophies of life. "Are we supposed to stand around and do nothing while these blacks come into our area and rob us?" 36 one woman asked a reporter in the wake of the Howard Beach attack. A twenty year old, who had lived in Howard Beach all of his life, said, "We ain't racial. . . . We just don't want to get robbed." 37 The hidden implication of these statements is that to be safe is not to be sorry, and that to be safe is to be white and to be sorry is to be associated with blacks. Safety and sorrow, which are inherently alterable and random, are linked to inalterable essences. The expectation that uncertain conditions are really immutable is a formula for frustration; it is a belief that feeds a sense of powerlessness. The rigid determinism of placing in the disjunctive things that are not in fact disjunctive is a set up for betrayal by the very nature of reality. The national repetition that white neighborhoods are safe and blacks bring sorrow is an incantation of powerlessness. And, as with the upside-down logic of all irrational incantations, it imports a concept of white safety that almost necessarily endangers the lives as well as the rights of blacks. It is also an incantation of innocence and guilt, much related to incantations that affirmative action programs allow presumably "guilty" blacks to displace "innocent" whites. 38 (Even assuming that "innocent whites" were being displaced by blacks, does that make [\*138] blacks less innocent in the pursuit of education and jobs? If anything, are not blacks more innocent in the scheme of discrimination?) In fact, in the wake of the Howard Beach incident, the police and the press rushed to serve the public's interest in the victims' unsavory "guilty" dispositions. They overlook the fact that racial slurs and attacks "objectif[y] people -- the incident could have happened to any black person who was there at that time and place. This is the crucial aspect of the Howard Beach affair that is now being muddied in the media. Bringing up [defendants' past arrest records] is another way of saying, 'He was a criminal who deserved it.'" 39 Thus, the game of victim responsibility described above is itself a slave to society's stereotypes of good and evil. It does no good, however, to turn race issues into contests for some Holy Grail of innocence. In my youth, segregation and antimiscegenation laws were still on the books in many states. During the lifetimes of my parents and grandparents, and for several hundred years before them, laws prohibited blacks from owning property, voting, and learning to read or write. Blacks were, by constitutional mandate, outlawed from the hopeful, loving expectations that being treated as a whole, rather than three-fifths of a human being can bring. When every resource of a wealthy nation is put to such destructive ends, it will take more than a few generations to mop up the mess. 40 [\*139] We have all inherited that legacy, whether new to this world or new to this country. It survives as powerfully and invisibly reinforcing structures of thought, language, and law. Thus, generalized notions of innocence and guilt have little place in the struggle for transcendence; there is no blame among the living for the dimension of this historic crime, this national tragedy. 41 There is, however, responsibility for never forgetting one another's histories, and for making real the psychic obliteration which lives on as a factor in shaping relations, not just between blacks and whites, 42 or blacks and blacks, 43 but also between whites and whites. Whites must consider how much this history has projected onto blacks the blame for all criminality, and for all of society's ills. It has become the means for keeping white criminality invisible. 44 The attempt to split bias from violence has been this society's most enduring and fatal rationalization. Prejudice does hurt, however, just as the absence of prejudice can nourish and shelter. Discrimination can repel and vilify, ostracize and alienate. White people [\*140] who do not believe this should try telling everyone they meet that one of their ancestors was black. I had a friend in college who having lived her life as a blonde, grey eyed white person, discovered that she was one-sixteenth black. She began to externalize all the unconscious baggage that "black" bore for her: the self-hatred that is racism. She did not think of herself as a racist (nor had I) but she literally wanted to jump out of her skin, shed her flesh, and start life over again. She confided in me that she felt "fouled" and "betrayed." She also asked me if I had ever felt this way. Her question dredged from some deep corner of my suppressed memory the recollection of feeling precisely that, when at the age of three or so, some white playmates explained to me that God had mixed mud with the pure clay of life in order to make me. In the Vietnamese language, "the word 'I' (toi) . . . means 'your servant'; there is no 'I' as such. When you talk to someone, you establish a relationship." 45 Such a concept of "self" is a way of experiencing the other, ritualistically sharing the other's essence, and cherishing it. In our culture, seeing and feeling the dimension of harm that results from separating self from "other" requires more work. 46 Very little in our language or our culture encourages or reinforces any attempt to look at others as part of ourselves. With the imperviously divided symmetry of the marketplace, social costs to blacks are simply not seen as costs to whites, 47 just as blacks do not share in the advances whites may enjoy. [\*141] This structure of thought is complicated by the fact that the distancing does not stop with the separation of the white self from the black other. In addition, the cultural domination of blacks by whites means that the black self is placed at a distance even from itself, as in the example of blacks being asked to put themselves in the position of the white shopkeepers who view them. 48 So blacks are conditioned from infancy to see in themselves only what others who despise them see. 49 It is true that conforming to what others see in us is every child's way of becoming socialized. 50 It is what makes children in our society seem so gullible, so impressionable, so "impolitely" honest, so blindly loyal, and so charming to the ones they imitate. 51 Yet this conformity also describes a way of being that relinquishes the power of independent ethical choice. Although such a relinquishment can have quite desirable social consequences, it also presumes a fairly homogeneous social context in which values are shared and enforced collectively. Thus, it is no wonder that western anthropologists and ethnographers, for whom adulthood is manifested by the exercise of independent ethical judgment, so frequently denounce tribal cultures or other collectivist ethics as "childlike." By contrast, our culture constructs some, but not all, selves to be the servants of others. Thus, some "I's" are defined as "your servant," some as "your master." The struggle for the self becomes not a true mirroring of self-in-other, but rather a hierarchically-inspired series of distortions, where some serve without ever being served, some master without ever being mastered, and almost everyone hides from this vernacular domination by clinging to the legally official definition of "I" as meaning "your equal." In such an environment, relinquishing the power of individual ethical judgment to a collective ideal risks psychic violence, an obliteration of the self through domination by an all powerful other. In such an environment, it is essential at some stage that the self be permitted to retreat into itself and make its own decisions with self-love and self-confidence. What links child abuse, the mistreatment of [\*142] women, and racism is the massive external intrusion into psyche that dominating powers impose to keep the self from ever fully seeing itself. 52 Because the self's power resides in another, little faith is placed in the true self, that is, in one's own experiential knowledge. Consequently, the power of children, women and blacks is actually reduced to the "intuitive," rather than the real; social life is necessarily based primarily on the imaginary. 53 Furthermore, because it is difficult to affirm constantly with the other the congruence of the self's imagining what the other is really thinking of the self, and because even that correlative effort is usually kept within very limited family, neighborhood, religious, or racial boundaries, encounters cease to be social and become presumptuous, random, and disconnected. This peculiarly distancing standpoint allows dramas, particularly racial ones like Howard Beach, to unfold in scenarios weirdly unrelated to the incidents that generated them. At one end of the spectrum is a laissez faire response that privatizes the self in order to remain unassailably justified. At the other end is a pattern that generalizes individual or particular others into terrifyingly uncontrollable "domains" of public wilderness, against which proscriptive barriers must be built to protect the eternally innocent self. The prototypical scenario of the privatized response is as follows: Cain: Abel's part of town is tough turf. 54 [\*143] Abel: It upsets me when you say that; you have never been to my part of town. As a matter of fact, my part of town is a leading supplier of milk and honey. 55 Cain: The news that I'm upsetting you is too upsetting for me to handle. You were wrong to tell me of your upset because now I'm terribly upset. 56 Abel: I felt threatened first. Listen to me. Take your distress as a measure of my own and empathize with it. Don't ask me to recant and apologize in order to carry this conversation further. 57 This type of discourse is problematic because Cain's challenge in calling Abel's turf "tough" is transformed into a discussion of the care with which Abel challenges that statement. While there is certainly an obligation to be careful in addressing others the obligation to protect the feelings of those others gets put above the need to protect one's own. The self becomes subservient to the other, with no reciprocity, and the other becomes a whimsical master. Abel's feelings are deflected in deference to Cain's, and Abel bears the double burden of raising his issue properly and of being responsible for its impact on Cain. Cain is rendered unaccountable for as long as this deflection continues because all the fault is assigned to Abel. Morality and responsiveness thus become dichotomized as Abel drowns in responsibility for valuative quality control, while Cain rests on the higher ground of a value neutral zone. Caught in conversations like this, blacks as well as whites will [\*144] feel keenly and pressingly circumscribed. Perhaps most people never intend to be racist, oppressive, or insulting. Nevertheless, by describing zones of vulnerability and by setting up fences of rigidified politeness, the unintentional exile of individuals as well as races may be quietly accomplished. Another scenario of distancing self from the responsibility for racism is the invention of some great public wilderness of others. In the context of Howard Beach, the specter against which the self must barricade itself is violent: seventeen year old, black males wearing running shoes and hooded sweatshirts. It is this fear of the uncontrollable, overwhelming other that animates many of the more vengefully racist comments from Howard Beach, such as, "We're a strictly white neighborhood. . . . They had to be starting trouble." 58 These statements set up angry, excluding boundaries. They also imply that the failure to protect and avenge is bad policy, bad statesmanship, and an embarrassment. They raise the stakes beyond the unexpressed rage arising from the incident itself. Like the Cain and Abel example, the need to avenge becomes a separate issue of protocol and etiquette -- not a loss of a piece of the self, which is the real cost of real tragedies, but a loss of self-regard. By self-regard, I do not mean self-concept as in self- esteem; I mean that view of the self that is attained by the self stepping outside the self to regard and evaluate the self. It is a process in which the self is watched by an imaginary other, a self-projection of the opinions of real others, where "I" means "your master" and where the designated other's refusal to be dominated is felt as personally assaultive. Thus, the failure to avenge is felt as a loss of self-regard. It is a psychological metaphor for whatever trauma or original assault that constitutes the real loss to the self. 59 It is therefore more abstract, more illusory, more constructed, and more invented. Potentially, therefore, it is less powerful than "real" assault, in that with effort it can be unlearned as a source of vulnerability. This is the real message of the attempt to distinguish between prejudice and violence: names, as in the old "sticks and stones" ditty, [\*145] although undeniably and powerfully influential, can be learned or undone as motivation for future destructive action. 60 As long as they are not unlearned, however, the exclusionary power of such free-floating emotions makes its way into the gestalt of prosecutorial and jury decisions and into what the law sees as crime, or as justified, provoked or excusable. 61 Law becomes described and enforced in the spirit of our prejudices. 62 The following passage is a description of the arraignment of three of the white teenagers who were involved in the Howard Beach beatings: The three defense lawyers also tried to case doubt on [the prosecutor's] account of the attack. The lawyers questioned why the victims walked all the way to the pizza parlor if, as they said, their mission was to summon help for their car, which broke down three miles away. . . . At the arraignment, the lawyers said the victims passed two all-night gas stations and several other pizza shops before they reached the one they entered. [\*146] A check yesterday of area restaurants, motels and gas stations listed in the Queens street directory found two eating establishments, a gas station and a motel that all said they were open and had working pay phones on Friday night. A spokesman for the New York Telephone Company, Jim Crosson, said there are six outdoor pay telephones . . . on the way to the pizzeria. 63 In the first place, lawyers must wonder what relevance this has. Does the answer to any of the issues the defense raised serve to prove that these black men assaulted, robbed, threatened or molested these white men? Does it even prove that the white men reasonably feared such a fate? The investigation into the number of phone booths per mile does not reveal why the white men would fear the black men's presence. Instead, it is relevant to prove that there is no reason a black man should walk or just wander around the community of Howard Beach. This is not semantic detail; it is central to understanding burdensomeness of proof in such cases. It is this unconscious restructuring of burdens of proof into burdens of white over black that permits people who say and who believe that they are not racist to commit and condone crimes of genocidal magnitude. It is easy to rationalize this as linguistically technical, or as society's sorrow. As one of my students said, "I'm so tired of hearing the blacks say that society's done them wrong." Yet these gyrations kill with their razor-toothed presumption. Lawyers are the modern wizards and medicine people who must define this innocent murderousness as crime. Additionally, investigations into "closer" alternatives eclipse the possibility of other explanation. They assume that the young men were not headed for the subway (which was in fact in the same direction as the pizzeria), and further, that black people must have documented reasons for excursioning into white neighborhoods and out of the neighborhoods to which they are supposedly consigned. It is interesting to contrast the implicit requirement of documentation imposed on blacks walking down public streets in Howard Beach with the implicit license of the white officers who burst into the private space of Mrs. Bumpurs' apartment. In the Bumpurs case, lawmakers consistently dismissed the availability of less intrusive options as presumption and idle hindsight. 64 This dismissal ignored the fact that police officers have an actual burden of employing the least harmful alternatives. In the context of Howard Beach, however, such an analysis invents and imposes a burden on nonresidents to stay [\*147] out of strange neighborhoods. It implies harm in the presence of those who do not specifically "own" something there. Both analyses skirt the propriety and necessity of public sector responsibility. Both redefine public accountability in privatized terms. Whether those privatized terms act to restrict or expand accountability is dichotomized according to the race of the actors. Finally, this factualized hypothesizing was part of a news story, not an editorial. "News," in other words, was reduced to hypothesis based on silent premises: they should have used the first phone they encountered; they should have eaten at the first "eating establishment;" they should have gone into a gas station and asked for help; surely they should have had the cash and credit cards to do any of the above or else not travel in strange neighborhoods. In elevating these to relevant issues, however, The New York Times did no more than mirror what was happening in the courtroom. In an ill-fated trip to the neighborhood of Jamaica, in the borough of Queens, Mayor Koch attempted to soothe tensions by asking a congregation of black churchgoers to understand the disgruntlement of Howard Beach residents about the interracial march by 1400 protesters through "their" streets. He asked them how they would feel if 1400 white people took to the streets of the predominantly black neighborhood of Jamaica. 65 This remark, from the chief executive of New York City, accepts and even advocates a remarkable degree of possessiveness about public streets. This possessiveness, moreover, is racially rather than geographically bounded. In effect, Koch was pleading for the acceptance of the privatization of public space. This is the de facto equivalent of segregation. It is exclusion in the guise of deep-moated private property "interests" and "values." In such a characterization, the public nature of the object of discussion, the street, is lost. 66 Mayor Koch's question suggests that 1400 black people took to the streets of Howard Beach. In fact, the crowd was integrated -- blacks, browns, and whites, residents and nonresidents of Howard Beach. Apparently, crowds in New York are subject to the unwritten equivalent of Louisiana's race statutes (which provide that 1/72 black [\*148] ancestry renders a person black) and to the Ku Klux Klan's "contamination by association" standard ("blacks and white-blacks" was how one resident of Forsythe County, Georgia described an interracial crowd of protesters there). On the other hand, if Mayor Koch intended to direct attention to the inconvenience, noise, and pollution of such a crowd in those small streets, then I am sympathetic. My sympathy is insignificant, however, compared to my recognition of the necessity and propriety of the protestors' spontaneous, demonstrative, peaceful outpouring of rage, sorrow, and pain. If, however, Mayor Koch intended to ask blacks to imagine 1400 angry white people descending on a black community, then I agree, I would be frightened. This image would also conjure up visions of 1400 hooded white people burning crosses, 1400 Nazis marching through Skokie, and 1400 cavalry men riding into American Indian lands. These visions would inspire great fear in me, because of the possibility of grave harm to the residents. But there is a difference, and that is why the purpose of the march is so important. That is why it is so important to distinguish mass protests of violence from organized hate groups that openly threaten violence. By failing to make this distinction, Mayor Koch created the manipulative specter of unspecified mobs sweeping through homes in pursuit of vague and diffusely dangerous ends. From this perspective, he appealed to thoughtlessness, to the pseudoconsolation of hunkering down and bunkering up against the approaching hoards, to a glacially overgeneralized view of the unneighborhooded "public" world. Moreover, the Mayor's comments reveal that he is ignorant of the degree to which the black people have welcomed, endured, and suffered white marchers through their streets. White people have always felt free to cruise through black communities and to treat them possessively. Most black neighborhoods have existed only as long as whites have permitted them to exist. Blacks have been this society's perpetual tenants, sharecroppers, and lessees. Blacks went from being owned by others, to having everything around them owned by others. In a civilization that values private property above all else, this effectuates a devaluation of humanity, a removal of blacks not just from the market, but from the pseudospiritual circle of psychic and civic communion. As illustrated in the microcosm of my experience at the store, 67 this limbo of disownedness keeps blacks beyond the pale of those who are entitled to receive the survival gifts of commerce, the [\*149] property of life, liberty, and happiness, whose fruits our culture places in the marketplace. In this way, blacks are positioned analogically to the rest of society, exactly as they were during slavery or Jim Crow. 68 There is a subtler level to the enactment of this dispossession. The following story may illustrate more fully what I mean: Not long ago, when I first moved back to New York after some twenty years, I decided to go on a walking tour of Harlem. The tour, which took place on Easter Sunday, was sponsored by the New York Arts Society, and except for myself, was attended exclusively by young, white, urban, professional, real estate speculators. They were pleasant looking, with babies strapped to their backs and balloons in their hands. They all seemed like very nice people. Halfway through the tour, the guide asked the group if they wanted to "go inside some churches." The guide added, "It'll make the tour a little longer, but we'll probably get to see some services going on . . . Easter Sunday in Harlem is quite a show." A casual discussion ensued about the time that this excursion might take. What astonished me was that no one had asked the people in the churches if they minded being stared at like living museums. I wondered what would happen if a group of blue-jeaned blacks were to walk uninvited into a synagogue on Passover or St. Anthony's of Padua in the middle of High Mass. Just to peer, not pray. My overwhelming instinct is that such activity would be seen as disrespectful. Apparently, the disrespect was invisible to this well-educated, affable group of people. They deflected my observations with comments such as, "We just want to look"; "No one will mind"; "There's no harm intended." As well intentioned as they were, I was left with the impression that no one existed for them whom their intentions could not govern. 69 Despite the lack of apparent malice in their demeanor, 70 it seemed to me that to live so noninteractively is a liability [\*150] as much as a luxury. To live imperviously to one's impact on others is a fragile privilege, which depends ultimately on the inability of others to make their displeasure known. Reflecting on Howard Beach brought to mind a news story from my fragmentary grammar school recollections of the 1960's: a white man acting out of racial motives killed a black man who was working for some civil rights organization or cause. The man was stabbed thirty-nine times, a number which prompted a radio commentator to observe that the point was not just murder, but something beyond. What indeed was the point, if not murder? I wondered what it was that would not die, which could not be killed by the fourth, fifth, or even tenth knife blow; what sort of thing that would not die with the body but lived on in the mind of the murderer. Perhaps, as psychologists have argued, what the murderer was trying to kill was a part of his own mind's image, a part of himself and not a real other. After all, statistically and corporeally, blacks as a group are poor, powerless, and a minority. It is in the minds of whites that blacks become large, threatening, powerful, uncontrollable, ubiquitous, and supernatural. There are certain societies that define the limits of life and death very differently than our own. For example, **death may occur long before the body ceases to function**, and under the proper circumstances, life may continue for some time after the body is carried to its grave. 71 These non-body-bound, uncompartmentalized ideas recognize the power of spirit, or what we in our secularized society might describe as the dynamism of self as reinterpreted by the perceptions of [\*151] other. 72 These ideas comprehend the fact that a **part of ourselves is beyond the control of pure physical will and resides in the sanctuary of those around us. A fundamental part of ourselves and of our dignity is dependent upon the uncontrollable, powerful, external observers who constitute society**. 73 Surely a part of socialization ought to include a sense of caring responsibility for the images of others that are reposited within us. 74 Taking the example of the man who was stabbed thirty-nine times out of the context of our compartmentalized legal system, and considering it in the hypothetical framework of a legal system that encompasses and recognizes morality, religion, and psychology, I am moved to see this act as not merely body murder but spirit-murder as well. I see it as spirit-murder, only one of whose manifestations is racism -- cultural obliteration, prostitution, abandonment of the elderly and the homeless, and genocide are some of its other guises. **I see spirit-murder as no less than the equivalent of body murder.** One of the reasons that I fear what I call spirit-murder, or disregard for others whose lives qualitatively depend on our regard, is that **its product is a system of formalized distortions of thought. It produces social structures centered around fear and hate; it provides a tumorous outlet for feelings elsewhere unexpressed**. 75 For example, when Bernhard Goetz shot four black teenagers in a New York City subway, an acquaintance of mine said that she could understand his fear because it is a "fact" that blacks commit most crimes. What impressed me, beyond the factual inaccuracy of this statement, 76 was the reduction of Goetz' crime to "his fear," which I translate to mean her fear. The four teenage victims became all blacks everywhere, and "most crimes" clearly meant that most blacks commit crimes.

### Racism Impacts -- Discrimination

#### Everyday White privilege oppressing Blacks, preventing an equal play field.

Bonilla-Silva 01 (Eduardo, PhD, professor of sociology at Duke University. “White Supremacy and Racism in the Post-Civil Rights era” Page 195 Lynne Rienner Publisher 2001

The theory and analyses advanced here are an anathema to many whites (and to color-blind minorities as well as honorary whites). Agreeing with my theory and substantive claims implies recognizing that all whites receive unearned benefits by virtue of being white and thus develop “defensive beliefs.” Naysayers will rebuke my claims by arguing that they are not “racist,” by stating that I am making a fictitious category- that of race- “real,” or by marshaling survey work showing whites’ tolerant racial attitudes or data comparing the status of blacks in the past with their status today. Some may even suggest that blacks are “racist” too: or that the racial gap in the United States is fundamentally shaped by blacks’ own cultural practices. Lastly, a group of commentators will point out that my analysis is “divisive,” arguing, “Wouldn’t it make more sense to develop an argument based on class as the unifying factor?” Although political disputes are never settled with data or rational arguments, I will attempt to answer each of the counterarguments. First, from a structural point of view, race relations are not rooted in the balance between “good” (non-racist) and “bad” (racist) whites or even in the struggle between “racist” actors (conscious of their racial interest) and “race militants” (conscious of the need to oppose the racial status quo). The reproduction of racial inequality transpires every day through the normal operation of society. Like capitalists and men, whites have been able to crystalize their victories in institutions and social practices. This implies that they do not need to be individually active in the maintenance of racial domination. Instead by merely following the everyday rituals of the postmodern, white-supremacist United States-living in a segregated neighborhood, sending their children to segregated schools, interacting fundamentally with their racial peers, working in a mostly segregated job or if in an integrated setting, maintaining superficial relation with the nonwhites etc.- they help reproduce the racial status quo. Of course, this does not mean that some actors in any racialized social system are significantly more prejudiced than others. My point is that the reproduction of white supremacy does not depend on individual racist behavior. Second, although all social categories are “constructed,” after they emerge they become real in their consequences. The fact that race, as with all social categories, is fluid does not mean that it does not become a social fact. Crying that you are not white, or male, or black, or female does not change the fact of your social reality as white, male, black, or female. Even those who claim to be “race traitors” receive advantages (many of which are invisible to them) just because of the racial uniform they wear every day. The mean streets of the social world have a way of letting you know rather quickly what you are rather than what you think or theorize you are. Hence, Tiger Woods may insist that he is not black by Fuzzy Zeller’s joke when he won the Augusta Open was based on the stereotypes about blacks and not on “Cablasasians.” Third, as I pointed out in Chapters 3 and 5, survey data on whites’ attitudes may be conveying false sense of racial tolerance and harmony. The combination of socially acceptable speech and old questions that no longer tackle our contemporary racial dilemmas has produced an artificial increase in racially tolerant responses among whites. Nonetheless, the same whites who state in surveys they have no problems with blacks and do not care if blacks move in their neighborhoods and that it is great to have children from all racial backgrounds interacting in schools have very limited and superficial relationships with blacks, live in white neighborhoods and more when blacks move in, and they have objected for over 40 years to almost all the government plans to facilitate school integration. Fourth, as far as the issue of black progress, I pointed out in Chapter 1 and in Chapter 4 that it is undeniable that blacks are better off today than during the slavery or Jim Crow period of race relations. Nevertheless, by solely focusing on blacks’ gains in the post-World War II era, analysts miss the boat because the appropriate way to measure the standing of a racial group (or any other group) in any society is to compare the statistics and status of that group with those of the majority group. When analysts do this comparison in the United States they find that blacks have not improved that much over the past 30 years. Therefore, my point is not to deny that blacks have improved their standing in the United States but to draw attention to the fact the new mechanisms that have emerged to maintain white privilege and which account for much of the contemporary black-white gaps. Fifth, those who insist that blacks are poorer than whites because of their cultural practices ought to consider the power dimension in the racial equation. Although blacks can be prejudiced (many are anti-white, anti-Latino, or anti-Asian), since racial inequality is based on systemic power and blacks do not have it in the United States, they are not “racist” in this systemic sense. There is no theoretical reason why blacks (the socially constructed group of people that has endured 500 years of white supremacy) could not become “racist” in this sense. However, substantively, this is an extremely unlikely event. Given the global nature of white supremacy, it is almost impossible for an anti-white or “black supremacy” order to operate successfully. Even in African countries where whites have lost political power (e.g. South Africa, Namibia, and Congo), the dictates of the global white supremacy (I borrow the term from Charles W. Mills) and the economic might of Western nations limit these regimes and severely constrain their possibilities.

### Racism Impacts – Democracy/Inclusion

#### Racism means minorities cannot adequately participate in the political system

Samuel Williams, Phd Philosophy, 2011, FROM OPPRESSION TO DEMOCRACY: AN ARGUMENT FOR REPARATIONS FOR AFRICAN AMERICANS FROM A DISCOURSE ETHICS PERSPECTIVE

<http://etd.lib.msu.edu/islandora/object/etd%3A1110/datastream/OBJ/view> DOA: 6-27-15

Economic interaction is concerned with the discourse about property, the distribution of and control of private and public property, and the distribution of private and public wealth. With this in mind, the discourse concerning economic relationships is a significant problem is society. If there is a crisis in economic relationships, then there is a crisis in the reproduction of life. And, whoever controls the economic relationships that political interaction be open to all members of society who are affected by those policies. Policy making power ought to be distributed democratically. Likewise, discourse ethics forbids the adoption and execution of policies that places more burdens on one individual or group unjustifiably. While discourse ethics requires more or less direct democratic procedures, such discourse is complicated by large complex societies. However, a political system can adopt a representative model as long as representatives consider the interests, perspectives, intentions and desires of all persons and ensure that the policies benefit all members of society. Furthermore, the possibility of more inclusive democratic procedures ought to be continually investigated in a continuous dialectical process. Innovations, such as the internet, ought to be developed to allow more discursive possibilities.

Racial oppression limits the possibility for dominated races to participate democratically in political discourse. First of all, because of the moral divisions between the so called races, members of the dominant race are less likely to form empathetic bonds with members of the oppressed race than they would with other members of the dominant race. Furthermore, members of the dominant race would have fewer chances to have interpersonal contact and have fewer chances to realize what policies would benefit members of the oppressed race.

#### Racism means individuals cannot participate in the economic system

Samuel Williams, Phd Philosophy, 2011, FROM OPPRESSION TO DEMOCRACY: AN ARGUMENT FOR REPARATIONS FOR AFRICAN AMERICANS FROM A DISCOURSE ETHICS PERSPECTIVE

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Economic interaction is concerned with actual discourse concerning where funds should go. That is why access to communication and political discourse is important. It is also concerned with non-coercive economic exchange, which equal education and full employment would work towards ensuring. Universal access to homes and private property serves a third function. Both homes and private property contributes to the development of personhood. People begin to see themselves in their property. The proposition “mine” contributes to the social being of the person. And, it has a solidaristic function. By owning property, people begin to see how important property is for others. Because of racial oppression, members of the oppressed group have limited possibilities to accumulate property necessary for human development. Likewise, they have less ability to participate in non-coercive economic exchange. And, they have fewer chances to participate in policy development that govern where funds should go. Thus, racial oppression has an effect on members’ of the oppressed race ability to participate in economic relationships as well as other aspects of social relationships.

#### Racial subjugation makes equal participatory power impossible

Samuel Williams, Phd Philosophy, 2011, FROM OPPRESSION TO DEMOCRACY: AN ARGUMENT FOR REPARATIONS FOR AFRICAN AMERICANS FROM A DISCOURSE ETHICS PERSPECTIVE

<http://etd.lib.msu.edu/islandora/object/etd%3A1110/datastream/OBJ/view> DOA: 6-27-15

Communicative ethics sets the standard for a universal normative outlook that refrains from excluding anyone who could participate in moral discourse. With regard to this normative outlook, any type of discourse that disregards the participatory power, the immediate interests, as well as the interests in the consequences of all persons involved, violates authentic communication. Distorted communication is a breakdown of normative interaction and acts as a barrier to communication that aims toward a common understanding. It is characterized by fraud, coercion, or use of rhetorical devices. It could also be caused by psychosis or some other inability to take part in rational discourse. Explained in this way, racial oppression is a type of distorted communication in which democratic social interaction is subverted because of racial differences in participatory power. Social interaction can be affected by distorted communication when the processes of social steering and organization are not controlled by democratic interaction. Some examples of this are: 1) political and economic policies that are derived by coercion and domination, 2) some persons are arbitrarily excluded from social discourse, and 3) some interests are excluded from social benefits while those same interests are not considered for protection from harms.

### Racism Impacts – Whites Responsible

#### Racism has become disguised to the people who do not directly experience it.

BARNDT Director of Crossroads, a non profit organization 2k7

(Joseph-has been a parish pastor and an antiracism trainer and organizer for thirty years, much of the latter work being done with Crossroads Ministry, Chicago, which he directed for eighteen years; “Understanding and Dismantling Racism: The Twenty-First Century Challenge To White America;” p.42)/

Thus, from the perspective of communities of color, the continuing presence of racism in the twenty-first century is easy to detect. For those who do not directly experience it, however, its presence is not so easily perceived. Whether it is described as “Bigfoot” or as a velvet glove covering an iron fist, racism has become more hidden and disguised, so that it is easy for white people to become convinced that it has gone away, or at least that it is rapidly diminishing and disappearing. In fact, the very effectiveness of the twenty-first century forms of racism is measure by its *not* being seen at work. So, the question is how to expose racism’s new disguises?

The critically important question for this book is how is it possible to see the new forms of the old racism that are operating in ways that still devastate people’s lives? How does a person “see” the velvet glove and detect the old iron fist that is being covered and disguised by a velvet glove? How can a society measure the presence and the effects of racism? In the chapters that follow, the goal is to reveal the ways in which new forms of racism comprise the powerful continuation of racism in the twenty-first century. Only as the eyes of each of us are opened as we begin to understand how racism functions in our society today will we be able to devise new ways to oppose racism and dismantle it.

To put the question another way, How can we really know whether racial conditions are getting “better” or “worse”? How can we know that racism is present, and how will we know when it is truly disappearing? Or, more simply put, how do we measure change from racial injustice to racial justice? Are there common criteria and standards of measurement that will produce agreement on the status of racial equality and inequality in our society? It is important to have effective and consistent means of quantifying he presence, absence, and intensity of racism, as well as its increase or decrease over a period of time. Since some people claim racism is disappearing, and others claim that it is as strong as ever, it is important that we use common methods of measuring.

#### Racism confines all of us to participate in its workings

BARNDT Director of Crossroads, a non profit organization 2k7

Joseph-has been a parish pastor and an antiracism trainer and organizer for thirty years, much of the latter work being done with Crossroads Ministry, Chicago, which he directed for eighteen years; “Understanding and Dismantling Racism: The Twenty-First Century Challenge To White America;” pp.81-82)

Racism takes all of us prisoner. Its ultimate design is to control and destroy everyone. Power3 is the third and most powerful expression of racism. This is the most devastating and destructive power of racism, because it subjects all of us to its will, people of color and white people alike.

You cannot cut the body of humanity in half and not have both halves bleed to death. The results of racism are far more devastating and destructive than its hurting of people of color (Power1) and benefiting of white people (Power2). In this, the greatest and worst expression of racism’s power, we can see its ability to make everyone serve its purposes, and to destroy everyone’s humanity in the process. In Power3 we can see that racism is far more than actions of evil and greedy people; it is an evil and destructive power in itself that has taken on its own self-controlling and self-perpetuating characteristics. At its deepest level, racism is a massive system of intertwining and choking roots that wrap and wind themselves around every person, institution, and manifestation of society. We need t explore how all of us-white people and people of color alike-are imprisoned by this power and cannot easily set ourselves free. We need to see how all of us face destruction as long as this evil power is at work to divide and take life from us.

Racism is able to make all of us-white people and people of color alike-cooperate with it and participate in its workings. Each and every one of us is socialized to become the person that racism wants us to become and to perform the function that racism wants us to perform. Racism actually claims the power to shape our identity, to tell all of us who we are, white people and people of color alike.

This socializing process is part of the identity formation that starts at the very beginning of each of our lives. Every white person is taught to behave according to a racist society’s standards for white people, and every person of color is taught to behave according to a racist society’s standards for people of color. In our further exploration of Power3 in chapter 4, we will call these identity-shaping processes “the internalization of racist superiority” and “the internalization of racist oppression.” And, in chapter 5 and 6, we will see that this same identity-shaping power of racism has deeply affected the nature of our institutions and our collective culture in society.

As we examine Power3 more closely we will see the ways in which all of us-people of color and white people-are imprisoned by racism. But we will also be clear that our prisons are very different. Although racism is destroying us all, it is designed to make people of color feel uncomfortable and hurt, and to make white people feel comfortable and good. But ultimately, we are all deceived, dehumanized, and destroyed by racism. To paraphrase Malcolm X, we’ve all been misled, we’ve been had, we’ve all been took, hoodwinked, and bamboozled. We are all defined and controlled in ways that threaten to destroy our very being. We will not fully understand racism until we recognize how all of us, including white people and white society, are destroyed by white racism.

### “Plainly Incompetent” Standard Bad

#### The “plainly incompetent” standard provides too much protection to law enforcement and increases litigation

Johnson, 2014

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Before Stanton, the established inquiry of qualified immunity, found in [Anderson v. Creighton](http://scholar.google.com/scholar_case?case=12881500287411882090), was not just whether the law was "clearly established" but also the "objective legal reasonableness" of the action. A defendant will be immune from liability only if no objectively reasonable officer could have believed his conduct was lawful or constitutional at the time the violation occurred. [Malley v. Briggs](http://scholar.google.com/scholar_case?case=12074975541007910866), only in dicta, noted that the policy behind the "objective legal reasonableness" standard gives officers "breathing room to make reasonable but mistaken judgments about open legal questions," such that "[w]hen properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law."

Stanton ignores the well-established "objectively reasonable" standard and seizes on the dicta statement ofMalley, holding, (quoting Malley): "Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'" This holding sets a new standard: an officer will lose his immunity only if he was "plainly incompetent" in believing his conduct did not violate clearly established law.

The Supreme Court's reliance on Malley is disingenuous; it splices the Malley policy statement and narrows-in on the "plainly incompetent" dicta (those words appear only once in Malley), transforming it as an authoritative rule in Stanton. The Malley holding does not reference "incompetence" but rather holds "objective reasonableness" "defines the qualified immunity accorded to an officer whose request for a warrant allegedly caused an unconstitutional arrest." Even Ashcroft (which the Stanton court relies heavily for support) follows the "objectively reasonable officer" standard.

Did Stanton lower the floor on qualified immunity standards? Because one could act unreasonably, but still be competent, plaintiffs will have greater difficulty in overcoming the qualified immunity bar to liability. As [noted](http://prawfsblawg.blogs.com/prawfsblawg/constitutional_thoughts/)by Law Professor Howard Wasserman (author of the leading treatise on §1983 litigation, Understanding Civil Rights) in "The Rhetoric of Qualified Immunity", a "'plainly incompetent' standard seems to be suggesting that a court that denies qualified immunity is, per se, labeling that officer as 'plainly incompetent.' If lower courts and defendants seize on that, qualified immunity will become even harder to overcome (and dismissal easier to obtain), because ... no court wants to sign onto calling police officers names or questioning their integrity and ability."

But Stanton might also harm defendants and undermine the policy goal of quick disposition of unmeritorious claims. While the pre-Stanton standard was "objectively reasonable," the "incompetent" standard underStanton is subjective, which involves factual questions. This precludes quick disposition via summary judgment or 12(b)(6) motion, since litigants will be unable to prove until much later in the factual development of the case whether the defendant is entitled to qualified immunity. This brings added expense, less predictability, and greater disruption to officials and government - the same concerns the Harlow "objectively reasonable" standard was created to extinguish; per Malley: it was "specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."

Stanton also creates confusion by its treatment of precedent in the "clearly established" inquiry. The Supreme Court held the law was not "clearly established" because binding precedent held that a warrantless entry to arrest a misdemeanant should be rare - not that it is never justified. In granting even greater leniency for determining what is "clearly established law," the Supreme Court also stated "it cannot be said the law was clearly established because the "federal and state courts of last resort around the Nation were sharply divided." Recall, the laws of the officer's jurisdiction are what count in determining whether the law was "clearly established;" the "sharply divided" standard as articulated in Ashcroft is applicable only for national officeholders, who would otherwise be forced to comply with varying and conflicting jurisdictions to maintain its eligibility for immunity. This expansion in Stanton might impose a second hurdle for civil rights plaintiffs - defendants will be entitled to qualified immunity so long as federal (and state) jurisdictions are "sharply divided" on the applicable law. Thus, an officer could know his conduct violates clearly established law in his jurisdiction, but point to a split in circuits as a defense.

## First Amendment Advantage

### Recording of Police is Protected by the First Amendment

#### Citizens should be allowed to record in public – it’s no different than observing action in public and there is no counter-value privacy interest there

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 252-5

Current constitutional tort litigation centers on whether the First Amendment permits two-party consent state wiretapping statutes to criminalize citizen recordings of police in public. State legislatures enacted these restrictive laws on audio recordings following the initial recognition of citizen privacy rights against government eavesdropping by the Warren Court in the 1960s. n36 Justice Harlan's dissent in Katz v. United States n37 created a two-pronged test for determining when a private conversation is protected from eavesdropping by the Fourth Amendment: (1) if "a person has exhibited an actual (subjective) expectation of privacy" and (2) "the expectation [is] ... one that society is prepared to recognize as 'reasonable.'" n38 Congress affirmed Katz's personal privacy right by passing the federal wiretapping statute that requires the government to obtain either consent or a warrant prior to recording. n39 Interestingly, the federal wiretapping statute allows "persons not acting under the color of state law" to record so long as just one or more parties consent, suggesting heightened protection for citizen recording vis-a-vis government recording. n40

The citizen privacy interest underlying the federal wiretapping statute n41 motivated some states to adopt protective two-party consent wiretapping statutes. n42 For example, the Massachusetts Electronic Surveillance Statute criminalizes "interception of any wire or oral communication" and defines "interception" as "secretly record[ing without] ... prior authority by all parties to such communication." n43 In Massachusetts, "the legislative focus was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers' surreptitious eavesdropping as an investigative tool." n44 At least twelve other states have similar wiretapping statutes that require two-party or all-party consent. n45 However, unlike the federal wiretapping statute n46 and more than three-dozen state wiretapping statutes, n47 several outliers like Massachusetts n48 and Illinois n49 do not require the parties intercepted to have a reasonable expectation of privacy in order for the interception to be a criminal act.

As a result, officers in two-party consent states are enforcing wiretapping statutes to shield themselves from audio and audiovisual recordings in public even when it is unreasonable to think that their words and actions are private. n50 This application has allowed state wiretapping statutes to become unhinged from the citizen privacy interests they serve. The sweeping breadth of the wiretapping statutes in Massachusetts and Illinois deters citizens from engaging in socially valuable newsgathering and citizen oversight activities that traditionally have been recognized as protected First Amendment activities. n51 Such deterrence raises the First Amendment concern of chilling protected speech.

**Some judges argue that there are legitimate privacy concerns that arise in the course of a police officer's public work, such as meeting with a confidential informant n52 or conducting a traffic stop. n53 But even in such situations, the police officer is no less doing the public's business than in a public park and therefore the First Amendment should apply just as strongly. These situations demand balancing a police officer's** **privacy rights against citizens' First Amendment recording rights. n54 However, most often citizen recording occurs in situations where the police officer is not meeting in secret with an informant** [ **or in a precarious situation where citizen recording could conceivably create a safety threat to the officer.**

#### Reasons the recording of police should be protected by the First Amendment

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 256-62

"Image capture" devices like cameras, video recorders, and cell phones have become pervasive in our society only in the last two decades. n67 Specifically, recordings have supplied critical proof in § 1983 actions brought against police officers and are accepted by the Supreme Court as incontrovertible evidence. n68 Videos containing audio are also the currency of Copwatch organizations, citizens concerned about police misconduct, and laypersons who wish to engage in political and social oversight activities on the Internet. n69 But the necessity of audio and audiovisual evidence in modern society does not alone place citizen recording within the realm of protected speech. n70

The First Amendment states, "Congress shall make no law ... abridging the freedom of speech, or of the press ... or the right of the people ... to petition the government for a redress of grievances." n71 Courts have relied primarily on the free and open discussion of governmental affairs n72 and the freedom of the press n73 in order to uphold a First Amendment right to record police in public. Several other colorable bases for First Amendment protection exist, such as [\*258] expressive conduct n74 and the prohibition on prior restraints. n75 Assuming that citizen recording is deserving of some First Amendment protection, such a right can be circumscribed to the extent that a public official has a countervailing reasonable expectation of privacy. n76

A. The Free and Open Discussion of Government Affairs

The First Amendment enshrines the right of citizens to petition the government for a redress of grievances without the fear of retaliation. This right would be hollow absent the ability for citizens to legally document and disseminate the basis for their grievances. The Supreme Court has affirmed that the public's access to truthful information about its own government is fundamental to the First Amendment right to petition for a redress of grievances. n77

Similarly, the Supreme Court has held that the ability of citizens to verbally criticize police officers is fundamental to this oversight function. n78 Since the arrest of Henry Louis Gates, Jr., by the Cambridge Police Department in July 2009, arrests based purely on what one says to a police officer have received much scholarly attention. n79 Officers do not have authority to arrest individuals who speak their minds unless the words "inflict injury or tend to incite an immediate breach of the peace," thereby removing the speech from First Amendment protection. n80

While not entirely akin to the right to verbally oppose police officers recognized in City of Houston v. Hill, n81 the right to record police officers in public serves the same fundamental First Amendment value of governmental accountability. n82 Accountability requires the free flow of accurate information about those implementing the government's laws and exercising its powers. The ubiquity of modern image capture technology makes audio and audiovisual recordings extremely useful methods of monitoring and disseminating such information. n83 Citizen recording is perhaps the most effective form of police oversight because so many citizens possess recording devices and the marginal cost of recording is close to zero. n84

Video recordings provide a direct check on police misconduct while other forms of oversight are more attenuated in their effect. n85 Internal checks in police departments such as internal affairs investigations and disciplinary measures are often toothless due to a combination of bureaucratic delay, lack of public knowledge, and an institutional bias against disciplining officers. n86 Judicial checks like the exclusionary rule in criminal cases, n87 civil sanctions, n88 municipal [\*260] liability, n89 and criminal prosecution of officers n90 only redress individual incidents of police misconduct and have empirically failed to address systemic problems. n91 External checks such as civilian and community police oversight boards suffer from political appointments, a lack of regulatory power, and police union backlash. n92

The ever-present possibility of citizen recording encourages police officers to behave in a professional manner when exercising their authority in public. n93 Recordings also have collateral benefits to citizens such as "powerfully rebutting jury bias favoring police credibility" n94 and sparking the interest of persons who are not otherwise involved in police oversight. n95 These benefits make citizen recording a powerful, democratic tool for governmental monitoring and transparency that is usable by everyone. The ease of dissemination of recordings and their ability to capture community attention are factors that motivate everyday citizens to record police officers in public and thereby participate in a new form of twenty-first-century police accountability.

Both Glik and Alvarez referenced the First Amendment's commitment to the free and open discussion of governmental affairs to justify the First Amendment right to record police officers in public. The Seventh Circuit Alvarez majority cited several original sources from the time of the Constitution's founding to support the following conclusion:

In short, the [Illinois] eavesdropping statute restricts a medium of expression - the use of a common instrument of communication - and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny. n96

The First Circuit in Glik also based its conclusion on the free and open discussion of governmental affairs: "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" n97

B. The Freedom of the Press

The First Amendment's protection for newsgathering and reporting can independently ground the right to record police officers in public. n98 The central purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." n99 A vibrant marketplace requires both the gathering and dissemination of all relevant information in order to fully inform the public. n100

The Supreme Court has found that the First Amendment undoubtedly protects [\*262] the disclosure, dissemination, and receipt of information that touches on matters of public concern. n101 Information gathering, however, is antecedent to information disclosure and the Court has found it to be just as vital to a free press, holding that "without some protection for seeking out the news, freedom of the press could be eviscerated." n102

The Court recognized recently in Citizens United v. Federal Election Commission that the government may not "repress speech by silencing certain voices at any of the various points in the speech process." n103 Here, two-party consent statutes operate to restrict the medium of expression and thereby impinge upon the dissemination of constitutionally protected speech. n104 Similarly, with a free press, the ability to record video and audio is critical to effective newsgathering expression and communication. n105 Professional journalists and citizens alike enjoy the freedom of the press. n106 The First Circuit in Glik explained that "the First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, [\*263] the public's right of access to information is coextensive with that of the press." n107

Citizen recordings serve as an unfiltered record of the conduct of government officials and are an essential part of the information-gathering process that undergirds a free and open marketplace of ideas. Some scholars have argued that the right to record and gather the content of speech is a prerequisite to fully exercising one's free speech rights because speech devoid of justification would be impotent in the marketplace of ideas. n108 One scholar also contends that the modern right to report would be handicapped in the absence of a right to record. n109

However, "generally applicable laws" prohibiting criminal conduct that have only "incidental effects on [the press's] ability to gather and report the news" can circumscribe the freedom to gather information. n110 Such laws prevent compelling persons to supply information against their will, n111 but do not restrain the press from recording images and audio that have already been exposed for public consumption. n112 Audio or audiovisual recordings of police officers in public places do not compel the officers to reveal private information; they preserve information that the officer has already decided to make public.

Cases decided before video recording was ubiquitous cited taking pictures and photographs of the police as core First Amendment activity. n113 The Seventh Circuit in Alvarez used the freedom of the press to support a First Amendment right to record police in public. n114 Alvarez concluded that Illinois's two-party consent statute directly targets videotaping as a medium of expression and undercuts the press freedom to gather and disseminate information. n115

C. Expressive Conduct and Prior Restraint Doctrine

While courts have not yet recognized the proposition, there is a colorable argument that the act of recording may deserve First Amendment protection by virtue of its expressive content. n116 On this view, the act of recording the police in public by, for example, holding up a cell phone camera expresses the idea that citizens should be monitoring the police. The First Amendment protects "an apparently limitless variety of conduct [] labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." n117

Conduct is expressive if it is "inherently expressive" or objectively conveys a message. n118 The Supreme Court has recognized certain media as inherently expressive without undertaking a separate inquiry into the particular message or idea expressed through that medium. n119 For example, music, n120 parades, n121 and monuments n122 are media so intertwined with protected expression that any message communicated within those media is inherently expressive. Motion pictures and similar media are expressive by virtue of their status as outward expression, regardless of how much creative effort went into their creation. n123 In contrast, nude dancing is not speech because it does not "communicate an idea or emotion" and is not "conventionally expressive." n124

Inherently expressive "speech" receives First Amendment protection without inquiry into the particular message or idea expressed. n125 In Alvarez, the American Civil Liberties Union ("ACLU") won a permanent injunction against enforcement of the Illinois eavesdropping statute that prohibited the ACLU's program of openly audio recording police officers without their consent when the officers are performing their duties in public. n126 ACLU members hold up cell phones in public as a part of the program, a signal to others that they are engaged in a collective effort to monitor police conduct. n127 Like nude dancing, this conduct is not "conventionally expressive," but it is "symbolic," like burning a draft card, because citizen recording communicates the idea that citizens ought to be monitoring the police. n128

The enforcement of two-party consent state wiretapping statutes against citizen recorders may also be a prior restraint on First Amendment speech. A prior restraint on speech or the press limits the speaker's right to speak ex ante, rather than imposing penalties after the speech act occurs. n129 For example, the government may suppress speech by erecting an administrative process through which speakers submit their statements for prior approval. Like censorship ex post, a prior restraint of speech is presumptively unconstitutional. n130 Justice Anthony Kennedy opined in a 2005 denial of a stay application in Multimedia Holdings Corp. v. Circuit Court of Florida, St. John's County, that the "informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint." n131 This opinion was the first time that the Supreme Court recognized that the entirely informal actions of government officials, taken together, could collectively constitute a prior restraint. n132

Classifying those police actions that deter citizens from recording as informal prior restraints may provide an additional First Amendment mooring for the right to record police in public. n133 Justice Kennedy's opinion in Multimedia Holdings states, "[a] threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability." n134 The informal actions taken by police officers to deter citizens who have already recorded them ought to invoke such special concern because the citizen is in possession of a specific recording that is ready for instant publication.

An officer who threatens citizen recorders, arrests them, or confiscates their cameras is engaging in exactly the type of informal activity contemplated by Justice Kennedy. n135 In Multimedia Holdings, a state court judge's animus toward a local newspaper in its order not to publish certain portions of a grand jury proceeding did not constitute a prior restraint because the orders "appear to have been isolated phenomena, not a regular or customary practice." n136 The animus of government officials toward citizen recordings is not isolated, especially when police officers arrest citizen recorders as part of the regular practice of enforcing their state's two-party consent wiretapping statute.

Discriminatory enforcement of two-party consent statutes by enforcing the statute against citizen recorders but not against police eavesdropping or citizen recordings of police heroism may also constitute a prior restraint. n137 It is inconsistent for the government to enforce two-party consent statutes to punish those who document police misconduct, while selectively absolving those who record police heroism. These inconsistent applications of two-party consent statutes stifle citizen recording by signaling punishment for those who disagree with the government. However, a court has yet to use this rationale in defense of the First Amendment right to record police officers in public.

### Qualified Immunity Undermines First Amendment Recording Protections

#### Qualified immunity means individuals who are subject to police harassment when recording police cannot effective seek relief

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 291-2

Mandating Saucier's merits-first adjudicatory model in First Amendment cases where chilling is a concern would appropriately constrain the unguided discretion that lower federal courts currently enjoy under Pearson. Such a modest return to Saucier would not alter the trans-substantive character of qualified immunity doctrine, as it would only change the order of the qualified immunity analysis when the underlying constitutional right is the First Amendment. This idea builds upon Dean Jeffries' view that "Pearson reminds us that different constitutional rights require different remedies ... depending on the alternatives." n286 As I explain in Section IV, **there are no viable alternative remedies to § 1983 actions for money damages that would allow the development of the First Amendment right to record police in public**. Qualified immunity findings in § 1983 actions alleging a violation of the First Amendment are sui generis because a finding that First Amendment law is not "clearly established" leaves the doctrine in limbo with the unique consequence of potentially chilling constitutionally protected speech. Remedial money damages offer the best hope for avoiding Saucier's worrying prediction that the "the law might be deprived of [an] explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." n287 **Repeated immunity findings since Pearson in several Circuits have led to the ossification of the First Amendment's application to citizens recording police officers in public. n288 The First Amendment law as applied to citizen recording of police and two-party consent state wiretapping statutes is, at present, only "clearly established" in the First and Seventh Circuits. Against this backdrop of nationwide legal uncertainty and potential criminal penalties, private citizens are indirectly deterred from using their cell phones to record the police. Those private citizens who attempt to hold police officers accountable in their own communities are without one of their best and easiest-to-use tools for oversight. Constitutional torts against individual officers are necessary because the alternatives of injunctive relief and Monell liability are much less likely to create adjudication on merits of the First Amendment right to record. Therefore, the alternatives of injunctive relief and Monell liability cannot effectively promote the development of constitutional law that is necessary to provide citizens certainty about their rights and prevent the chilling of citizen oversight of the police. In adjudicating First Amendment constitutional torts for damages, Saucier's mandatory sequencing would force the common law of the First Amendment to adapt to new media and provide citizens with firm notice regarding the legality of recording citizen-police interactions. This merits-first approach to qualified immunity offers the best route for developing the First Amendment right to record, thereby clarifying the legal landscape and removing the chilling effect created by the uncertainty surrounding two-party consent statutes.**

### General First Amendment Extensions

#### Qualified immunity used to protect First Amendment violations by government actors

**Hudson, Fall 2001**

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This piece surveys the impact that Pearson has already had on First Amendment law.

I. Impact on First Amendment Law

Judges have seized upon the enhanced flexibility to grant qualified immunity provided by Pearson v. Callahan and impacted numerous areas of First Amendment law. For example, the Tenth Circuit utilized its newfound discretion to grant qualified immunity to Park City, Utah officials who prohibited a visual artist from selling his work in public parks and streets. n34 In Christensen v. Park City Municipal Corp., n35 the court remarked, "Fortunately, very recently, while this opinion was being prepared, the Supreme Court jettisoned its prior holding that courts in qualified-immunity cases must determine whether the plaintiff's constitutional rights were violated before turning to whether the asserted right was clearly established." n36 The court went on to note that "this case is a prime example of when the discretion to avoid the first half of the Saucier two-step should be exercised." n37

A. Student Speech

Pearson's discernable impact in several areas of the law is especially apparent in student speech. This is understandable in a certain sense, as many questions in student speech remain deeply divided and controversial. n38 Consider the example of student online speech - an area fraught with uncertainty. The Second Circuit ruled that public school officials in Burlington, Connecticut were entitled to qualified immunity when they disciplined a high school student for criticizing school officials with intemperate language on the Internet. n39 "We do not reach the question whether school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary," the Second Circuit wrote. n40 "We see no need to decide this question. We agree with the district court that any First Amendment right allegedly violated here was not clearly established." n41 Other courts have questioned whether there is any clearly established law with respect to school officials' regulation of students' online speech. n42

The Ninth Circuit recently considered an interesting case involving a student who filed an Establishment Clause challenge based on a series of comments made by his Advanced Placement History teacher that allegedly showed hostility toward Christianity and religion in general. n43 In C.F. v. Capistrano Unified School District, n44 the Ninth Circuit had little trouble with moving to the "clearly established" prong in part because the case was considered unique. n45 It reasoned, "We have little trouble concluding that the law was not clearly established at the time of the events in question - there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion." n46 While many may agree with this holding, the court ultimately erred in declining to address whether the teacher's alleged hostility toward religion in class crossed the line for Establishment Clause purposes. n47 Had the court done so, it would have given better guidance to students, teachers and school administrators in an area of First Amendment law known as a culture war. n48

B. Public Employee Speech

Public employee First Amendment jurisprudence is especially susceptible to the Pearson analysis. For years, the seminal test for determining the free-speech rights of public employees was the Pickering-Connick test derived from Pickering v. Board of Education n49 and modified by Connick v. Myers. n50 Under this test, a public employee had to show that his or her speech touched on matters of public concern or public importance. n51 This threshold prong was designed to "weed out" claims that were more akin to personal grievances. n52 If employee speech touches on matters of public concern, the analysis proceeds to a balancing prong. n53 Under such balancing, the court weighs the employee's free-speech rights against the employer's efficiency interests in a disruptive-free workplace. n54

In 2006, the United States Supreme Court added another threshold inquiry in Garcetti v. Ceballos. n55 Under Garcetti, a public employee has to show that he spoke as a citizen, not as an employee. n56 In other words, he must show that his speech does not relate to his official job duties. n57 As a result of this standard, the Court ruled in the case that an assistant district attorney's internal office memorandum recommending dismissal of a criminal case was part of his official duties rather than expression he would have made as a citizen. n58

Courts struggle mightily with all three prongs of this public employee free-speech test: (1) whether an employee is speaking as an employee or a citizen ("the Garcetti" prong); (2) whether the speech touches on a matter of public concern; and (3) the balancing prong. Because of the difficulty and complexity of the test's prongs, several lower courts have used the Pearson shortcut.

For example, in Stickley v. Sutherly, n59 the Fourth Circuit determined that a police chief and town manager were entitled to qualified immunity even though they took disciplinary action against a police officer right after the officer spoke out against his demotion. n60 The Fourth Circuit analyzed this issue by stating, "Having reviewed the substantive law governing employee speech, we are persuaded that the law in this area is not "clearly established' such that a reasonable person would have known what the law necessarily required in many cases." n61 The court reasoned that the Supreme Court's public-concern test - determining whether employee speech speaks to important public issues - leads "to the conclusion that an employee's right to speech in any particular situation will often not be immediately evident." n62

The Seventh Circuit used Pearson to grant qualified immunity to prison officials who transferred an Illinois assistant deputy director after he voluntarily testified on behalf of an inmate at a Prisoner Review Board. n63 Specifically, in Mastrisciano v. Randle, n64 the assistant deputy director, Ronald Mastrisciano, testified on behalf of inmate Harry Aleman, at Aleman's parole hearing. n65 The testimony was controversial, in part, because Aleman was a defendant who had obtained an acquittal on murder charges in the early 1970's. n66 It was later determined that Aleman had bribed the trial judge. n67 The appeals court explained that "in these particular circumstances, the law at the time was not such that reasonable officials would know that transferring Matrisciano [the assistant deputy director] after his testimony before the Board was unlawful." n68 However, the Seventh Circuit has determined that retaliating against public employees after testimony in court or at other hearings constitutes unlawful retaliation. n69

The Second Circuit has relied upon Pearson to bypass the first prong of the Saucier test and, in doing so, determined that eight Connecticut state officials did not violate clearly established law when they removed the former executive director and general counsel of the State Ethics Commission for criticizing their conduct during his disciplinary hearing. n70 In Plofsky v. Giuliano, n71 the Second Circuit bluntly stated, "Here, we exercise our discretion to move immediately to the second step of the qualified immunity analysis." n72 Because of the short-circuited qualified-immunity analysis, the Second Circuit's decision fails to provide future public employee litigants with a sense of where their free-speech rights begin and end in employment retaliation cases.

C. Inmates

Perhaps because inmate litigation comprises such a sizeable portion of the dockets for federal district courts, n73 the Pearson shortcut has been embraced in these courts. Even though the Prison Litigation Reform Act n74 has made it tougher for inmates to pursue litigation, they still file a large number of lawsuits. n75 One California federal magistrate judge acknowledged this reality and stated, "And nothing we're able to do will ever stem the tide of prisoner lawsuits." n76

One way for courts to deal with the sheer mass of prisoner lawsuits is to handle as many cases in an expedited fashion. Enter Pearson v. Callahan and qualified immunity, as sometimes courts in inmate cases follow the traditional two-step Saucier procedure. n77 But the Ninth Circuit recently used Pearson and its grant of discretion to courts to give prison officials qualified immunity, even though they instituted an eighteen-month ban on visits from minors. n78 A federal district court also cited Pearson in finding that prison officials were entitled to qualified immunity when they denied a Muslim inmate prayer oils. n79 Another federal district court held that officials were entitled to qualified immunity over a Nation of Islam inmate's allegations that his constitutional and statutory rights were violated by the denial of his request for a Halal meal. n80 A federal district court in Massachusetts declined to resolve the question of which constitutional standard from the United States Supreme Court should apply in a challenge by an inmate alleging he had a First Amendment right to send e-mail to family [\*135] members. n81 Rather than resolving the question, the court conveniently relied on Pearson and found no clearly established right. n82

Another federal district court cited Pearson favorably in denying an inmate's right to receive any erotic magazine subscriptions. n83 The court purported to rely on the "clearly established" prong in awarding prison officials qualified immunity, though the court seemingly did not need to do so as it had already determined there was no underlying valid First Amendment claim. n84 In another recent decision, a federal district court in Texas dismissed a prison inmate's First Amendment retaliation claim by granting officials qualified immunity. n85 Here, the court noted the two prongs to the test for qualified immunity and maintained that, under Pearson, the court had "discretion "in deciding which of the two prongs of the qualified immunity analysis should be addressed first'" n86 The court, however, ultimately decided the case based on the "clearly established" prong. n87

As another example, a federal district court in Oregon granted qualified immunity to prison officials who censored an inmate's outgoing letters for containing racial and ethnic slurs. n88 The court reasoned that there was no clearly established right for an inmate to send letters with such hateful language. n89

Unfortunately, many people in society do not care about prisoner rights. They reason that people that violate legal norms and harm others do not deserve the various protections the Constitution provides. n90 The sheer amount of inmate litigation, however, and the fact that there appear to be so many deprivations of First Amendment rights within the prison context, should compel the courts to more clearly articulate the parameters of constitutional freedoms. n91

#### QI Standards established in Pearson allows the Courts to avoid First Amendment questions

**Hudson, Fall 2001**

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II. The Pearson Problem

The First Amendment rights of students, public employees, and prisoners are just some areas noticeably impacted by Pearson and represent only a narrow part of First Amendment jurisprudence. The Pearson decision gives judges the discretion to avoid tough constitutional questions and decide cases based on the "clearly established" prong in other situations as well. n92 One law professor has referred to the decision as an example of "procedural judicial activism." n93 As such, Pearson certainly gives judges more power to avoid deeper constitutional analysis and dismiss cases in a more expedited fashion; a reality especially problematic in the First Amendment arena.

Specifically, a serious problem could emerge if lower court judges regularly cite Pearson to avoid the Saucier two-prong approach. n94 Courts could simply avoid deciding important constitutional questions and the law could stagnate, as courts fail to explain when certain governmental conduct violates First Amendment and other constitutional rights. n95 As United States District Judge Lynn Adelman and Jon Dietrich explained:

While allowing courts to decide the "easy' question and avoid the hard one might make sense from a judicial economy standpoint, it would impede the development of constitutional law. If courts regularly decided the question of immunity before determining whether the defendant had violated a constitutional right, they would establish few such rights. n96

Other commentators agree, writing that "there is good reason to believe that courts will generally elect to decide qualified-immunity cases solely on the basis of the "clearly established' prong wherever possible." n97

This caveat applies with great force in the First Amendment context where there are so many difficult, complex and unsettled areas of law. These include:

. When does speech cross the line from protected speech into an unprotected true threat? n98

. When does profane speech directed at another person constitute "fighting words"? n99

. When can school officials punish students for off-campus speech by reasoning that such speech might cause a substantial disruption? n100

. When can school officials punish students for pro-gay and anti-gay themes? n101

. When does a student's insulting speech to a teacher constitute a threat or "fighting words"? n102

. Whether funeral protest statutes limiting the time and distance at which protests can take place are constitutional? n103

. Whether speech is classified as political speech or commercial speech? n104

Conclusion

The potential remains that federal judges will decide at least some First Amendment cases on qualified immunity grounds by deciding simply whether the right was clearly established and not address the merits of whether certain government conduct violates the First Amendment in the first place. As Professor Michael Wells stated, "First Amendment values and constitutional values in general would be better served by an approach that obliges courts to decide constitutional questions." n105 Many courts could avoid deciding important questions of constitutional law and simply hold, "The right was not clearly established." This could hinder the development of First Amendment law and deprive litigants of proper redress. n106 Hopefully, federal judges will take heed of Justice Alito's recognition that the Saucier approach "is often beneficial" n107 and "promotes the development of constitutional precedent." n108

### Injunction Relief Doesn’t Solve

#### Injunctive relief suits are not an effective way to challenge qualified immunity in recordings cases

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 280

Section 1983 suits for injunctive relief are less likely than suits for money damages to develop the First Amendment right to record because permanent injunctions require the plaintiff to prove an "irreparable injury," i.e., one that a court cannot remedy with "monetary damages." n213 In addition to this difficulty in proving injury, citizen recorder plaintiffs in suits for injunctive relief may lack the redressability sufficient for Article III standing. n214 In right-to-record suits for injunctive relief, a plaintiff would seek an injunction against the enforcement of two-party consent statutes or a declaration that state wiretapping statutes do not apply to recordings of police officers made in public. A declaration or injunction would provide a citizen plaintiff forward-looking relief by removing the threat of future prosecution and the chilling effect on protected speech.

The requirement that a plaintiff assert an "irreparable injury" that "monetary damages" cannot remedy stifles § 1983 actions for forward-looking injunctive relief as a tool for constitutional development. n215 Injury-in-fact analysis is grounded in the harm-based model created in FCC v. Sanders Bros. Radio Station n216 and Data Processing Services Organizations v. Camp n217 that explicitly disavowed the prior personal rights model. n218 After Sanders Bros. and Camp, a plaintiff need not assert the violation of a legal right to demonstrate injury-in fact sufficient for Article III standing. As applied to right-to-record cases, citizen recorders who the police arrest suffer factual harm to their interest in videotaping even if the Constitution does not clearly enshrine that interest in a personal right. Thus, § 1983 plaintiffs seeking backward-looking relief to compensate them for a prior arrest can easily allege factual harm sufficient for injury-in-fact and Article III standing.

However, injury-in-fact is more difficult to prove for § 1983 plaintiffs seeking forward-looking injunctive relief because it is less clear that they have suffered factual injury to an interest in videotaping. Alvarez demonstrates the upside of a § 1983 action for forward-looking injunctive relief, but the unique fact that the Cook County District Attorney threatened the ACLU with prosecution under the Illinois Eavesdropping Act is what injured the ACLU's interest in videotaping and therefore provided it standing to bring a pre-enforcement challenge to the statute. n219 The District Court described the injury on remand, stating, "in the last two years, the Cook County State's Attorney's Office has prosecuted at least three civilians under the Illinois Eavesdropping Act ... who recorded on-duty police officers." n220 While police officers are arresting citizen recorders nationwide, suits for injunctive relief will only secure injury-in-fact and therefore standing where the plaintiff can prove a credible threat of future prosecution. n221 The ACLU of Illinois was fortunate insofar as its defendant in Alvarez has brought prior wiretapping prosecutions. n222

A novel theory of informational injury-in-fact under Federal Election Commission v. Akins n223 would similarly fail to secure Article III standing to seek injunctive relief against two-party consent statutes. In Akins, the Court held that Congress could give plaintiffs a right of action arising from a widely shared injury, such as the informational injury stemming from nondisclosure of donor information under the Freedom of Information Act. n224 In so holding, the Court recognized that the rule against standing for widely shared injuries was a prudential one that Congress could override with a statutory right of action. n225 The inability of citizens to access audio or audiovisual recordings of police in public may constitute a similar informational injury. However, Akins's holding is narrow because the Court referred only to information "directly related to voting." n226 The limited application of Akins beyond information related to intelligent political activity and other fundamental political rights curtails its use as a basis for injury-in-fact sufficient to seek forward-looking relief.

Furthermore, suits for injunctive relief brought in jurisdictions where citizens are arrested for catchall charges cannot allege a credible threat of future prosecution. In such a suit, a citizen recorder plaintiff would seek a permanent injunction against police harassment and intimidation. However, monetary relief is likely a sufficient remedy for a citizen who is wrongly arrested under an isolated application of a catchall criminal statute. n227 In addition, a suit seeking injunctive relief against catchall criminal charges may fail Article III's bar on generalized, hypothetical grievances. n228 By seeking forward-looking injunctive relief, these citizen recorder plaintiffs are not complaining about a specific prior application of the state wiretapping statute; they are seeking to avoid hypothetical future arrests and intimidation for catchall offenses. n229 The facts alleging such future threats are common to all citizen recorders, rendering suits seeking injunctive relief against catchall charges mere generalized grievances. As such, suits for money damages provide an easier route to adjudication on the merits of the First Amendment right to record.

Citizen recorders suing for forward-looking relief may also face redressability problems. n230 Redressability links the plaintiff's injury to the remedy sought. n231 A forward-looking remedy such as an injunction can only redress injuries that the plaintiff will suffer in the future. n232 In City of Los Angeles v. Lyons, the Court held that a plaintiff injured by a police chokehold had no standing to seek an injunction against the police department's policy allowing chokeholds because he could not credibly allege that the police would arrest him again and, even if arrested again, that the police would use the chokehold technique in the course of the future arrest. n233 In order to overcome the redressability bar to forward-looking relief, citizen recorder plaintiffs will need to plead a specific threat from law enforcement. n234 While the ACLU in Alvarez was able to do this due to the Cook County District Attorney's public threat of prosecution, n235 such a threat is unlikely to present itself in the vast majority of cases arising from citizen recording, thus limiting the ability of injunctive relief to serve as an appropriate vehicle for constitutional development. Given the problems of injury-in-fact and redressability, constitutional torts for injunctive relief are not as viable an avenue for the development of the First Amendment right to record as constitutional torts for money damages.

### Monnell Calims/City Suits Don’t Solve

#### Monnell claims/suits against cities fail to protect First Amendment claims

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 285-90

Furthermore, constitutional torts brought against municipalities under Monell cannot develop the First Amendment as well as those brought against individual officers because the difficulty of discovery in Monell cases profoundly limits its scope. Monell claims that allege policy and practice liability - such as a claim that a municipality had a policy of arresting citizens who recorded the police in public - are difficult to prove n236 and often complicate the parallel § 1983 claim against individual government officials because the municipality will vehemently object to discovery. n237 Discovery of municipal documents is critical to proving Monell liability n238 where a municipal governing body, department, or agency formally adopted or promulgated a policy statement, regulation, ordinance, or decision. n239 Municipalities almost always attempt to bifurcate the Monell claim from the claim against government officials brought pursuant to a § 1983 right of action, n240 thereby delaying and frustrating the plaintiff's ability to compile evidence in support of policy or practice liability. n241 Judges regularly grant motions to bifurcate because they recognize the extremely high burden of proof for Monell plaintiffs and do not want to confuse the § 1983 claim. n242 Absent discovery, a plaintiff most often has no route to adjudication on the merits of the Monell claim.

The municipality's obstructionism results in the settlement of many Monell claims whereby the municipality stipulates to some limited wrongdoing or, most often, none at all. n243 Settlements and stipulations stunt the development of constitutional rights in Monell suits because they do not develop any new constitutional law. n244 Settlement is antithetical to the development of the First Amendment right to record because it is a purely private outcome of civil litigation, one that serves the narrow goal of resolving disputes and does not serve a strong deterrent purpose. n245 On the contrary, suits against individual officers rarely settle because the defendants are professionally and personally motivated to contest the charges. n246 The tendency of Monell claims to settle thus makes § 1983 suits for damages against individual officers the best route to the development of the First Amendment right to record police officers in public.

Monell liability also does not provide citizen recorders a remedy for arrests based on catchall charges because such arrests are made in an ad hoc, fact-bound manner. A city may be able to immunize itself from Monell liability by simply creating a monitoring system for catchall arrests, but officers can nonetheless intimidate citizens by enforcing unspoken rules and enacting their own subjective form of street justice. Even a large number of such arrests by individual officers will likely be untraceable to the municipality.

Such instability creates an opening for a qualified immunity doctrine that is tailored to the First Amendment. Requiring Saucier's merits-first adjudication in First Amendment cases would address the concern that repeated immunity findings might leave citizens in the "limbo" contemplated by Camreta**. Without clear notice about their First Amendment rights, citizen recorders will stop recording due to fear of harassment, arrest, wiretapping charges, or catchall charges. Since wiretapping is a felony in certain states, some two-party consent state wiretapping statutes give prosecutors the tools to seek up to five years in** **prison for citizens who record police officers in public. n264 Even if prosecutors ultimately drop the charges, public arrests for recording embarrass citizens in the full view of their community members and thereby deter citizen recording. Because the specter of criminal charges presently deters citizens from recording the police, it is possible that citizens are chilled from engaging in conduct that is protected by the First Amendment.**

In addition to chilling protected speech, judges that continue to practice constitutional avoidance risk ossifying First Amendment doctrine in their respective Circuits. The Third Circuit police recording case, Kelly v. Borough of Carlisle, explained that "it would be unfaithful to Pearson if we were to require district courts to engage in 'an essentially academic exercise' by first analyzing the purported constitutional violation in a certain category of cases." n265 Ironically, the Third Circuit here viewed Pearson as a rigid rule and not an invitation for it to exercise its own discretion. This preference for constitutional avoidance allows the First Amendment to stagnate and become essentially backward-looking. Saucier's merits-first adjudication is preferable in First Amendment cases precisely because courts must extrapolate enduring First Amendment principles to the new medium of citizen recording.

First Amendment claims concerning the chilling of protected speech are a sui generis form of § 1983 litigation where the lower federal courts ought to have less discretion to entirely avoid reaching the merits. Pearson's conclusion, affirmed in Camreta, that a merits-first approach can develop constitutional precedent is manifestly applicable to cases where the direct impact of unclear precedent is the chilling of protected speech. **A chilling effect is such a strong constitutional concern under the First Amendment that it ought to rebut the presumption of Pearson discretion in favor of Saucier's mandatory sequencing.**

Pearson recited nine arguments against Saucier's mandatory sequencing, six of which counsel against courts ever deciding the merits before the "clearly established" prong. n266 For example, Pearson cited the avoidance canon and the concern over advisory opinions. n267 The current chilling effect wrought by two- [\*287] party consent wiretapping statutes powerfully rebuts the avoidance rationale. It is impossible to avoid the merits because the First Amendment right to record police in public is likely to continue developing via common law adjudication in which merits rulings will be the primary vehicle for the right to become "clearly established" in the Circuits nationwide.

Even assuming that the principles of constitutional avoidance and judicial economy should guide a court's discretion under Pearson, addressing the merits would resolve a recurrent constitutional question and avoid much future constitutional litigation. Continued immunity-first sequencing is likely to spawn myriad suits seeking injunctive and declaratory relief against two-party consent statutes. n268 Answering the merits question would foster the development of the First Amendment right to record police officers in public and thereby create governing standards that will resolve numerous future cases.

Lower federal courts hearing First Amendment constitutional torts should also relax the norm against advisory merits rulings in right-to-record cases. The norm is already flexible, as evidenced by "such well-established practices as the inclusion in opinions of alternative holdings, the resolution of the merits in harmless error cases, and the flexible mootness doctrine which allows courts to decide moot cases that are 'capable of repetition yet evading review.'" n269 Judge Pierre Leval distinguishes these necessary advisory circumstances from unnecessary merits rulings in qualified immunity cases, arguing that the latter cases confuse dicta and precedent. n270 Camreta addressed just such confusion, holding that the Supreme Court may review an advisory merits ruling when petitioned by the government defendant that won the lawsuit below because the merits were not "clearly established" in the Circuit. n271 Camreta thus recognizes that there is some doctrinal force and prejudice to a party facing an adverse, advisory merits ruling. n272 The functionally precedential character of such advisory rulings on the merits countenances judges to relax the norm against dicta in order to promote constitutional development.

[\*288] Pearson also criticized Saucier's mandatory sequencing in cases where the merits determination is tied to an uncertain issue of state law. n273 In such cases, federal courts often abstain from resolving federal constitutional questions that might turn on state law grounds under the doctrine of Pullman abstention. n274 Pullman abstention is one way in which courts avoid constitutional issues outside of a straightforward avoidance canon. There are a number of uncertain issues of state law in right-to-record cases, such as: (1) whether two-party consent state wiretapping statutes apply to citizen recordings of the police in public, (2) whether the statutes apply only to secret recordings, and (3) whether a party can give constructive consent to the recordings.

Resolving these uncertain state law issues, albeit important, likely will not assist courts in determining the federal constitutional question. Even if state courts clarified the application of state wiretapping statutes, police officers could continue to arrest citizen recorders for catchall criminal charges such as disturbing the peace, disorderly conduct, etc. Pullman abstention in cases where a citizen recorder was arrested for a catchall offense is similarly fruitless because the state criminal statutes governing catchall charges likely have well-settled interpretations under state law that are entirely independent of state wiretapping statutes. In general, constitutional tort litigation brought in response to arrests for catchall charges is likely to be fruitless for developing the First Amendment right to record police because a plaintiff will have difficulty pleading a First Amendment violation. **Unlike arrests for wiretapping, police can point to citizen conduct outside the scope of protected speech as the basis for catchall criminal offense arrests. Until circuit courts give the federal constitutional question more clarity, § 1983 actions challenging catchall arrests will have little traction.**

Furthermore, constitutional tort plaintiffs in right-to-record cases are unlikely to plead the pendant state law claim that is a requirement for federal courts to abstain under Pullman. n275 For example, a constitutional tort plaintiff could plead simple assault or false arrest but would not do so because these claims do not accrue additional damages beyond those available in § 1983 actions. n276 [\*289] Plaintiffs are thus strategically incentivized to plead only their federal civil rights claim. It is also clear that two-party consent states have already settled on an interpretation of those statutes that criminalizes citizen recording of officers absent express consent by the officer, thereby rendering abstention unnecessary. n277

Pullman abstention is also inappropriate in First Amendment constitutional torts because, "to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." n278 Protracted state court litigation surrounding the applicability of two-party consent statutes would fail to remove the threat of prosecution that deters citizen recorders. Only a full articulation of the merits of the First Amendment right to record under Saucier's mandatory sequencing can provide such clarity.

Pearson also argues that Saucier improvidently required courts to reach the merits in fact-bound cases that would be of little precedential value. n279 All of the current constitutional tort cases in the right-to-record area involve similar facts: citizens arrested for wiretapping or catchall criminal offenses based on their act of recording police officers while located in a public place where they had a right to be and where they did not physically or verbally interfere with a police investigation. These facts are likely to repeat themselves and generate continuing constitutional controversy because "copwatch" groups nationwide currently record police actions as a means of community police oversight. n280

At least thirty-five major American cities or counties have created civilian review boards that allow community members to directly oversee, monitor, and account for the conduct of police officers. n281 While not all of these groups will record police, they represent the growing portion of private citizens who have recently become involved in police oversight. Modern recording technology like cell phone cameras are ubiquitous and provide citizens with an oversight tool that they can reasonably and practicably use to hold governmental actors accountable. It is inevitable that citizens involved in police oversight will continue [\*290] to record officers in two-party consent states and thus generate factually similar cases. Any concrete discussion of the First Amendment merits would provide notice and guidance to oversight groups about their rights during their encounters with the police in public. Even a discussion of the First Amendment interests in dicta would begin to develop a common law consensus around the presence or absence of a First Amendment right to record police officers in Circuits other than the First and Seventh.

Pearson lastly criticized the Saucier mandatory sequencing because the motion to dismiss stage involves a cursory factual record on which to reach the merits. n282 This concern is not present in most constitutional torts regarding the right to record police officers in public because they involve simple factual allegations, not less common situations such as where a citizen recorder is interfering with a police officer. The factual record need not be fully developed to decide whether citizens in two-party consent states ever, under any circumstances, have the right to openly make an audio or audiovisual recording of the police in public. Right-to-record cases therefore offer a relatively pure question of First Amendment law that courts should be equipped to resolve on the basis of the bare factual allegations contained in a complaint.

Furthermore, a specific qualified immunity analysis for First Amendment cases where chilling is a concern cannot eschew the traditional trans-substantive character of qualified immunity doctrine. n283 Trans-substantivity, as Professor Richard Fallon observes, makes qualified immunity doctrine "a poor tool for attempting to achieve an equilibration of the values underlying particular rights and the social costs of enforcing them." n284 However, "despite its trans-substantivity, official immunity doctrine is not, of course, wholly inflexible." n285 A rights-specific qualified immunity analysis that puts the First Amendment merits first is simply a procedural return to Saucier; it does not make it more or less difficult for officers to win a qualified immunity defense when their conduct allegedly violates the First Amendment as opposed to other federal rights.

## Gay Rights Advantage

#### Since gay rights in particular instances are not clearly established by many courts, qualified immunity limits the ability of plaintiffs to recover for rights violations

Robin B. Wagner, J.D. Candidate Spring 2014, Are gay rights clearly established? The problems with the qualified immunity doctrine, Depaul Law Review, Spring, <http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1029&context=law-review>, p. 870-1

Part II of this Comment provides the background for these three cases and suggests how the courts diverged in their reasoning. n11 Part III examines the qualified immunity doctrine through the lens of the constitutional rights associated with sexual orientation and demonstrates problems with the doctrine. n12 These problems hamper the courts' roles in clarifying constitutional rights and undermine the power of Supreme Court precedent that expanded the umbrella of constitutional protections. n13 **Recent developments in the qualified immunity doctrine provide broader protection for defendants (particularly federal actors), make the standard of clearly established law more elusive, and discourage courts from defining rights in a way that** [\*871**] puts government actors on notice of the existence of constitutional rights. n14 Constitutional protections for sexual minorities are a sharp lens for examining the qualified immunity doctrine because the key Supreme Court decisions eschew the standard legal formulations associated with the Equal Protection Clause and the Due Process Clause.** n15 **This characteristic allows less conscientious lower courts to skirt the key holdings or define the holdings with reference to dissenting arguments**. n16 **Part IV suggests changes that should be made to restore the purpose of qualified immunity, which protects individuals from government actors clearly violating their known rights**. n17 Currently the doctrine does not allow the courts to serve society by clarifying existing constitutional rights and interpreting those rights in light of society's evolved appreciation for human dignity. n18 II. Background In 2012, three different homosexual plaintiffs brought employment discrimination claims before three different circuits. Each reached a different outcome. Jacqueline **Gill and the Tarrant County College District settled after a Texas district court ruled that Gill had "plausibly alleged the violation of her clearly established equal-protection rights" and therefore denied qualified immunity to the defendants. n19 Sandra Ambris had her case dismissed by an Ohio district court that conflated her § 1983 equal protection claim with her employment discrimination claim under Title VII and rejected the applicability of the same Supreme Court decisions relied on by the Gill court.** n20 Lastly, Sean Lathrop and the City of St. Cloud settled after a Minnesota district court ordered more fact development regarding whether he had alleged an equal protection violation. n21

A. The Two Prongs of Qualified Immunity

The affirmative defense of qualified immunity arose in association with § 1983 claims to ensure that government officials would not be hampered by insubstantial suits. n22 This doctrine shields "government officials performing discretionary functions" from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." n23 However, in explaining the rationale that even one of the highest government officials might not receive qualified immunity, the Supreme Court has emphasized the seriousness of the need for a measured and limited immunity for government officials: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." n24 **The traditional qualified immunity analysis involves a two-part objective query: (1) whether the facts alleged establish the violation of a federal statute or constitutional right; and (2) whether the right violated was a "clearly established statutory or constitutional right[] of which a reasonable person would have known.**" n25 In Pearson v. Callahan, the Court overturned a short-lived regime initiated by Saucier v. Katz that required courts to first address whether there was a violation of a constitutional right, and only then address the second prong of whether the right was clearly established. n26 Under Pearson, courts are no longer obligated to conduct a prong-one analysis if prong two results in there being no clearly established right. n27 Therefore, § 1983 cases need not identify a constitutional right that could then become "clearly established" by virtue of a court ruling and thereby put government actors on notice regarding future behavior. n28 The Supreme Court has also recognized qualified immunity as an important protection for government officials from burdensome litigation by allowing a preliminary resolution of the question of law regarding whether the complaint alleges a violation of "clearly established law." n29 This means that the matter is typically ruled upon in summary judgment or motions to dismiss, either based on the pleadings or after narrow discovery on the immunity question alone. n30 Because the value is protecting an official from frivolous litigation, the Court has "repeatedly stressed the importance of resolving qualified immunity questions at the earliest possible stage of litigation." n31 The "clearly established" requirement in qualified immunity analysis ensures that officials were on notice that their actions could violate an individual's right. n32 Furthermore, the Court has held that a single specific warning is not necessary to establish the right clearly, and neither is a general rule from a court's decision required: "officials can still be on notice that their conduct violates established law even in novel factual circumstances." n33 There are two options for finding clearly established law in the absence of a statute or express constitutional right: "any cases of controlling authority in their jurisdiction," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." n34

B. Romer and Lawrence: The Supreme Court Precedent Establishing Gay Rights

**An essential question raised by this Comment, then, is whether it is clearly established law that a government actor has violated an individual's [\*874] constitutional rights when he discriminates against that individual on the basis of sexual orientation. Two key Supreme Court cases undergird this question. Romer v. Evans** struck down a 1992 Colorado constitutional amendment prohibiting all governmental action at any level of government designed to protect gays a**nd** lesbians. n35 The Court implicitly invoked equal protection grounds for its decision, beginning its opinion with an excerpt from Justice Harlan's dissent in Plessy v. Ferguson: "the Constitution 'neither knows nor tolerates classes among citizens.'" n36 In **Lawrence v. Texas,** the Court held that private, consensual sexual activity between adults of the same sex is protected by the Due Process Clause. n37 The defendants in Lawrence were convicted under the Texas homosexual conduct law, which criminalized oral and anal sex between two persons of the same sex. n38 The court reasoned that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." n39 Together, Romer and Lawrence stand for the constitutional holdings that whether one considers the classification of an individual as homosexual, or whether one considers that individual's private sexual activity, the government has no legitimate interest in burdening individuals merely because they are homosexual or engage in private homosexual conduct. **It is important to note that Justice Scalia's dissents in both cases have been influential in limiting the precedential value of both Romer and Lawrence**. n40 Justice Scalia criticized the Romer majority for engaging inappropriately in culture wars and argued that the challenged amendment was a legitimate, "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores" against political forces seeking to revise those mores. n41 Because at the time Romer was decided the Court had not yet struck down laws criminalizing sodomy, Justice Scalia also reasoned that laws prohibiting special protections on homosexuals were certainly constitutional if laws criminalizing homosexual conduct were. n42 Justice Scalia assailed the Lawrence opinion for failing to apply the appropriate substantive due [\*875] process analysis: "Nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'" n43 C. Three Recent Sexual Orientation Discrimination Cases, Each Applying Supreme Court Precedent Differently Justice Scalia's dissents aside, the majority opinions in Romer and Lawrence form the backbone for subsequent findings like Gill of unconstitutional discrimination on the basis of sexual orientation. n44 The Gill case involved a full-time, temporary English instructor who was told during the interview process that "instructors who successfully complete a contract teaching term and then apply for a permanent position are 'uniformly hired.'" n45 Gill was arguably quite successful; she received good feedback on her teaching in the fall and she was asked to take on teaching above her full-time load during the spring term. n46 Still, Gill's supervisor subjected her to a "lengthy diatribe about 'homosexuals' and how the Texas public views them." n47 Despite confirmation from the dean that he had not heard anything adverse about her teaching, Gill was not invited to interview for any of the seven open permanent instructor positions, even though the other six temporary instructors were interviewed and hired. n48 Under the first prong of the qualified immunity analysis, the court determined that Gill had adequately pleaded that she "received treatment different from that received by similarly-situated individuals and that the unequal treatment stemmed from discriminatory intent." n49 The court then reviewed Romer, Lawrence, and the Fifth Circuit ruling in Johnson v. Johnson, n50 and ultimately determined that "a reasonable [\*876] person in [the defendants'] position would have understood that his conduct constituted sexual-orientation discrimination in violation of the Equal Protection Clause of the Constitution." n51 In Lathrop v. City of St. Cloud, as in Gill, n52 the court began with the optional first prong of the qualified immunity analysis to evaluate whether the plaintiff had asserted a constitutional right. n53 Sean Lathrop was a highly commended officer in the St. Cloud Police Department until May 2009, when the defendants, key officials in the police department, learned that he was gay. n54 After his sexual orientation became known at work, Lathrop experienced "a 'concerted effort' to paper his file with disciplinary documents in an effort to force him to resign." n55 The court acknowledged two potential challenges to the first-prong qualified immunity analysis: that sexual orientation implicates only a rational-basis review, and that this claim lacked the comparators - individuals similarly situated to the plaintiff - typically required for finding employment discrimination. n56 It resolved the first matter by echoing Romer, holding that the "defendants have not alleged, nor does the Court find, that any legitimate governmental concerns would justify" the disparate treatment the plaintiff received because of his sexual orientation. n57 The court accepted the plaintiff's assertion that he was his own comparator: "the Department treated [him] differently after he requested to become an openly gay officer." n58 The court refused to grant the defendants qualified immunity because there were contestable issues regarding the prong-one question of whether there was a violation of the plaintiff's constitutional rights. n59 In Ambris v. City of Cleveland, an Ohio district court evaluated a harbormaster's claim of discrimination in the workplace. The court utilized a strict reading of employment discrimination under Title VII and rejected applicable circuit precedent to grant summary judgment for the defendants without evaluating the substance of the allegations. n60 The harbormaster reported her supervisor for his incessant homophobic comments and repeatedly requested to be transferred out of his department. n61 Her requests to transfer were ignored, and two months after her report she was given disciplinary notice and put on administrative leave for allegedly awarding a contract to a relative of her significant other. n62 But her disciplinary hearing did not focus on the matter of the questionable contract bid, and instead centered on her sexual orientation and inquiries about her significant other. n63 Even in the face of a Sixth Circuit case that did not apply the Title VII framework to evaluate a § 1983 claim of discrimination related to sexual orientation, n64 the Ambris court applied the Romer holding to equal protection claims in the government employment context. n65 **The Ambris court claimed that the Sixth Circuit had not provided sufficient guidance on whether equal protection claims involving sexual orientation should be analyzed under Title VII. n66 The court's emphasis on the Title VII framework, which does not apply to sexual minorities, implicitly subverted the § 1983 claim regarding equal protection. n67 Moreover, the court minimized the existing Sixth Circuit precedent that could have been applied, reasoning that one circuit court ruling was insufficient and that there was "heavily conflicting case law" within the circuit. n68 The court did not cite to any cases that held differently than the one supporting availability of equal protection for sexual minorities**. n69 III. Analysis

A. Qualified Immunity Fails as a Tool to Clarify Rights

Seventh Circuit Judge Richard Posner critiqued the qualified immunity doctrine over twenty years ago, remarking that "the easiest cases don't even arise." n70 Judge Posner's point was that if a new claim had squarely fit the exact precedent in which the law or right had been clearly established, the doctrine could not provide meaningful protection from government officials who violate an individual's rights. n71 But the Gill, Lathrop, and Ambris plaintiffs seemingly presented the easiest cases - there was clear animus in each allegation of discrimination, and clear precedent from Romer that "'a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" n72 Yet one plaintiff got her day in court, n73 a second received the opportunity to press the case that discrimination against him was indeed unconstitutional, n74 and the third did not even get an opportunity to have the substance of her issues heard. n75 **These cases illuminate problems with the qualified immunity doctrine that are gaining significance: the analysis results in a defendant-friendly environment in which it is harder to identify clearly established rights, and courts do not serve society by clarifying and defining rights so that future actors are put on notice**. Despite the stated purpose of the first prong of the qualified immunity doctrine to put government actors on notice going forward, in practice, a ruling that there is a violation of a constitutional right without a ruling that the right was clearly established does not create effective notice. n76 Pamela Karlan has associated the qualified immunity doctrine with part of the Court's trend to "undermine[] the concept of the 'private attorney general' who brings suit to vindicate both her own claims and the broader public interest." n77 A court can issue declaratory and injunctive relief altering the practice of defendants who otherwise have qualified immunity from damage claims. n78 However, without attorney's fees or even minimal damages, a plaintiff may be reluctant to appeal a prong-one decision. n79 Moreover, a defendant may appeal the prong-one holding, but only by taking on the risk that an affirmation would create circuit-wide precedent, rather than a more limited district court holding. n80 When the Court in 2009 overturned the short-lived practice of requiring a prong-one analysis before prong two, it spared the district courts from tackling unnecessary constitutional questions when a reasonable person would not have known the right was clearly established (prong two). n81 Now that courts can rely primarily on prong two, as the Ambris court did, n82 and find that even if there were a right, it was not clearly established, an appeal is even less likely. **And with fewer appeals, it is less likely that a right can be identified and established by court precedent.** The Supreme Court has acted recently to remove the "clearly established" label from a right if there is disagreement among the circuits. n83 In Ashcroft v. al-Kidd, the Court reversed the Ninth Circuit on both prongs of its qualified immunity analysis, holding that it was not a violation of the Fourth Amendment to seize an individual under a material witness warrant when the government official has no intent to use him as a witness, and that no jurisdiction had ruled in such a way to clearly establish that such an action would be unconstitutional. n84 A year later in Reichle v. Howards, the Court reversed the Tenth Circuit's denial of qualified immunity to Secret Service agents who violated [\*880] the First Amendment by arresting a suspect in retaliation for comments they heard him make against the Vice President under their protection. n85 The Court averred that qualified immunity will not be granted when the legal issue is defined at a "high level of generality." n86 Additionally, the Court held that when the impact of a new Supreme Court ruling has not yet been determined with regard to circuit-level precedent on a related question, the entire area is considered sufficiently in flux that a reasonable official should not be denied qualified immunity. n87 Scholars and commentators have reacted to these two decisions with concern that the Court is developing a new doctrine for how courts may find "clearly established law." One commentator noted that the Reichle decision may have severely narrowed "clearly established law," particularly for circuit-level precedent, because it precluded finding the law clearly established in that circuit when "it was at least arguable" that the Supreme Court ruling affected the circuit precedent on a separate, but related issue. n88 And Orin Kerr added his concern on the Reichle ruling that circuit precedent, without consensus among other circuits, may no longer be sufficient to clearly establish the law in that home circuit. n89 While a third commentator viewed this decision as a narrow ruling, he nonetheless noted that the Court did not rule on the substance of the alleged violation, but only that the average federal agent would not have found clear guidance on the law due to the differences among circuits. n90 The Reichle decision drew heavily on the Pearson v. Callahan and al-Kidd precedents to justify its focus only on the second, "clearly established" prong of qualified immunity analysis. n91 This line of cases may imply a significant change emerging to restrict the ability of lower courts to identify "clearly established" constitutional rights and [\*881] thereby deny qualified immunity. n92 Justice Kennedy's concurrence in al-Kidd suggested a new paradigm for analyzing qualified immunity that would create a different standard for finding "clearly established law" when the defendants were federal officials. n93 The Reichle Court, rather than finding immunity only for a federal agent acting in a landscape of circuit disagreement, held, perhaps more broadly, that when it is arguable but not clear that a Supreme Court ruling may affect existing circuit precedent, the government official receives qualified immunity. n94 **The Supreme Court has, in the past few years, ruled in ways that may deter courts from prospectively establishing law through a prong-one analysis and that curtail the ability of lower courts to find "clearly established law" in their own precedents that run counter to the decisions of sister circuits**. An implicit insistence seems to have emerged from these decisions that, absent a Supreme Court ruling or federal statute, only a true "consensus of persuasive authority" can define "clearly established law" for the denial of qualified immunity. **Ultimately, the current state of the qualified immunity doctrine limits the ability of an individual to bring, as a "private attorney general," a claim that would clarify the contours of clearly established rights a government official may not violate**.

B. The Clearly Established Constitutional Rights Regarding Sexual Orientation

Several key challenges arise in evaluating the constitutional guarantees associated with sexual orientation. Courts have traditionally been reluctant to address sexual orientation as a status akin to race, religion, or gender. Instead courts sometimes framed constitutional issues raised by sexual minorities in terms of homosexual acts and conduct. n95 As Pamela Karlan explained: The situation of gay people provokes an "analogical crisis" because in some ways it involves regulation of particular acts in which gay people engage, and so seems most amenable to analysis under the liberty prong of the Due Process Clause, while in other ways it involves regulation of a group of people who are defined not so much by what they do in the privacy of their bedrooms, but by who they are in the public sphere. n96 Furthermore, it is challenging to evaluate what rights exist in the rapidly changing landscape of legislation relating to sexual minorities, state and federal court decisions on specific issues like marriage and adoption, and social discourse on gay rights. Equal protection - the right associated with the Gill, Lathrop, and Ambris decisions - traditionally focuses on an individual and her immutable characteristics, such as race, gender, or national origin, although it has also been used to address the rights of individuals sharing traits detested by the majority. n97 One's conduct, by contrast, is more often associated with Due Process Clause protections of a liberty right, such as privacy, education, or child rearing. n98 Despite such distinctions, these rights and the analysis of them are often intertwined. "Gay rights cases 'just can't be steered readily onto the strict scrutiny or the rationality track,' let alone onto the due process/conduct or the equal protection/status track." n99 [\*883] In her analysis of Lawrence v. Texas shortly after it came down, Karlan closely associated the case with the Loving v. Virginia decision that struck down bans on interracial marriages, n100 explaining that both cases involved the interplay between the jurisprudence of liberty and the jurisprudence of equality. n101 Karlan argued that Lawrence crystallized a doctrine that had been evolving since Griswold v. Connecticut and Loving - that "'the substantive reach of liberty' under the Due Process Clause extends to the way individuals choose to conduct their intimate relationships." n102 Indeed, the Court in United States v. Windsor confirmed and expanded this reading when it interpreted the Lawrence holding as the constitutional protection of an individual's "moral and sexual choices." n103 Both Romer and Lawrence, according to Karlan, "undermine[] the traditional tiers of scrutiny altogether," with Romer eschewing the levels-of-scrutiny analysis for equal protection claims and Lawrence avoiding the traditional strict scrutiny threshold for due process claims. n104 While these landmark cases addressing constitutional rights for sexual minorities may not adhere to the traditional methodology for judicial analysis, it does not follow that these decisions have not clearly established the law. Conscientious and discerning courts have applied the Romer and Lawrence holdings to confirm and vindicate the rights of sexual minorities violated by government actors, n105 and yet many courts have failed sexual minorities by ignoring or misinterpreting these precedents. n106

1. The Clearly Established Law from Romer v. Evans

Despite its initial discussion of classifications, the Romer Court did not apply a typical classification assignment to sexual minorities and instead first found that the challenged amendment itself was not rational; that is to say, it bore no reasonable relationship to any legitimate government purpose. n107 The Romer Court's discussion of rational-basis review drew from some of the most deferential rational- [\*884] basis cases in the Court's history. n108 Yet, the Romer Court distinguished the challenged government action in each of these prior cases from the Colorado constitutional amendment at issue because, in each, the burden to the classification bore "a rational relationship to an independent and legitimate legislative end" and was "not drawn for the purpose of disadvantaging the group burdened by the law." n109 The Romer majority also discussed a second line of rational-basis reasoning, often referred to as "rational basis with bite," n110 that applies a slightly more probing analysis to ensure "that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." n111 Courts since Romer have wrestled with the issue of whether sexual orientation triggers a heightened scrutiny for equal protection analysis, but such efforts have either failed or found no traction with the Supreme Court. The Second Circuit's holding in Windsor, for instance, held that homosexuality was a classification like gender that required a heightened level of scrutiny; n112 however, the Supreme Court ignored this point in its Windsor decision. n113 Without linking the facts to either a rational-basis, or a rational-basis-with-bite analysis, and without addressing whether sexual orientation is the type of classification that requires a heightened level of scrutiny, the Romer Court held that "[a] State cannot so deem a class of persons a stranger to its laws," and thereby declared the amendment unconstitutional. n114 Two key post-Romer cases in the Seventh and Ninth Circuits demonstrate that discrimination on the basis of sexual orientation [\*885] would henceforth constitute a violation of equal protection under the law, and clearly established that a government official would not receive qualified immunity against such an allegation. n115 Both circuits denied qualified immunity to school officials whose actions and failures to act resulted in violations of the equal protection rights of gay and lesbian students. In Nabozny v. Podlesny, the Seventh Circuit evaluated a § 1983 claim that school officials had violated a student's rights to equal protection under the law when they acted with deliberate indifference to the years of persistent verbal and physical abuse that the student suffered at the hands of his classmates. n116 The court explained its standards in evaluating an equal protection discrimination claim: The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action... . [Discriminatory purpose] implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. n117 Nabozny involved equal protection claims on the basis of both sexual orientation and gender. The student alleged that the school administrators acted with indifference because he was gay, and that this action was substantially different from the way they would have responded to a female student reporting similar types of abuse. n118 The court found gender-based discrimination by virtue of the school's different treatment of the male student and its departure from customary policy: the school "aggressively punished male-on-female battery and harassment," but not the abuse Nabozny suffered, which included a mock rape by classmates. n119 The court believed that "a reasonable state actor would have known that his actions, viewed in the light of the law at the time, were unlawful." n120 The court acknowledged the recently published Romer decision, but because Romer was decided [after the Nabozny facts occurred, it could not be applied to a qualified immunity analysis. n121

In Flores v. Morgan Hill Unified School District, the Ninth Circuit addressed the question of equal protection rights and qualified immunity for school officials alleged to have acted with deliberate indifference to peer-on-peer harassment and bullying based on the victims' sexual orientation. n122 The court upheld the district court's denial of qualified immunity for the school official defendants because the plaintiffs "showed that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional." n123 The court noted that the Second Circuit, in addition to the Seventh Circuit in Nabozny, n124 had found deliberate indifference and improper motive in school officials who "responded to known peer harassment in a manner that is ... clearly unreasonable." n125 In denying qualified immunity to the defendants, the court framed the issue broadly: The guarantee of equal protection ... requires the defendants to enforce District policies in cases of peer harassment of homosexual and bisexual students in the same way that they enforce those policies in cases of peer harassment of heterosexual students. ... The constitutional violation lies in the discriminatory enforcement of the policies, not in the violation of the school policies themselves. n126 The Nabozny and Flores cases clearly demonstrate that post-Romer courts can find equal protection violations in the disparate treatment by government actors of homosexuals compared to similarly situated heterosexuals. 2. The Clearly Established Law from Lawrence v. Texas Lawrence, as Romer before it, departed from the standard approach of determining whether the liberty at stake was fundamental and thereby deserving of a strict scrutiny analysis, and made a "magisterial but vague" description of the liberty interest without addressing [\*887] whether to apply strict scrutiny. n127 The Court opted not to address the equal protection challenge to the statute, even though it had granted certiorari on both the Due Process Clause and Equal Protection Clause issues. n128 Nonetheless, as both Pamela Karlan and Laurence Tribe have argued, equal protection is deeply embedded in the Lawrence decision. n129 Lawrence derived its reasoning n130 from the privacy rights found in Griswold v. Connecticut, n131 Eisenstadt v. Baird, n132 Roe v. Wade, n133 and the post-Bowers decision Planned Parenthood of Southeastern Pennsylvania v. Casey. n134 But the opinion ranged beyond these cases' conceptions of liberty as "the absence of interference" by the state; n135 instead, the Court "described the liberty at issue as gay people's right to 'control their destiny,' because 'at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." n136 However, because the same decision concludes that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the personal life of the individual," n137 it can be inferred that there might be other situations in which a state could provide a legitimate interest that would justify such an intrusion. Indeed, Lawrence includes a long list of exceptions limiting the protection for individual sexual and moral choices. n138 [\*888] Both Karlan and Tribe interpret the Lawrence decision as a significant "doctrinal innovation" linking the "due process right to demand respect for conduct protected by the substantive guarantee of liberty" with "equality of treatment." n139 The Court in Lawrence identified the interrelatedness of the moral stigma attached to homosexual conduct and the ways in which laws against gay sex contributed to the social ostracization of homosexuals and burdened their rights to "equal liberty" through privacy inside the bedroom and dignity in society at large. n140 Despite the powerful statement for both due process and equality rights in Lawrence, most courts have not confirmed it as clearly established law. n141 In one of the few lower court decisions to embrace Lawrence for its full meaning, the Fifth Circuit invalidated a Texas law grounded in morality justifications. n142 Holding that Texas's ban on sex toys "impermissibly burdened the individual's substantive due process right to engage in private intimate conduct of his or her choosing," n143 the court explained that "to uphold the statute would be to ignore the holding in Lawrence and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive." n144 The Fifth Circuit, then, has unequivocally accepted the holding of Lawrence - that one's intrinsic human dignity encompasses moral and sexual choices, and that these choices are constitutionally protected.

3. Avoiding the Clearly Established Law of Romer and Lawrence

Rights related to sexual orientation provide a useful context for evaluating the doctrine of qualified immunity because of the unusual reasoning employed in Romer and Lawrence. By eschewing the standard forms of scrutiny applied in equal protection and due process considerations, these two cases, particularly Lawrence, have presented challenges to courts attempting to apply their holdings. n145 [\*889] A key challenge for courts attempting to apply the Romer and Lawrence holdings has been the influence of Justice Scalia's dissents in these cases. By invoking the culture wars in his Romer dissent and by ignoring the significant innovation in Lawrence of equating the harm to human dignity that occurs from societal homophobia with the criminalization of private, intimate relationships, n146 Justice Scalia provided strong rhetoric to undermine the majority holdings. Unscrupulous courts could dismiss Romer as merely a single round in an undecided political dispute over traditional mores, n147 and narrow Lawrence by claiming that it never explicitly characterized sodomy or anything else related to homosexual conduct as a fundamental right. n148 Moreover, Justice Scalia's dissents explicitly tie sexual conduct to the status of being a homosexual, committing the precise harm the Lawrence majority identified that came from stigmatizing individuals publically for their protected private relationships. Arthur Leonard points out that the First, Eighth, and Eleventh Circuits have applied Justice Scalia's dissents. n149 Additionally, the Sixth Circuit demonstrated the influence of Justice Scalia's dissent in a key ruling on facts similar to Romer. n150 In a challenge to a law similar to the Colorado constitutional amendment struck down in Romer banning "special protections" for sexual minorities enacted in Cincinnati, the Supreme Court remanded the case for reconsideration in light of the contemporaneous Romer decision. n151 However - in what Leonard characterized as a "willful misrepresentation of the Romer Court's handling of the Equal Protection analysis" n152 - the Sixth Circuit narrowed the Romer holding to being an objection to a generally applicable state law that interfered with local citizens' ability to create laws applicable only locally, n153 and upheld the ordinance because it was of a local rather than statewide scope. n154 When courts employ Justice Scalia's dissents to limit the Romer and Lawrence holdings, they are set on an analytical path that further undermines the majority holdings. Significantly, when Justice Scalia framed Lawrence as a ban on laws prohibiting sodomy, n155 he asserted a very specific and narrow holding that would allow lower courts to avoid a broader generalization of the holding - that it is unconstitutional for the state to regulate laws governing private sexual choices because such laws harm human dignity. n156 In Lofton v. Secretary of the Department of Children & Family Services, for instance, when the Eleventh Circuit evaluated the constitutionality of Florida's ban on allowing gays to adopt, it narrowly viewed Lawrence as prohibiting sodomy laws and not as an assertion of the fundamental right to private, intimate relationships. n157 By doing so, the court could then accept the Florida government's rationale for not allowing sexual minorities to adopt children without triggering the protection of a fundamental right and the heightened scrutiny it would require. n158 Furthermore, by adopting Justice Scalia's narrow views, Romer became irrelevant to the court's reasoning; Romer could have been used to [\*891] attack Florida's discrimination against gay people wishing to adopt as irrational animus against sexual minorities disguised as the need to protect and promote heterosexual norms. n159 Though courts have less regularly applied Lawrence than Romer, when they have done so it has been the "zone of dignity" language that indicates what kind of moral and sexual choices are not protected under Lawrence. n160 Lawrence excluded from its protection sexual choices involving minors, individuals who were coerced or injured in relationships, public conduct, and prostitution. n161 Courts have effectively applied this "zone of dignity" aspect of Lawrence to interpret the holding as an as-applied decision to distinguish it from cases involving inequities in criminal codes between same-sex and different-sex minors, prostitution and "unnatural oral carnal copulation," and even a North Carolina law banning sodomy outright - which Lawrence at least should have been seen to have facially invalidated. n162 **Regardless of the motivation, the implication for the qualified immunity doctrine is that lower courts have not always found clearly established law, even when it should be by virtue of clear Supreme Court precedent.**

C. Three Courts Tackle Similar Facts and Reach Different Results, Illustrating the Problem

Returning to the three cases of government employment discrimination introduced at the beginning of this Comment, the challenges presented by finding clearly established law become clear. Even with [\*892] Supreme Court decisions addressing the issues presented broadly, district courts can be constrained by circuit court holdings in ways that undermine the power of Romer and Lawrence. Ambris v. City of Cleveland demonstrates the misapplication of law and precedent when the court avoided addressing the plaintiff's claims that her government employers treated her differently than similarly situated heterosexual employees. n163 The court reasoned that it was bound by circuit precedent to treat the Title VII and the § 1983 claims under the same Title VII analysis. n164 However, the cases cited to support the required Title VII analysis addressed situations in which Title VII addressed the alleged harms; n165 whereas, sexual orientation discrimination is not protected under Title VII. Ambris's invocation of § 1983 was necessary because her equal protection claim could be addressed under that broader statute. n166 The court rigidly applied the precedents requiring a Title VII analysis for identical § 1983 claims even while acknowledging that the Sixth Circuit had affirmed that "a state action based on ... animus [against homosexuals] alone violates the Equal Protection Clause." n167 The court went to great lengths to address and distinguish that case in which government employment discrimination related to sexual orientation was analyzed solely under § 1983 as an equal protection claim, and found that decision lacking an express abrogation of the Title VII analytical requirement. n168 Furthermore, to address why qualified immunity was proper even if there had been a constitutional violation, the court narrowly construed Romer to distinguish it from the case at bar: "Romer is distinguishable from the facts in the present case. Romer was decided outside of an employment context. There is no mention of Title VII throughout the entire opinion ... ." n169 Such a narrow reading of Romer is highly disingenuous, given that Romer struck down a Colorado constitutional amendment in part because of the broad range of [\*893] impairments it imposed on homosexuals, specifically mentioning protections against employment discrimination. n170 Moreover, the Ambris court's analysis provides a textbook example of how a narrowed reading of a holding does injustice to the right being evaluated. n171 Rather than proceeding as the Gill court did - accepting the pleadings as sufficiently showing a constitutional violation and then analyzing whether it was clearly established law n172 - the Lathrop court found "sufficient evidence to create a genuine issue of material fact as to whether the Defendant Officers violated Plaintiff's constitutional rights." n173 The Lathrop court stopped short of finding a constitutional violation, despite employing a Romer-type analysis; however, the judge was by no means looking to diminish the allegations of discrimination. n174 But it is possible that without a controlling case in the Eighth Circuit like the Fifth Circuit's Johnson precedent - upon which Gill relied in large part to find clearly a clearly established constitutional right n175 - this district court did not feel free to judge the allegations as consistent with a constitutional violation, let alone a clearly established one. Indeed, Eighth Circuit precedent may have hampered the Lathrop judge, as that circuit court had previously relied strongly on Justice Scalia's dissents in Romer and Lawrence. n176 At the same time, the Lathrop court also demonstrated its concern for the vindication of the plaintiff's rights by circumventing the potentially fatal flaw that the plaintiff provided no comparators in an employment discrimination allegation. n177 The portion of the decision analyzing the discriminatory workplace cited no precedent for the novel [\*894] argument that the comparator was the plaintiff himself prior to when he came out at work. n178 Gill represents the strongest plaintiff outcome of these three cases, and it relied in its reasoning on Romer, Lawrence, and its circuit precedent, Johnson. It correctly applied the standard of consideration for the defense's dispositive motion: it accepted as true all well-pled and nonconclusory allegations, and construed them in the light most favorable to the plaintiff. n179 It also accepted Romer and Lawrence as controlling, both to find reasonable the plaintiff's assertion that the defendants had violated the plaintiff's constitutional right to equal protection and to find that this right was clearly established law. n180 The defendants settled the suit, rather than test the facts of the violation in court. n181 The Gill court did not look for ways to diminish the strength of the claim that there had been a violation of a clearly established right. The straightforward application of controlling authority from both the Supreme Court and the Fifth Circuit leaves the impression that the judge, a Republican appointee, n182 was likely applying the law without the influence of any personal beliefs or local societal norms on the analysis. In the Lathrop and Ambris cases, however, the judges struggled with precedent to achieve a result that seems more related to personal or societal norms than to the law. The Lathrop judge, a Democrat appointee, n183 did not find that the facts as pleaded established a constitutional violation. Nonetheless, the Lathrop judge employed the optional first prong of the qualified immunity analysis and accepted a novel employment discrimination argument to avoid finding that the plaintiff had failed to state a claim. n184 Without circuit precedent, the judge may not have been in the position to claim that sexual orientation discrimination in the context alleged was a constitutional violation, let alone a clearly established one. However, he allowed the case [\*895] to proceed so that such an assertion could be heard, as opposed to using the lack of clarity in his circuit to grant qualified immunity on the grounds that the right was not established. n185 We can infer from this case a considerable exercise of judicial discretion to at least promote the potential for a finding of a violation of a clearly established right. In Ambris a Republican appointee n186 created an outcome more favorable to the defendants than Sixth Circuit precedent would support. The judge did not distinguish the analysis of the Title VII claim from the § 1983 claim and ignored the circuit precedent allowing a § 1983 claim in the employment context to go forward despite sexual orientation not being a suspect classification. n187 The judge then narrowly construed Romer to find it unrelated to employment cases instead of giving it the breadth of impact seen in controlling circuit precedent.

D. Rational-Basis Analysis Also Weakens Qualified Immunity Doctrine

A recent alteration in the Court's treatment of rational-basis review may present even further challenges to courts evaluating a qualified immunity defense in the context of constitutional protections for sexual minorities. Since the Romer Court affirmed that rational-basis scrutiny requires a "rational relationship to a legitimate governmental purpose," n188 several decisions have emerged from the Roberts Court that have given scholars pause over whether the "legitimate government purpose" is still a steadfast requirement in rational review. n189 This development underscores the problems yet to arise for plaintiffs trying to avoid a grant of qualified immunity. According to H. Jefferson Powell, Chief Justice Roberts and Justice Scalia have articulated a new doctrine regarding the rational-basis standard: that the review is only to enforce the Constitution's provision against irrational laws, and nothing more. n190 Rather than using [\*896] rational-basis review as a tool to bridge the gap between explicit constitutional language and societal norms, or to show deference to the actions of the elected branches of government, the conservative justices are applying rational review only to prohibit law created "literally without reason." n191 The Romer decision could be particularly vulnerable to this new line of jurisprudence on rational-basis review. The Colorado amendment was struck down for being nothing more than animus - a law literally without reason. n192 However, as the discussion above has demonstrated, courts have alternatively considered Romer a rational-basis or rational-basis-with-bite decision. n193 Powell explains that the Roberts Court conservatives would not feel burdened by this line of rational-basis-with-bite cases, because the need for a normative judgment that a government had a bad, or illegitimate, reason for a law is irrelevant as long as the government has some reason - that is, any rational basis - for the law. n194 This thinking, Powell argues, is a radical departure from accepted constitutional law, to which even Justice Scalia had previously subscribed in decisions holding that the need for a rational basis "cannot be saved from constitutional challenge by a defense that relates it to an illegitimate governmental interest." n195 The perception that the Roberts Court is moving away from considering whether a law is grounded in a legitimate government purpose comes from the distinction between government actors working in a rule-bound context and acting with legitimate discretion. n196 Rather than grounding rational-basis review in an assumption or even expectation of good faith adherence to the Constitution by government actors, the Roberts Court is demonstrating that "there is no normative element to rationality." n197 The key decision in which this line of thinking debuted is Engquist v. Oregon Department of Agriculture, wherein the Court held that the class-of-one equal protection right does not apply to actions involving public employees. n198 The Court reasoned that when a government actor has clear standards for a decision, the application of equal protection under the law can be judged; however, the courts cannot easily discern equal protection in discretionary decisions that are "subjective and individualized" like a personnel action. n199 In other words, "the Constitution puts no equal protection constraint on the power of government to 'treat[] an employee differently from others for a bad reason, or for no reason at all,' at least if it does not make use of a group-based classification in doing so." n200 The logic in the Engquist decision may extend beyond governmental personnel decisions because Justice Scalia referred to the Engquist treatment of rational-basis review in District of Columbia v. Heller. n201 Enquist could be applied to anything within the domain of an official's discretion: "His liability to judicial correction if he acts on the basis of race or sex only confirms [that] there is an external rule, externally enforced, that sets an outer bound to his domain of discretion. Within that domain, equal protection is silent." n202 According to Powell, "taxpayers have no duty of good faith to maximize the government's goals, and political officials, after Engquist, apparently have no duty of good faith to make discretionary decisions conform to the Constitution's goals." n203

Here the impact on future treatment of the qualified immunity doctrine becomes clear and alarming to potential plaintiffs. Where the Constitution or a statute has not specifically enshrined an applicable prohibition or external rule - that is, when no existing suspect classification or enumerated right is implicated - the courts may in the future only evaluate a law against whether it is rational or whether it is irrational, with no consideration of whether the government purpose was legitimate or illegitimate. n204 The key to how the qualified immunity doctrine will survive this emerging approach to rational-basis review lies in the definition of discretion. In a case central to the establishment of the judge-made qualified immunity doctrine, the Court explained that the doctrine shields "government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." n205 Romer's susceptibility to being ignored may depend on whether it is viewed as more closely allied with the highly deferential rational-basis cases or with the rational-review-with-bite cases. The first element in the Romer Court's reasoning illustrated the need to demonstrate that a classification bore merely a relationship, however tenuous, to a governmental goal. n206 The Romer Court adamantly rejected laws drawing classifications that disadvantaged a group and had no "independent and legitimate legislative end." n207 A law drawn for no purpose other than to disadvantage a specific group is, and should remain to be, seen as precisely the kind of irrational law the Constitution prohibits, even under the Roberts Court's articulation of rational-basis review. By contrast, the Romer majority's second line of reasoning, "that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," n208 would become irrelevant under the Roberts Court's approach to rational-basis review and undermine its precedential value. With Windsor, Justice Kennedy may have inoculated Lawrence and, to some degree, Romer against a narrowed reading that could be abrogated by this new approach to evaluating whether a government purpose is legitimate. By claiming in Windsor that the Lawrence holding found a constitutional protection for moral and sexual choices, n209 Justice Kennnedy specifically asserted that a state does not have the power to legislate on moral grounds to limit an individual's sexual choices. This assertion may provide a broader basis for interpreting Lawrence than the common formulation that moral disapproval is not a legitimate reason for a government to burden certain private, consensual conduct. n210 The Court's emerging rational-basis doctrine may have an important impact on qualified immunity analysis. Imagine how much harder it would have been for the Gill, Lathrop, and Ambris plaintiffs to achieve a denial of qualified immunity if the courts were unable to find clear guidance in Romer or Lawrence that an individual's sexual orientation fit neatly into the suspect classification mold. Unless a court embraced Romer and Lawrence for their nontraditional approach to equal protection and due process analysis, the lowered bar of a rational-basis analysis would protect defendants and deny plaintiffs' access to the courts. Moreover, because § 1983 cases tend to involve a government official's actions, the Roberts Court's deference to an official's discretion would likely result in a stronger opportunity to receive immunity. Despite the circuits' differing interpretations of Romer and Lawrence, there are two essential constitutional guarantees found in these decisions: that an individual's inherent dignity is protected against government actions arising from nothing other than animus against a classification such as one's sexual orientation, n211 and that this dignity creates a zone of protection around the moral and sexual choices made by two consenting adults. n212 Yet, these decisions are central to a still hotly contested question: in combining equal protection and due process liberty interests, the privacy rights established nearly forty years prior in Griswold, Eisenstadt, and Roe have become entitlements for everyone, but are gay people included in "everyone"? n213 When government agents act in ways that burden the rights described in Romer and Lawrence, this hot-button question of whether gays are included in "everyone" heavily influences the outcome, even though the two decisions explain the rights clearly. Several factors contribute to this problem. First, the Romer and Lawrence methodology eschews the traditional approach to equal protection and due process analysis, and some courts have misrepresented these decisions. Second, the Supreme Court has developed an approach to rational-basis analysis that greatly broadens the appropriate discretion imbued in decisionmakers. Because of these first two conditions, the current state and possible future trends of qualified immunity analysis hampers courts' abilities to find clearly established law.

IV. Impact

In three cases of government officials denying their homosexual employees their clearly established equal protection rights, three different courts in three different circuits arrived at different conclusions regarding the availability of qualified immunity to the defendants. n214 These three cases demonstrate that the qualified immunity doctrine fails to serve its purpose of holding government officials accountable for violations of clearly established rights, but otherwise protecting them from unnecessary lawsuits that would distract them from their ministerial responsibilities. **Courts could take two actions that would better facilitate the qualified immunity doctrine's purpose. First, courts should be more conscientious about evaluating issues against the relevant precedent in a way that embraces the methodology and true holding of that precedent. And second, courts should more often take on the difficult challenge of conducting a prong-one analysis to define the right implicated in the issues of a given case.** Conscientious evaluation of presented issues against existing precedent is not inherently objective, nor should we expect that most judges can readily leave the culture wars and their personal political beliefs at the door. Nonetheless, when courts deliberately narrow and undermine a majority decision by framing that holding through the dissent, they betray the weight of the precedent and they betray the parties relying on them for predictable outcomes of law. The Eighth Circuit, for instance, hampered the ability of the Lathrop court to immediately find that a constitutional right had been violated under the prong-one analysis, because it had undermined the Lawrence holding by misinterpreting its reasoning. n215 Even if courts were to engage more conscientiously with precedent when analyzing qualified immunity defenses, the results may not always favor plaintiffs. For instance, the Roberts Court's move towards treating government employment decisions as purely discretionary without the need for a link to legitimate governmental purpose could have a negative impact on cases like Gill, Lathrop, and Ambris. Were a court to continue to interpret sexual orientation rights as tied to rational-basis scrutiny, that outcome would be nearly assured: there would no longer be a clearly established right in play. **The key to avoiding such negative outcomes for plaintiffs is for courts to employ the first prong of a qualified immunity analysis. The first prong requires the court to find a sufficient allegation that a constitutional right has been violated, n216 and if the courts conscientiously examined the Romer and Lawrence holdings in a prong-one analysis, they would see that the rights identified in those precedents do not employ the traditional levels-of-scrutiny methodology. They should appreciate that Romer holds "that a state policy that treats people adversely due to their sexual orientation requires at least some sort of non-discriminatory, non-moralistic justification in order to be found constitutional." n217 They should also accept that Lawrence provides constitutional protection for individuals' private sexual and moral choices. n218 Between these two powerful precedents, even purely discretionary actions of a government employer could not be based on discriminatory or moralistic grounds related to that person's sexual orientation. Therefore, even if rational basis included everything but the purely irrational, sexual orientation discrimination could still be unconstitutional because the Court has required that there be something more than moralistic grounds.**

Another value of the prong-one analysis is demonstrated by the Lathrop court, which faced the challenge of circuit precedent that did not easily support a finding of clearly established law. n219 By first engaging prong one, the court was able to probe the question of whether a right had been violated. n220 Even though district courts in other circuits, like Gill in the Fifth Circuit, would have readily found the violation of equal protection in the Lathrop facts, the court was able to rule that there existed a genuine issue of material fact as to whether there was a right violation. n221 The prong-one inquiry allowed the case to stay active and no doubt helped the parties reach a settlement. n222 It is tempting when reviewing how courts have misunderstood the Romer and Lawrence decisions to criticize the Supreme Court decisions for their avoidance of the traditional equal protection and due process analyses. The lack of levels-of-scrutiny language has indeed provided an excuse for the lower courts to misinterpret and misapply the holdings. It is also tempting to call on Congress to enact legislation that would include sexual orientation as a classification protected by civil rights laws like Title VII. However, enough courts have correctly understood Romer and Lawrence as clearly established constitutional protections for sexual minorities. Rather, the problem in vindicating these rights in court lies with the qualified immunity doctrine. The Supreme Court's growing mistrust of anything short of a perfect consensus among circuits could allow less conscientious courts to undermine these high-court precedents on a national level. Furthermore, because prong-one-only rulings can create opportunities for both parties to appeal, district courts may be reluctant to engage in the hard work of finding a violation when a second-prong ruling that the violation was not clearly established would more often close the dispute and avoid appeal. If more district courts engaged the law and key precedential cases directly to determine if a violation of a right had been alleged, the qualified immunity doctrine could still serve our society by holding officials accountable when they have indeed violated an individual's clearly established right.

V. Conclusion

Oliver Wendell Holmes called the law a body of "systematized prediction." n223 For parties to have an ability to predict how the law will treat their claims once a right is established through federal legislation or Supreme Court precedent, the federal courts should be able to evaluate the same facts in the same way regarding the elements of that right. **Qualified immunity doctrine already applies this predictability strongly in favor of a government defendant by requiring that he be granted immunity against damages unless it can be shown that he violated a plaintiff's clearly established constitutional right. Even when the right involves a topic caught up in the cultural wars, if the facts are close enough to the defined law, the results should be predictable. Therefore, when three cases on facts that easily sufficed for allegations of equal protection violations came before three courts in three different circuits in the same year and resulted in three different outcomes, it is clear that there is a problem with the qualified immunity doctrine. Under the Roberts Court, the qualified immunity doctrine has become more generous to defendants with an increasing requirement for circuit unanimity and an emerging approach to rational-basis review that protects decisionmakers' discretion. The problems arising in qualified immunity doctrine are particularly apparent when evaluating constitutional rights related to sexual orientation, because the key Supreme Court cases did not rely wholly on the established methodologies for equal protection and due process analysis. In the hands of judges who unconscientiously apply precedent or wish to avoid hot-button social policy topics, the qualified immunity doctrine can prevent plaintiffs from vindicating their rights and further weaken the "private attorney general" approach to rights claims. During the civil rights era, the courts played a leading role in recognizing and expanding civil rights for people of color. In this era of gay civil rights, the courts should not be the slower and less reliable vehicle for recognizing implicit rights. If courts were to more regularly apply the prong-one analysis of qualified immunity and faithfully adhere to the actual holdings of Supreme Court precedent, the law related to civil rights violations under § 1983 could provide both parties with the predictability they need and deserve from the law**.

#### Since rights for LGBT students are not clearly established, current QI standards make it difficult for them to gain redress for rights violations

Natalie Knight, Joint J.D. and M.P.P. candidate at UCLA School of Law and UCLA Luskin School of Public Affairs, 2014, Keeping the closets in our classrooms: How the qualified immunity test is failing LGBT students , <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Knight-Natalie-Student-Note-2014.pdf>, pp. 35-50

**INTRODUCTION**

**Two-thousand thirteen was a year of major victories for the** lesbian, gay, bisexual, and transgender (**LGBT) community. The United States Supreme Court struck down part of the Defense of Marriage Act,** allowing for federal recognition of same-sex marriages for the first time. n1 **California's long battle over marriage recognition was resolved in favor of same-sex couples, and legalization of same-sex marriage came to seven new states.** n2 It was also the year that finally saw a vote on the Employment Non-Discrimination Act, which passed the Senate with the support of several conservatives. **n3 Despite these victories, 2013 was also the year of *Wyatt v. Fletcher*, n4 a case that largely escaped media headlines, but will likely have profound implications for thousands of LGBT youth. n5 In *Wyatt v. Fletcher*, the Fifth Circuit held that two high school softball coaches were not liable for disclosing a teen's perceived sexual orientation to her mother. n6 *Wyatt* poses a substantial threat to adolescents in the LGBT community. Adolescence is a critical period for personal exploration during which teens need privacy**. A violation of privacy in this period could threaten a teen's sense of identity, jeopardize family relationships, and even discourage the use of important health services which can be difficult to access without a family member's knowledge. n7 **This is a period where LGBT youth may be in particular need of role models and relationships with trusted adults, such as teachers or coaches. *Wyatt* threatens these relationships by ensuring that public school officials are not responsible for protecting what may be their students' most private secrets and denying students control over when and how to disclose their identities to family members.**

Sadly, *Wyatt* is not the first case of its kind. Three years before the Supreme Court's ruling in *Lawrence v. Texas*, n8 the Third Circuit held in *Sterling v. Minersville* that a police officer violated an eighteen-year-old's constitutional right to privacy by threatening to disclose his sexual orientation to the teen's family. n9 The officer had first questioned the teen and his friend who were parked in a lot at night near a business that had recently been burglarized. n10 Though the officer did not find any indication that the teens were planning a burglary, he continued to question them since they appeared to be drinking. n11 The officer searched the car, found two condoms, and arrested the two teens. n12 At the police station, the officer lectured them about the immorality of homosexuality and threatened to tell the eighteen-year-old's grandfather that the young man was gay. n13 The teen committed suicide shortly after he was released from the police station. n14 In *Nguon v. Wolf*, a teen sued for violations of her First Amendment rights and privacy rights after a principal outed her to her mother. n15 The district court held that the student had a reasonable expectation that she would not be outed to her mother, but that the principal had not violated the student's privacy rights under the First Amendment because the principal had made the disclosure in the context of reasonable disciplinary actions. n16 The court also ruled in favor of school officials on the freedom of expression claim. n17 It reasoned that the officials disciplined *disruptive* conduct but allowed non-disruptive conduct that expressed the students' sexuality, such as holding hands with her girlfriend. n18 Thus, the student had not been singled-out for discipline on the basis of her sexuality. n19 *Wyatt* is factually similar to *Nguon*, but it is the first case in which a court granted qualified immunity to the defendant. This means that the student-plaintiff could not even proceed to trial to show that her privacy had been violated. n20 Qualified immunity protects government employees like teachers and coaches from liability even when they violate a plaintiff's constitutional rights. n21 A plaintiff can only overcome this protection by proving that the right the government official violated is "clearly established." n22 This initial hurdle deprives LGBT students of their rights by giving them the impossible task of providing a precedent which does not exist. There is no precedent specifically stating that LGBT students have a right to not be outed by school officials. There might also never be such a precedent because qualified immunity can be used to preclude a case from proceeding to trial to establish such a precedent. Thus, qualified immunity puts LGBT students in a catch-22, a paradoxical set of rules that precludes students from constitutional protection.

**This Comment will demonstrate that the qualified immunity test can be used to deprive LGBT students of their privacy by its paradox of requirements**. Part I will discuss the importance of privacy in one's sexual orientation, especially between an adolescent and her parent(s), and provide background on cases illuminating the right to privacy under the Fourteenth Amendment. Part II will provide background on the qualified immunity doctrine as it relates to privacy interests, and discuss the extent to which existing precedents may or may not protect LGBT students. Part III will show that existing precedents do not explicitly protect: 1) privacy of sexual orientation, 2) privacy in the school environment, 3) privacy of minors, and 4) privacy in the parent-child relationship. Part IV will use *Wyatt* to demonstrate how courts can exploit the qualified immunity doctrine to avoid recognizing LGBT student privacy. n23 Part V will discuss possible interventions and also address counterarguments from those who would defend the continued use of qualified immunity in this context. This Comment concludes that while LGBT students' privacy rights are jeopardized and perhaps non-existent under some judges' applications of the qualified immunity doctrine, advocates for LGBT student privacy should pursue state legislation and keep a watchful eye out for claims that may serve as test cases in more favorable circuits.

**I. ESTABLISHED LGBT STUDENT RIGHTS, THE NEED FOR PRIVACY, AND IMPORTANT PRECEDENTS**

LGBT students have been relatively successful in demonstrating a clear claim to constitutional protections under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in some contexts. n24 These rights are well-suited to addressing LGBT student needs in the realm of bullying. The First Amendment protects students' expressive behavior including how a student dresses, acts, and interacts with other students. The Equal Protection Clause ensures an evenhanded disciplinary response by school officials to that expression and to other students' responses to that expression. In combination, these rights guarantee a minimum level of protection of LGBT student conduct and prevent school administration from being complicit in the bullying of LGBT students by other students. However, these rights are not protected when the school official *is* the bully or is reckless with student privacy. By outing students, the school does not directly interfere with a student's expression on campus or at home. While outing LGBT students does entail unequal treatment, there is no way to make it equal since straight students cannot be outed. Thus, the most recognized rights of LGBT students are useful in the context of bullying by other students, but are ill-suited to defending LGBT students from unauthorized disclosure of their sexuality by school officials. This invasion of student privacy poses unique and serious dangers to LGBT students. While student-to-student bullying is abhorrent and can be both physically and psychologically destructive, it often leaves [\*39] evidence of it harms. A black eye or a defaced locker can alert supportive administrators of a need for disciplinary action. In these situations, parents may be on the frontlines of defending the student and if a lawsuit is brought at all, it will almost certainly be due to the action of a parent or other family member. n25 However, there are dangers that accompany being out to one's parents. While support for LGBT rights has grown substantially over the years, a youth's coming out or being outed to her parents can have severe consequences. Even among the "millennial" generation who are now in their twenties--who were born when the stigma of HIV was loosening its hold on the LGBT community, who could get married in at least some states before many ever seriously considered marriage, and who have watched the steady erosion of anti-LGBT laws--even the millennial generation faces serious risks in being out to their parents. n26 Among this generation there are those who are not permitted to discuss their relationships in their parents' house, who do not feel welcome in their parents' house at all since coming out, and who lose financial support from their parents as a result of coming out. n27

Sadly, other LGBT youth face even greater burdens. A survey of providers of services to homeless youth found that 30% to 40% of clients are LGBT youth. n28 Family rejection of clients' sexual orientation or gender expression was the number one contributor to LGBT youth homelessness. n29 LGBT youth who are not out to family members report that they remain closeted because their families would be unsupportive, they would get kicked out of their homes, and their family members view LGBT people as "disgusting" or "diseased." n30 These are harms that courts cannot rectify. Schools cannot rectify these harms either, but they can exacerbate them. Even when a student is outed by a teacher or other school official, it is very unlikely that a student will be able to bring a suit for the [\*40] invasion of the student's privacy without a parent's support. Thus, the courts are very unlikely to hear these cases at all. They will likely never hear the cases in which a school official's disclosure of a student's identity has caused the most damage. This may explain in part why LGBT students' rights have advanced to address bullying, but have failed to advance protections of fundamental privacy rights of one's sexual orientation. That is not to say that LGBT students' privacy claims are without precedential support. The fundamental right to privacy was first discussed in *Griswold v. Connecticut*, a case in which the U.S. Supreme Court found a state statute impermissibly interfered with the privacy in one's martial decisions by preventing the distribution of contraceptives. n31 While the majority opinion found that the right of privacy was found in the penumbras of other rights, the concurrences had a more lasting effect on subsequent fundamental privacy cases. n32 Justice Goldberg's concurrence emphasized that privacy is among the liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and are protected by the Due Process Clause of the Fourteenth Amendment. n33 Justice Harlan's concurrence noted that the Fourteenth Amendment's privacy protection "stands, in my opinion, on its own bottom" and so is not dependent on other Amendments and rights. n34 Justice Harlan even went so far as to say that he wanted to be sure judges were not "confined" and "thereby . . . restrained from introducing their own notions of constitutional right and wrong into the vague contours [of the right to privacy]." n35 Justice Harlan's concurrence supports a very flexible view of privacy that depends on judges for reasonable expansion. Subsequent justices took Justice Harlan up on his offer. In *Roe v. Wade*, the Court endorsed the Fourteenth Amendment as the appropriate source of a fundamental right to privacy and held that it protected a woman's right to an abortion. n36 Justice Kennedy also relied on the Fourteenth Amendment in his majority opinion in *Lawrence v. Texas*. n37 The case invalidated criminal sodomy laws and held that adults could not be penalized for private, consensual, same-sex sexual conduct. Although this narrow description of the holding does not apply to the outing of teens by school officials, the decision includes ample language that supports the argument that such an action would be an unconstitutional invasion of privacy. In reviewing the privacy precedents, Justice Kennedy stated that "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny." n39 Studies show that a parent's knowledge of a child's sexual orientation can certainly affect a child's destiny. n40 Justice Kennedy's majority opinion also emphasized "the respect the Constitution demands for the autonomy of the person" in "personal decisions relating to marriage, procreation, contraception, *family relationships*, child rearing, and education." n41 The unauthorized disclosure of a student's sexual orientation to her parents clearly undermines her autonomy in her family relationships.

Admittedly, Justice Kennedy specified that *Lawrence* did not involve minors, but his decision echoes Justice Harlan's expansive approach to the right to privacy protected by the Fourteenth Amendment as he concludes, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." n42 Thus, while scholars still debate whether *Lawrence* is an acknowledgment of the privacy rights of all LGBT people or much more limited to its specific facts, it contains substantial language that supports the idea that teachers and school officials may not constitutionally out LGBT students to their parents. n43

Some scholars and courts have characterized cases like *Griswold, Roe*, and *Lawrence* as protecting conduct and point to a separate line of cases to protect disclosure of information such as sexual orientation. n44 This distinction dates back to *Whalen v. Roe*, a 1977 case involving the dissemination of prescription drug information to the state government to prevent illegal drug use. n45 The Supreme Court described the privacy protected by the Fourteenth Amendment as covering two distinct interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making [\*42] certain kinds of important decisions." n46 Arguably, cases like *Griswold, Roe*, and *Lawrence* relate only to the second interest while the outing of LGBT students by teachers and school officials would relate to the first. Since *Whalen* dealt with disclosures *to* the government, the Court specifically left open the question of disclosures of information *from* the government under the Fourteenth Amendment. n47 Though the Supreme Court has said very little about the Fourteenth Amendment's protection against government disclosures of personal information, there are two federal circuit cases worth noting, both from 2000. In *Gruenke v. Seip*, the Third Circuit held that a swim coach had interfered with a student's fundamental privacy right when he forced her to take a pregnancy test. n48 The court did not discuss the privacy protections established by *Griswold* and later expanded in *Roe* and *Lawrence*. However, the court held that the coach had clearly interfered with the student's informational privacy rights and that the student's claim "[fell] squarely within the contours of the recognized right of one to be free from disclosure of personal matters" as established in *Whalen*. n49 Later that same year, the Third Circuit also decided *Sterling v. Minersville* and held that a police officer unconstitutionally violated an eighteen-year-old's privacy when the officer threatened to out the teen to his grandparent. n50 Though the case dealt with disclosure, the court relied on the *Griswold, Roe* and *Lawrence* and also the informational privacy cases. n51 Since *Sterling* was decided before *Lawrence* and there was Supreme Court precedent for the punishment of same-sex conduct under *Bowers v. Hardwick*, n52 the court had to distinguish *Bowers* in order to rule for the plaintiff. n53 It used the informational privacy cases to draw a distinction between being able to punish sexual conduct and being able to disclose (or threaten to disclose) a person's sexuality. n54 The court reasoned that even though same-sex conduct was punishable, being gay was not and concluded that the teen's "sexual orientation was an intimate aspect of his personality entitled to privacy protection [\*43] under *Whalen*." n55 Thus, while the Supreme Court has given little guidance on informational privacy, these circuit cases can be used to bolster student claims that there is a fundamental right to the privacy of their sexual orientation and gender identities.

**II. BACKGROUND ON THE QUALIFIED IMMUNITY DOCTRINE**

Student claims in this context, however, face a major complication: qualified immunity. Qualified immunity protects government employees like teachers and coaches from liability even when they violate constitutional rights, unless the plaintiff can prove that the right they have violated is clearly established. n56 Qualified immunity is intended to strike a balance between holding government officials accountable for irresponsible action and ensuring that officials are not needlessly subjected to the legal process when they act reasonably. n57 A court answers two questions to determine if a government employee is entitled to qualified immunity. n58 It first examines if the facts stated in the light most favorable to the plaintiff describe a violation of a constitutional right. n59 Second, a court determines if the right at issue was "clearly established." n60 If both conditions are met, the official is not entitled to qualified immunity and the case may proceed to trial. If the facts as described by the plaintiff do not make out a constitutional claim then the case is dismissed for failure to state a claim. If the claim involves a right that was not clearly established, the official is entitled to qualified immunity and the plaintiff is denied recovery even if her rights have been violated. The Supreme Court has in the past required that courts first address whether the facts as stated by the plaintiff describe the violation of a constitutional right before proceeding to the determination of whether that right was "clearly established." n61 Addressing the qualified immunity in this order is sometimes called "sequencing." n62 However, the Supreme Court currently allows courts to address the two questions in any order. n63 Therefore, a court may first decide that a right is not clearly established and end its inquiry there, since qualified immunity will be granted and the case concluded whether or not the alleged actions constituted a violation. The Supreme Court recently illustrated how qualified immunity shields officials from violations of student privacy in *Safford Unified School District v. Redding*. n64 In *Safford*, a thirteen-year-old student alleged a violation of her Fourth Amendment privacy rights when school officials strip-searched her to try to find painkillers. n65 The Court concluded that the strip search lacked the reasonableness that precedent required and was therefore unconstitutional. n66 However, the Court found that since judges varied greatly in their understanding of precedent on school searches, a student's right to be free from strip searches was not clearly established. n67 Thus, the case demonstrates that even where school officials take actions that some (if not most) would consider extreme and the Supreme Court agrees are unconstitutional, qualified immunity may shield school officials from liability.

**III. HOW COURTS CAN EXPLOIT QUALIFIED IMMUNITY TO AVOID RECOGNIZING LGBT STUDENT PRIVACY**

**The above cases demonstrate that there is ample precedent suggesting the Fourteenth Amendment protects a student's right to privacy of her sexual orientation and gender identity. However, qualified immunity shows that the suggestion of such a right, even in light of extreme privacy violations, may not be enough to ensure school officials are held accountable for their actions. This section will assess the extent to which existing precedents, particularly *Lawrence*, do not explicitly protect four dimensions of student privacy where a school official discloses a student's sexuality to her parent(s): 1) orientation versus activities, 2) the school context, 3) age, and 4) the parent-child relationship. These dimensions are gaps that a court may exploit to assert that a school official has not violated a "clearly established" right under the qualified immunity inquiry**.

*A. Orientation Versus Activities*

The distinction between a student's sexual orientation and sexual (or merely romantic) activity directly parallels the distinction in *Whalen* [\*45] between "disclosure of personal matters" and "interest in independence in making certain kinds of important decisions." n68 Courts might regard revealing a student's orientation as a disclosure of a personal matter and the revelation of a student's activity such as kissing or holding hands with a person of the same-sex (possibly leading to a parent's restriction of such behavior) as interfering with the student's independence in making decisions like whether to engage in this activity and with whom. The *Sterling* decision used this distinction in a pre-*Lawrence* world to uphold protection of sexual orientation, even though homosexual activity was not yet constitutionally protected. n69 At the time, the precedent required making such a distinction because same-sex activity was not only unprotected, but also punishable. Since then, *Lawrence* made it clear that at a minimum same-sex sexual activity, and arguably also sexual orientation, is protected under the Fourteenth Amendment. Despite Justice Kennedy's language emphasizing autonomy in family relationships that supports the argument that sexual orientation should also be protected, *Lawrence* dealt with the regulation of sexual activity, leaving a gap that qualified immunity can exploit. Though courts have developed separate lines of cases to deal with the separate privacy interests identified in *Whalen*, the distinction is fairly irrelevant in this context. When a teacher or school official discloses a student's orientation, he has also interfered with the student's actions because he has denied the student the choice of if or when to disclose her orientation. The disclosure could also impact how the student chooses to express her orientation through activities, such as whether or where she might engage in same-sex activities. n70 LGBT youth advocates could reasonably use cases that focus on privacy of information (like *Whalen)* as well as cases that focus on privacy of conduct (like *Griswold, Roe*, and *Lawrence)* to assert that students are entitled to privacy of both their orientation and activities that could reveal their orientation. Significantly, the Supreme Court has not clarified whether there is a difference in constitutional protection between violations of privacy related to conduct and those related to information such as gender identity or sexual orientation. n71

*B. The School Environment*

*Lawrence* says nothing about the contours of Fourteenth Amendment privacy in the school environment and the Supreme Court has generally been very deferential to school officials when deciding Fourth Amendment search and seizure cases. n72 In *Nguon v. Wolf*, a district court held that the fact that a female student publically held hands and kissed a student of the same gender at school did not negate the student's Fourth Amendment expectation of privacy with respect to her orientation at home. n73 Still, the court held that the principal's disclosure of the student's orientation did not violate her Fourth Amendment rights because the California Education Code required conversations with parents when a student is suspended, as the student in *Nguon* was for inappropriate public displays of affection. n74 Thus, while the student's orientation and the gender of the other student involved had no bearing on the suspension, the court held that the disclosure was reasonable under the Fourth Amendment in the context of the school disciplinary process. n75 The case did not address whether there was a violation of the student's fundamental privacy under the Fourteenth Amendment.

*C. Age*

As Justice Kennedy specifically noted, *Lawrence* involved adults, not minors. n76 Similarly, the outed decedent in *Sterling* was eighteen-years-old. While the Supreme Court has recognized that young people may have vulnerabilities that adults do not have, this logic does not always create higher protections for adolescents' privacy. n77 For example, lower courts have used age as a justification for reduced privacy in the informational privacy context. n78 As a factual matter, youth will often go hand-in-hand with the school context. Thus, courts may use the deference given to school officials and adolescents' need for additional protection to reinforce each other as justifications that a minor student's right to privacy is not clearly established.

*D. The Parent-Child Relationship*

The Supreme Court has long ago recognized that parents have some right to control the upbringing of their children, especially a child's education. n79 As previously explained, courts are especially unlikely to hear cases in which parents are not supportive of a child's identity or decision to bring a claim since it is only with the support of a parent or other adult that a student might seek judicial action to vindicate her rights. The Supreme Court has not discussed how the parent-child relationship impacts disclosures of sexual orientation, but it has discussed the Fourteenth Amendment privacy rights of minor children with respect to their parents when such disclosures could harm the child. n80 The Supreme Court has rejected laws requiring a female minor to notify her parents before she seeks an abortion, instead requiring that a minor is entitled to an opportunity to show that she is capable of making the decision herself or that an abortion would be in her best interests. n81 This demonstrates that while the Court has regarded the parent-child relationship as special, it also has shown some signs that the autonomy and well-being of minors can be more important than the parental relationship. However, the Court has also regarded the abortion decision as a particularly unique situation, n82 and has yet to discuss the uniqueness of coming out or being outed to one's parents. Lower courts provide limited support for privacy within the parent-child relationship. The Fourth Circuit has stated that "the Constitution does not impose a duty of parental notification before the pupil's disciplinary detainment" but the student's Fourteenth Amendment right to privacy was not at issue in that case. n83 Lower court cases that have involved the Fourteenth Amendment, and specifically informational privacy, have generally dealt with information that is disclosed to or risks disclosure to the general public, not the release of information about children to parents or between other closely related parties. n84

IV. *WYATT V. FLETCHER*: A CASE STUDY OF HOW COURTS CAN ABUSE QUALIFIED IMMUNITY

The "clearly established right" prong of qualified immunity can be used to exploit gaps in precedent thereby preventing new precedent from coming into existence that might confirm LGBT students' fundamental right to privacy in their sexual orientation and gender identity. This is true even in the school environment and even (if not especially) from their parents. When used in this way, qualified immunity guts all meaning from Justice Kennedy's optimistic assertion that, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." n85 LGBT students are instead left with an impossible set of rules that asks them to point to exceedingly specific precedent while preventing the demanded precedent from ever coming into existence, thus preserving the status quo. The Fifth Circuit's decision in *Wyatt* is a perfect example of how qualified immunity creates this catch-22 and deprives students of their ability to recover for violations of their privacy.

In *Wyatt v. Fletcher*, the Fifth Circuit held that:

there is no clearly established law holding that a *student* in a public secondary *school* has a privacy right under the Fourteenth Amendment that precludes school officials from discussing *with a parent* the student's private matters, including matters relating to [the] sexual *activity* of the student. n86

The italicized portions show how the Fifth Circuit's decision takes advantage of each of the distinctions discussed above. "Student" and "school" both emphasize the school-setting as well as the plaintiff's age. The court added that, "perhaps the most salient distinguishing factor in all [the cases the plaintiff cited as precedent] is that none occurred in a school context." n87 "With a parent," which the court italicized, emphasizes the court's incredulity that precedent protects privacy rights within the parent-child relationship. The court further added that none of the cases relied upon by the plaintiff "even touch on privacy rights between a student and a parent," n88 and also states that, "[i]t is of major significance [\*49] that neither occurred in the context of public schools' relations with their students and the students' parents." n89 The court combines the school context, age, and parent-child relationship--which as a factual matter will nearly always go together--as independent reasons that undermine the possibility that a student's right to privacy of her sexual orientation are clearly established. While the court describes the right as relating to "activity" in the statement of the holding above, it later describes the claimed right to privacy as protecting "orientation." The court again emphasizes the parent-child relationship as it states that, "even to speculate that an established right to the non-disclosure of one's sexual orientation exists does not help [the plaintiff's] case ...because such speculation does not establish specifically that school officials are barred from communicating with parents regarding minor students' behavior and welfare." n90 Thus, the court is upfront in its assertion that to deny qualified immunity in this case, there would have to be a precedent holding that a minor has a right to privacy in her sexual orientation in the school setting and that such a right prevents school officials from disclosing the student's orientation to a parent. In other words, the court demands a case that *simultaneously* covers each of the gaps in precedent noted above and at the same time concludes that *Wyatt*, a case that could become exactly such a precedent were it to overcome qualified immunity, will not proceed forward.

This is the impossible task that the *Wyatt* plaintiff faced, and it gets worse for future plaintiffs since other courts can now point to *Wyatt* as evidence that an LGBT student's right to privacy in her sexual orientation is not clearly established. Thus, even though the clearly-established-right prong was designed to ensure officials did not violate laws that a reasonable person would not be aware of, it goes much further. In this context, it operates to alert school officials to a new right: the right of school officials to out or threaten to out students without fear of personal liability. Defenders of the current qualified immunity regime will claim that *Wyatt* was an exception and point out that the plaintiffs in *Sterling* and *Nguon* were both able to overcome the qualified immunity hurdle to challenge government officials' threatened and actual disclosure of their sexual orientations. However, it is more likely that *Wyatt* is the norm and *Sterling* and *Nguon* were the exceptions. *Sterling* involved an extreme harm since the threat of disclosure led to the suicide of an eighteen-year-old. n91 While the harm suffered is not factored into the qualified [\*50] immunity test, application of the qualified immunity test involves discretion and a judge may be more willing to give the plaintiff the opportunity to bring charges when the harm is so great. Given that *Sterling* was decided before *Lawrence* and the judge had to overcome a very damaging precedent disfavoring the treatment of LGBT people, n92 it is quite possible that the judge was influenced by the tragic suicide of the teen. Because of the circumstances of the case, scholars have cast doubt on whether *Sterling* can be relied upon as precedent for the outing or threatened outing of teens. n93 Additionally, *Sterling* was not a school case and the decedent was not a minor. A police officer, not a teacher or school official, had threatened to out the teen, who was an adult in the eyes of the law. Thus, qualified immunity allows *Sterling* to be distinguished as merely demonstrating a clearly established right to privacy in a legal adult's sexual orientation in a non-school context, even if these distinctions are not actually relevant. This is exactly the approach the Fifth Circuit took to distinguish *Sterling*. n94 The plaintiff in *Nguon* was also able to clear the hurdle of qualified immunity. However, *Nguon* brought claims under the First and Fourth Amendments and under California privacy statutes, but not the Fourteenth Amendment's fundamental right to privacy. With virtually no discussion, the court held simply that, "[w]ith respect to the [qualified immunity] inquiry, the Court finds that the Complaint implicates [the student's] Constitutional rights to equal protection, freedom of expression, and privacy, that these are clearly established rights, and that there is no basis for assessing the objective reasonableness of the conduct." n95 Thus, the fact that the student brought numerous claims could have contributed to the denial of qualified immunity. For example, since equal protection is very well-established in the school context, qualified immunity with regard to the privacy violations would be useless to the official who would still have to be involved in the ongoing litigation. Even if this played no role in the court's decision, the plaintiff did not assert a Fourteenth Amendment privacy claim, only a Fourth Amendment privacy claim and a Fourteenth Amendment equal protection claim. The plaintiff chose not to appeal so *Nguon's* significance for future privacy cases is uncertain at best. n96 One important conclusion one could draw from *Sterling* and *Nguon* is that the qualified immunity inquiry greatly depends on judicial discretion. The contours of what counts as a "clearly established right" vary from circuit to circuit and are ultimately up to judges. Thus, the grant of qualified immunity in *Wyatt* is not a forgone conclusion at all. The qualified immunity inquiry does not require judges to demand as precise a precedent as was demanded in *Wyatt*. Indeed, in his dissent, Judge James Graves agreed with the district court judge who found that the coaches were not entitled to qualified immunity. n97 Judge Graves stated that while a Fifth Circuit court had "never explicitly held that a student has a right to privacy in keeping his or her sexual orientation confidential, an analysis of precedent compels the finding of such a right." n98 It is therefore fair to say that qualified immunity is not always a catch-22 for LGBT students, but it permits judges to make it one. Thus, as in many areas of the law, judges who understand LGBT issues are more likely to render LGBT-friendly decisions. The qualified immunity inquiry thus creates a catch-22 at worst and a gamble on a favorable judge at best. Surely, the privacy of LGBT students is worthy of more than a gamble.

**V. PROPOSED SOLUTIONS**

Progressive LGBT advocates are likely to want more than a judicial gamble to determine LGBT students' rights. There are several possibilities for surmounting the seemingly impossible hurdle that qualified immunity has created in this context.

*A. Reinstate Mandatory Sequencing of the Qualified Immunity Inquiry*

A possible solution would be to return to a sequenced qualified immunity inquiry which would require judges to first address whether the facts in the light most favorable to the plaintiff amount to the violation of a constitutional right. Only then could they proceed to whether the right was clearly established. As the Supreme Court has stated, "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." n99 The outing of students by public school teachers and officials will probably *never* arise in a case where qualified immunity is unavailable since all public school teachers are protected by it. By requiring courts to engage in the first part of the inquiry, courts could determine that a particular set of facts, like the outing of a student to a parent by a teacher, is unconstitutional and *then* proceed to grant qualified immunity if the court found that a reasonable teacher would not have known that such an action was unconstitutional. n100 Thus, reinstating sequencing would resolve the catch-22 while still protecting qualified immunity's purpose of ensuring that government officials are not held liable for violations they would not reasonably have known about (if outing a student is indeed such a case in the first place). After a court has determined in one suit that a teacher or school official outing a student to her parent is unconstitutional, the decision would give notice to schools such that future defendants would have an increasingly difficult time showing that despite past rulings, a right is still not clearly established. n101 Empirical evidence supports that giving courts the discretion to address only the clearly established right prong when granting qualified immunity has led courts to avoid making a determination of whether a constitutional violation may have occurred. n102 Since the Supreme Court lifted the sequencing requirement, circuit courts have avoided the constitutional inquiry and granted qualified immunity in 24.6% of claims that were ultimately dismissed either due to a grant of immunity or due to the absence of a constitutional violation, compared to only 6.2% when sequencing was required. n103 Still, mandatory sequencing has raised concerns about its potential to create bad constitutional law since it requires judges to make constitutional determinations on a limited record with potentially low-quality briefs. n104 Additionally, a unanimous Supreme Court decided to lift sequencing in part because of the substantial criticism it received from judges. n105 Thus, while sequencing may help LGBT students, numerous judges are wary of its broader consequences and a return to sequencing is not especially likely. Given this reality, advocates should focus on more promising reforms like working for the appointment of LGBT-friendly judges and advocating for statutory protections.

*B. Good Judges Write Good Decisions*

Perhaps the most obvious approach, as previously alluded to, is to appoint judges who are willing to agree with Justice Harlan and Justice Kennedy that the Fourteenth Amendment right to privacy can be periodically expanded to include new rights. Simply because courts have not yet seen a particular set of facts does not mean that an entire vulnerable population ought to be stripped of its constitutional privacy protections. However, judicial confirmations under President Obama have slowed to a crawl as Senate Republicans have shown an unprecedented willingness to obstruct new nominees. n106 The Senate's recent change in judicial confirmation rules may enable the appointment of judges that would have a favorable view of the privacy rights of LGBT students, but this change will come slowly, if at all. n107 Since judges have lifetime appointments, it would likely be a very long time before LGBT students could be assured their claims would be heard by judges with broader views of the Fourteenth Amendment's privacy protections, especially since *Wyatt* has created a precedent that at least Fifth Circuit judges will likely feel compelled to follow. Judicial nominations are very meaningful and important, but a slow route to protecting LGBT student privacy. However, another option for advocates in the interim may be to target circuits that potentially have more amenable judges, a more expansive interpretation of the Fourteenth Amendment, or a less stringent application of qualified immunity than the Fifth Circuit.

*C. Statutory Protections*

Though statues would not resolve the inadequacy of constitutional privacy protections for LGBT students that qualified immunity creates, they could provide an alternative basis for LGBT student privacy. For example, statutes are already in place in some jurisdictions that give privacy protections between minors and parents in the medical context, such that a doctor could be liable for disclosing a student's sexual orientation. n108 Statutory protections have the advantage of allowing the creation of relatively narrow laws that could protect the privacy of students' sexual orientations and gender identities without upsetting teachers' ability to discuss other matters, such as disciplinary action, with parents. n109 The creation of a statue could allow for the public, and especially school officials and LGBT advocacy groups, to weigh in on the contours of an appropriate rule. However, this may not be a perfect fix. Even well-intentioned statutes can have unintended consequences. For example, the Massachusetts Legislature passed a law that included many provisions designed to reduce bullying of LGBT students, but the law also included a provision requiring school officials to notify parents of bullying incidents which could lead to intentionally or incidentally outing students to their parents. n110 Legislation to protect LGBT students from being outed in a school environment may also be very difficult to pass. Federal legislation would depend on congressional agreement, which can be hard to attain. n111 Since the current House majority leadership vehemently fought federal recognition of same-sex marriages, there is little reason to expect LGBT-friendly legislation would be considered in the current House. State legislation will almost certainly be more difficult to pass in some states, leaving perhaps many LGBT youth without statutory privacy protections. Still, increasing support for LGBT rights suggests that some states would pass a statute, and the risks of unintended consequences seem low for a law that simply requires school officials to not out students and creates a cause of action when they do.

**CONCLUSION**

**LGBT students' privacy rights are jeopardized and perhaps unenforceable under some judges' applications of the qualified immunity doctrine. By requiring that students point to very specific precedent to show their rights are clearly established *and* preventing their claims to go forward and create such a precedent, qualified immunity presents LGBT students with an impossible task. In the long-run, judges may play a critical role in advancing a more expansive view of the Fourteenth Amendment's promise of privacy, in line with the views of the justices who helped establish the fundamental privacy right in the first place**. Until then, advocates for LGBT student privacy should pursue state legislation and keep a watchful eye out for claims that may serve as test cases in more favorable circuits.

## Juries Advantage

### QI Determinations by Judges Undermine Juries

#### Qualified immunity allows judges to dismiss cases of wrongful action against police, undermining the role of the jury. QI needs to be eliminated to protect this jury role

Philip Sheng, J.D. with Distinction, Brigham Young University, J. Reuben Clark Law School, 2012, The BYU Journal of Public Law, An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immun**ity** in Excessive Force Cases Brought Under *42 U.S.C. § 1983* http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1459&context=jpl, p. 99-103

I. Introduction

**In Graham v. Connor, the United States Supreme Court announced** for the first time **that "all claims that law enforcement officers have used excessive force ... in the course of an arrest, investigatory stop, or other "seizure' of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness' standard**." n1 In other words, "the question is whether the officers' actions [were] "objectively reasonable' in light of the facts and circumstances confronting them." n2 Application of the "objectively reasonable" standard in the context of excessive force cases ought to be rather straightforward; after all, the standard is fundamental to the American legal system. For example, in tort law, juries are routinely asked to place themselves in the shoes of medical doctors, lawyers, and other professionals in an effort to determine what conduct is objectively reasonable under a given set of facts. n3 Likewise, in criminal law, where a defendant raises self-defense in response to a charge of murder or battery, juries must determine whether the force used was objectively reasonable in response to the perceived threat. n4 **The inquiry is often fact intensive, and like all questions of fact, should be entrusted to the jury.** n5

**As this paper seeks to explain however, in excessive force cases brought under *42 U.S.C. § 1983,* n6 the role of juries has been essentially usurped by the doctrine of qualified immunity, such that judges are deciding what is reasonable and enabling law enforcement officers to escape liability through ambiguities in the law**. The Supreme Court's [\*100] attempt at harmonizing the doctrine of qualified immunity with its holding in Graham has only caused greater confusion, and **the only solution appears to be eliminating qualified immunity from excessive force cases altogether.**

II. The Doctrine of Qualified Immunity

The doctrine of qualified immunity protects government officials from civil damages under *42 U.S.C. § 1983.* Its primary purpose is to allow for the dismissal of a lawsuit at the summary judgment stage, such that government officials in the course of performing their discretionary functions are not burdened by the costs of litigation or distracted from their governmental duties. n7 The leading case is Harlow v. Fitzgerald, where the Supreme Court formulated the rule that "government officials [are entitled to qualified immunity] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." n8 What a "reasonable person would have known" is clearly a question of fact; however, **the Supreme Court has turned the entire qualified immunity analysis into a question of law - decided by judges.** n9 **The Court did this by not focusing on the "reasonable person" aspect of the rule announced in Harlow, but rather, on the "clearly established ... rights" aspect. n10 The Court instructed judges to determine whether there was a clearly established law, n11 at the time the alleged civil rights violation took place, that forbade the official's conduct. n12 If no such law existed, the official would be presumed to have acted reasonably since the conduct at issue had not been "previously identified as [being] unlawful**." n13 On the other hand, if there was a clearly established law, the official would not be entitled to qualified immunity because "a reasonably competent public official should know the law governing his conduct." n14

III. Excessive Flaws

**Harlow essentially allowed judges to determine the "objective reasonableness of an official's conduct" solely "by reference to clearly established law**." n15 According to the Court, approaching qualified immunity in this manner would allow for many lawsuits to be dismissed on summary judgment, thus avoiding the need for trial. n16 Ironically however, Harlow was not decided on summary judgment - the qualified immunity issue was remanded back to the trial court. n17 The Court reasoned, "The trial court ... is better situated to make any such further findings as may be necessary." n18 **This exposed a flaw in Harlow: If the primary purpose of qualified immunity is to allow for the dismissal of a lawsuit at the summary judgment stage, a single dispute concerning a material issue of fact will preclude summary judgment**. n19 For example, imagine a situation where a suspect is shot multiple times by a law enforcement officer during the course of an arrest. In a subsequent civil rights lawsuit, the suspect claims that he submitted to the arrest and did nothing to provoke the officer's attack. The officer however, claims that he feared for his life because the suspect reached for something in his pocket despite being told to put his hands up. In a situation such as this, where a government official is entitled to qualified immunity under one set of facts, but not the other, summary judgment would be precluded until the disputed facts are resolved by a jury. n20 Once a jury is summoned however, the purposes of qualified immunity announced in Harlow - to prevent government officials from being burdened by the costs of litigation or distracted from their governmental duties - are largely diminished, if not lost entirely. At this point, the officer would likely need to go through witness testimony and evidence production, which can be costly and time consuming. Moreover, particularly in excessive force cases, another potential problem arises.

If a jury is summoned to resolve disputed facts for the purpose of qualified immunity, the jury will also be asked, in the interest of judicial economy, to resolve facts that go towards the merits of the excessive force claim. n21 That is, whether under Graham, the officer's use of force was objectively reasonable. This places the jury in an exceptional position. On one hand, the jury is resolving facts for the judge to determine whether the force used was objectively reasonable - by reference to clearly established law - under Harlow, and on the other hand, the jury is resolving facts for itself to determine whether the force used was objectively reasonable under Graham and the Fourth Amendment. The result can be problematic. Recall the example used above where a suspect is shot multiple times during the course of an arrest. Imagine that after the facts are resolved by a jury, the judge determines that there is no clearly established law prohibiting the officer's conduct, and therefore, the officer is presumed to have acted reasonably and is entitled to qualified immunity. Imagine also however, that although there was no clearly established law, the jury found that the officer's use of force was completely unreasonable under Graham. In a situation such as this, should the officer be allowed to escape liability because there was no clearly established law, when a jury found that the amount of force used was objectively unreasonable? In other words, "can there be a reasonable use of unreasonable force?" n22

Apparently so. In fact, the example used above where a suspect is shot multiple times during the course of an arrest is taken from an actual case - Anderson v. Russell. n23 In Anderson, the suspect was walking around a shopping mall with headphones on and a portable Walkman radio tucked in his back pocket. n24 Another mall patron mistakenly believed the Walkman radio to be a handgun and notified a nearby law enforcement officer. n25 The officer observed the suspect and determined that the hard object in his back pocket (the Walkman radio) resembled the shape of a handgun. n26 Thus, the officer followed the suspect outside, drew his firearm, and instructed the suspect to get on his knees and put his hands up. n27 The suspect complied with the order, but then reached to turn off his Walkman radio whereupon the officer began firing. n28 The suspect suffered permanent injuries to his arm and leg and brought a civil rights lawsuit in the District of Maryland. n29 The facts were heavily disputed, which caused the district court to summon a jury. n30 On the excessive force claim, the jury unanimously found that the officer's use of force was unreasonable under the Fourth Amendment and rendered a verdict in favor of the suspect. n31 On the officer's claim for qualified immunity however, the judge held that the officer's use of force complied with his training, n32 and there was no clearly established law prohibiting the officer's conduct. n33 Therefore, the officer was granted qualified immunity and judgment as a matter of law, notwithstanding the jury's verdict. n34

**Allowing a judge's presumption of reasonableness - based solely on the presence or absence of clearly established law - to trump a jury's finding of unreasonableness runs counter to the "bedrock principle" that "questions of fact are best determined by a jury."** n35 **As one commentator/judge explains, "Juries are in the best position to discern the truth, having heard testimony first-hand along with all the eye-twitches, sweaty brows, pregnant pauses and other non-verbal cues that accompany it."** n36 Cases like Anderson seem to ignore this importance - but courts do not have a choice. It used to be that many circuit courts refused to follow Harlow in excessive force cases to avoid a result like Anderson. n37 For instance, in a landmark case called Saucier v. Katz, the Ninth Circuit denied a police officer's claim for qualified immunity based on the premise that the rules announced in Harlow and Graham both sought to determine the reasonableness of an officer's conduct. n38 If material facts were in dispute, the question of reasonableness should go to the jury. n39 The Ninth Circuit reasoned that "an officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the force used was necessary (establishing a Fourth Amendment violation)." n40 As convincing as this sounds, the Supreme Court reversed 9-0. n41

### Juries Advantage Solvency/Plan

#### Juries should resolve the facts and then judges should decide if the conduct is reasonable

Philip Sheng, J.D. with Distinction, Brigham Young University, J. Reuben Clark Law School, 2012, The BYU Journal of Public Law, An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immun**ity** in Excessive Force Cases Brought Under *42 U.S.C. § 1983* http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1459&context=jpl, p. 108-110

In light of the confusion after Saucier, Hope, and Brosseau, **the Court should consider reformulating the doctrine of qualified immunity**, at least in the context of excessive force cases. The Ninth Circuit's approach in Saucier was persuasive - recognizing that Harlow and Graham are substantially the same inquiry and denying qualified immunity in favor of the jury deciding the question of reasonableness. Apparently however, the Supreme Court felt that this approach did not provide law enforcement officers with sufficient protection for reasonable mistakes. One explanation could be that the Court is wary of juries having to apply a constitutional standard on a consistent basis. n82 If that is the case, the following approach could be a reasonable alternative to qualified immunity in excessive force cases.

**A better approach might be to eliminate qualified immunity altogether in excessive force cases; but rather than create a whole new test, the Court should remove the question of reasonableness from the jury and allow judges to decide whether the use of force was objectively reasonable. Under this approach, jury interaction would remain much the same, except that after all the facts are resolved, the judge would decide the ultimate constitutional question of reasonableness based on the jury's findings**. **While this would be a departure from settled practice, it appears to have an adequate basis in the law. For instance, trial court judges already decide the question of reasonableness on motions for summary judgment whenever facts are undisputed or viewed in the light most favorable to the plaintiff. n83 Moreover, appellate judges routinely decide the question of reasonableness every time an excessive force case goes on appeal. n84 Judges are well-equipped, yet it seems odd that the constitutional question of reasonableness only goes to the judge when facts are not in dispute, but at all other times, is entrusted to the jury. It would perhaps make better sense to have the jury resolve the facts, and have the judge decide the question of reasonableness based on those facts**.

**There are several benefits to this approach. First, it would eliminate the need for line drawing between Hope and Brosseau, and courts would not have to worry about clearly established law. Second, the Court could retreat from its "irreducibly murky" n85 distinction between Graham and Harlow. If applied judiciously, Graham alone provides law enforcement officers with adequate protection for reasonable mistakes. Third, even though they would be denied qualified immunity, law enforcement officers would benefit by having judges decide the constitutional question of reasonableness. Judges are in a better position to decide constitutional questions, having been trained in the law and having developed expertise through experience. This approach would also eliminate potential jury bias**. While jury bias can cut both ways, n86 consider the case of Jared Massey, a YouTube sensation and public hero after being Tasered by a Utah Highway Patrol officer in 2007. n87 Despite an internal investigation clearing the officer, the state settled for $ 40,000 rather than risk a jury awarding more. n88 **Fourth, the approach would serve the same purposes as qualified immunity by allowing claims to be decided early on summary judgment. If no material issues of fact remain in an excessive force case, instead of looking to see whether there is a clearly established law, the judge would simply decide the case. This would not be an unprecedented expansion of judicial power; as mentioned above, our legal system already allows judges to do this in a variety of circumstances. Lastly, the approach would keep judges honest by holding them to the Fourth Amendment standard. Granted there is still flexibility for judges to decide cases based on their own personal ideologies, but the amount of discretion is far less than what the current doctrine of qualified immunity allows. n89**

VIII. Conclusion

In conclusion, the doctrine of qualified immunity is incompatible with excessive force cases. Both qualified immunity and the Fourth Amendment constitutional standard focus on reasonableness, and the Supreme Court's attempts to distinguish the two have made qualified immunity cases near impossible to predict. Under Brosseau, a plaintiff will be hard-pressed to find case law that is materially similar in a world of "limitless factual circumstances." n90 Under Hope, law enforcement officers arguably have fair warning of everything. The difficulty is fashioning a rule that balances these two extremes, something the Supreme Court has not been able to do. Asking whether the constitutional violation is "obvious," as suggested in Brosseau, is no more helpful than asking whether the constitutional violation is clearly established. The reality that it is possible for law enforcement officers to "reasonably act unreasonably" is evidence that the doctrine of qualified immunity needs to be eliminated from excessive force cases, or the Supreme Court needs to fashion a whole new test.

## Constitutional Avoidance Advantage

### Constitutional Avoidance Links

#### Under Person v. Callahan, judges no longer have to determine if constitutional violation occurred, only if knowledge of such a constitutional violation is widespread, when deciding if a defendant is entitled to qualified immunity. Eliminating this step undermines the development of constitutional law

**Hudson, Fall 2001**

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At first glance, a search and seizure case involving informants, the consent-once-removed doctrine, n1 and other Fourth Amendment concepts would seemingly have little connection to freedom of expression. n2 Commentators have noted, however, that, despite the case's scant media coverage, n3 **the** United States **Supreme Court's 2008 decision in Pearson v. Callahan n4 has had a substantial impact on First Amendment litigation**. T**he Court's decision in Pearson dealt with qualified immunity - a doctrine that enables government officials to avoid liability if they have not violated clearly established constitutional or statutory law.** n5 The case involved criminal defendant, Afton Callahan, and his sale of methamphetamine to an informant working for a drug taskforce in Millard County, Utah. n6 The wired informant gave an arrest signal to officers in the area, who then arrested Callahan on drug charges. n7 **Callahan asserted that the officers violated his Fourth Amendment rights with their warrantless search and arrest**. n8 A trial court ruled that the officers' warrantless search was justified by exigent circumstances. n9 **The Court of Appeals for the State of Utah** reversed, **finding that the search was unconstitutional under exigent circumstance**s (which the State conceded) or the inevitable discovery rule. n10 **Callahan then filed a constitutional tort claim in federal court** under *42 U.S.C. § 1983,* n11 asserting a violation of his Fourth Amendment rights. n12 The federal district court granted the state officials qualified immunity, finding that a reasonable officer may have believed that the consent-once-removed doctrine could apply when Callahan gave consent to the informant to come into his home. n13 On appeal, the Tenth Circuit reversed, finding that the officers were not entitled to qualified immunity. n14 The court reasoned that the officers knew or should have known that their conduct was unlawful because they knew they did not have a warrant and knew that Callahan did not consent to the police entering his home. n15 The United States Supreme Court unanimously reversed, writing that "when the entry at issue here occurred in 2002, the "consent-once-removed' doctrine had gained acceptance in the lower courts." n16 But the Court did something much more important than rule that the officers were entitled to qualified immunity in the specific civil rights [\*127] case of Alton Callahan. **The Court ruled that lower court judges could decide qualified-immunity questions by avoiding the often difficult issue of whether there was a constitutional violation and proceed directly to the inquiry of whether such a right was clearly established**. n17 **Previously, in Saucier v. Katz, n18 the Court had determined that the initial questions to be addressed in a qualified-immunity case were (1) whether there was a violation of a constitutional right and (2) whether that right was clearly established at the time of defendants' conduct.** n19 Some Justices, however, criticized the Saucier approach. Justice Stephen Breyer referred to it as the "failed Saucier experiment." n20 The problem with the "rigid order of battle" n21 mandated by Saucier was that the first question - whether there has been a constitutional violation - is often a much more difficult question to resolve than the second question of whether the law was clearly established. n22 **In Pearson**, Justice Samuel Alito, Jr. explained that before Saucier, judges had the option of whether to apply the steps sequentially or to proceed directly to the clearly established prong. n23 **Justice Alito** then explained that the experience with Saucier showed that it was too inflexible and should be abandoned in favor of giving the judges needed discretion. n24 **He stated: "On reconsidering the procedure required in Saucier, we conclude that while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory." n25** Justice Alito quoted one complaint which regarded Saucier as a ""puzzling misadventure in constitutional dictum.'" n26 He also cited numerous colleagues on the Court who questioned the mandatory sequence of Saucier. n27 **However, Justice Alito wrote that, even though no longer mandatory, the two-step protocol is "often beneficial" in part because it "promotes the development of constitutional precedent." n28 He reasoned that lower federal district and circuit court judges are in the best position to determine how to analyze qualified-immunity cases. n29 Scholars have questioned whether Pearson would impede the development of constitutional law. For example, law professor Michael Wells has stated that the decision "will make it easier for courts to decide that the law is unsettled, grant qualified immunity and not get to the merits of important constitutional questions... . Now there is always an argument against facing them." n30 Professor John Jeffries, Jr. warned that the Pearson decision, at times, could lead to the "degradation of constitutional rights." n31 As one commentator wrote, "Pearson's holding has, if anything, intensified the debate over the proper procedural framework for addressing qualified-immunity claims." n32 Other scholars have identified the "post-Pearson" period as crucial to studying the vitality of § 1983 civil rights litigation.**

#### Court has eliminated the first step – determining if it is a constitutional violation

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

The process for applying this doctrine has evolved in recent years. Under older precedent, the Court mandated a two-step sequence for qualified immunity claims.163 First, a reviewing court had to decide whether the facts alleged by the plaintiff amounted to a constitutional violation. Second, if the plaintiff made this showing, the court had to decide whether the right was “clearly established” at the time of the misconduct. The Court noted that skipping ahead to the “clearly established” prong of the test would deprive future courts of case law defining the parameters of the right in question. However, lower courts frequently criticized this “rigid order of battle” on “practical, procedural, and substantive grounds.”164 Under the older regime, lower courts were required to fully litigate the constitutional merits when in many instances it was obvious that the law relied upon was not clearly established at the time. In an effort to give courts more flexibility, in the 2009 case Pearson v. Callahan, the Court overruled its prior rule and held that lower courts “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”165 That being said, the Court noted that following the Saucier order is “often beneficial.”166

## Solvency

### Actor – Congress

#### Congress can eliminate qualified immunity through a statute

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

This doctrine has frequently come under attack for shielding officers from liability even when they have engaged in unconstitutional conduct.162 In response to this concern, it should be noted that qualified immunity appears to be derived from common law, and is not constitutionally compelled. Thus, Congress can alter its contours or eliminate it altogether via statute.

### Solvency – Generally Need to Limit Qualified Immunity

#### Qualified immunity needs to be replaced with strict liability

Bernick, 2015, Evan Bernick is the Assistant Director of the Center for Judicial Engagement at the Institute for Justice, a libertarian public interest law firm, To Hold Police Accountable, Don’t Give them Immunity, <https://fee.org/articles/to-hold-police-accountable-dont-give-them-immunity/> DOA: 10-1-16

Qualified immunity shields police misconduct not only from liability but also from meaningful judicial scrutiny. Private lawsuits are an essential tool in uncovering the truth about police misconduct. The discovery process can yield information that makes broader policy changes within police departments possible. At trial, [judicial engagement](http://www.ij.org/cje) — an impartial, evidence-based determination of the constitutionality of the officer’s actions — can take place. Qualified immunity can cut this search for truth short. If qualified immunity is raised as a defense before trial and the judge denies it, that decision is immediately appealable. If it is granted, discovery stops, and there is no trial on the merits. What needs to happen? Simply put, qualified immunity has to go. It should be replaced with a rule of [strict liability](https://www.law.cornell.edu/wex/strict_liability) for bona fide constitutional violations. There are a variety of possible rules. First, police officers could be held personally liable for any rights violations. They’d need to carry personal malpractice insurance, just like lawyers, doctors, and other professionals. Insurance companies are qualified and motivated judges of risk, and they would provide another reasonable level of scrutiny on police conduct, policies, and training. Second, police departments could be held liable for any rights violations by officers and punitive damages could be assessed against individual officers for particularly outrageous conduct. Third, police departments could be required to insure officers up to a certain amount — officers would have to purchase insurance to cover any costs in excess of that amount. As ambitious as these reforms might seem, never underestimate the power of widespread public outrage. In the case of Kelo, the Court’s cavalier treatment of property rights led to a number of laws protecting citizens from eminent domain abuse in states across the country. Here, too, the public can force legislators to respond. The question of how to ensure that officers exercise the authority delegated to them with the proper vigor, while also keeping them within the limits of that authority, should be left in the first instance to elected officials — subject to constitutional limits and the requirements of valid federal laws (like Section 1983). Qualified immunity enables officers to flout those limits and those laws. We must replace the judicially-invented impunity that police officers currently enjoy with a realistic avenue for the vindication of constitutional rights

#### Plan – don’t allow qualified immunity when officers violate departmental policy

Jason Lee Storts, August 27, 2015, The Atlantic, When Should Cops be able to use deadly force? http://www.theatlantic.com/politics/archive/2015/08/use-of-deadly-force-police/402181/

Legislatures could partially address that problem by establishing that officers will not be granted qualified immunity in wrongful-death suits when their actions violate departmental training or policy. And independent bodies whose members include community representatives could be empowered to fire officers even if they have not been found criminally culpable or civilly liable.

#### Qualified immunity needs to be limited to hold police accountable in court

Write, 2015,

*Sam Wright is a dyed-in-the-wool, bleeding-heart public interest lawyer who has spent his career exclusively in nonprofits and government.* Want to Fight Policy Misconduct? Reform Qualified Immunity, http://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity/

This part of the Campaign Zero platform [breaks down into four umbrella requests](http://www.joincampaignzero.org/solutions/#solutionsoverview):

1. Community Oversight — Campaign Zero proposes to increase community oversight of the police by establishing more effective structures for civilian oversight and removing barriers to reporting police misconduct.
2. Independent Investigation and Prosecution — Campaign Zero wants to make police oversight more independent by [lowering the standard of proof for federal civil rights investigations of police](http://www.theatlantic.com/politics/archive/2015/05/the-limits-of-police-reform/393530/), using federal funds to increase investigations of killings by police officers, establishing a permanent Special Prosecutor position in each state, and requiring independent investigations of all deaths and serious injuries caused by police.
3. Body Cameras and Filming the Police — Campaign Zero supports reforms to make it easier for civilians to obtain video evidence of encounters with police both by requiring police body cameras and by ensuring civilians can record police encounters.
4. Fair Union and Police Contracts — Campaign Zero wants to remove special procedural protections for police officers accused of misconduct, to make police disciplinary records public, and to bar police officers who have killed or severely injured civilians from going on paid leave.

I think Megan McArdle is probably right that these proposals (and the others in Campaign Zero’s broader platform) range from “worthy of consideration” to “immediate moral imperative.” But I also think the list is missing something. As usual, I’ve not buried the lede: that something is qualified immunity reform In order to truly hold police accountable for bad acts, civilians must be able to bring, and win, civil rights suits themselves — not rely on the Department of Justice, or special prosecutors, or civilian review boards to hold officers accountable. And in order to both bring and win civil rights suits, civilians need a level playing field in court. Right now, they don’t have one. Instead, police officers have recourse to the broad protections of the judicially established doctrine of qualified immunity. Under this doctrine, state actors are protected from suit even if they’ve violated the law by, say, using excessive force, or performing an unwarranted body cavity search — as long as their violation was not one of “clearly established law of which a reasonable officer would be aware.” In other words, if there’s not already a case where a court has held that an officer’s identical or near-identical conduct rose to the level of a constitutional violation, there’s a good chance that even an obviously malfeasant officer will avoid liability — will avoid*accountability*. To **bring about true accountability and change police behavior, this needs to change. And change should begin with an act of Congress rolling back qualified immunity. Removing the “clearly established” element of qualified immunity would be a good start — after all, shouldn’t it be enough to deviate from a basic standard of care, to engage in conduct that a reasonable officer would know is illegal, without having to show that that conduct’s illegality has already been clearly established in the courts? That’s just a start**. There are plenty of other reforms that could open up civil rights lawsuits and help ensure police accountability for bad conduct. Two posts ([one](http://balkin.blogspot.com/2015/10/whats-missing-in-police-reform-debate.html), [two](http://balkin.blogspot.com/2015/10/whats-missing-in-police-reform-debate_20.html)) at Balkinization by City University of New York professor Lynda Dodd provide a good overview. Campaign Zero should consider adding civil rights litigation reform to its platform, **our policymakers should consider making civil rights litigation more robust, and, if we want to see justice done, we should push to make it happen.**

### Solvency Ideas/Plans/Specific Standards

#### Need a clear QI standard

Kit Kimports, 2016, law professor, Penn State The Supreme Court’s Quiet Expansion of Qualified Immunity, Minnesota Law Review, <http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf> DOA: 10-1-16, pp. 77-8

Given the Court’s distinction between Fourth Amendment rights and remedies, ***Heien***may not signal a retreat from the precedents analogizing qualified immunity and the good-faith exception to the exclusionary rule. Nevertheless, the **Justices’ amorphous suggestion that qualified immunity is a “forgiving” rather than “demanding” standard—and the implication that public officials who make “sloppy” errors may nevertheless sat- isfy qualified immunity’s objective reasonableness inquir**y— mirror the change in the tone used to characterize the qualified immunity defense that is discussed in Part I. Justice Sotomayor, dissenting in *Heien*, criticized the majority’s insistence on leaving “undefined” the objective reasonableness standard it was endorsing in that case as well as the failure to “elaborat[e]” on the distinction between that Fourth Amendment standard and the qualified immunity inquiry, predicting that the difference “will prove murky in application.”69 **Given the Court’s tendency to qualify its precedents and thereby covertly expand the qualified immunity defense, it would not be at all surprising to find future § 1983 decisions citing *Heien* in referring to qualified immunity as a “forgiving” defense and in dismissing a government actor’s misunderstanding of constitutional doctrine as merely “sloppy” rather than “plainly incompetent**

#### Additional standards that can be used to protect plaintiffs when constitutional rights are violated

Aaron Belzer, JD Candidate, 2012, Denver University Law Review, The audacity of ignoring hope: How the existing qualified immunity analysis leads to unmediated rights, 686-9

Although the concept of qualified immunity accepts this result once in order to further articulation of the law, the idea is to make the law more clear so that an unremedied constitutional violation does not happen repeatedly. n267 The *Kerns* court is, in effect, kicking the can down the road, waiting for the next *Kerns* case to make a decision about the right at stake instead of taking the opportunity to articulate constitutional law now. And, unfortunately, while that can is being kicked down the road, those future plaintiffs suffering similar constitutional harms will be left without any avenue for recovery. That avoidance exemplifies a court willfully allowing for a violation of the exact same constitutional right to go unremedied in the future. By leaving the law unarticulated, the *Kerns* court has, with its eyes wide open, guaranteed that, at the bare minimum, one more violation of the exact same kind can occur and the plaintiff in that case too will be left with no remedy, especially because the law will not be clearly established for the purposes of qualified immunity even if the constitutional issue is decided in Kerns's favor upon remand in the district court (ahem, again). Leaving the law unarticulated means that another case with a similar constitutional violation not only has to occur but also has to reach the Tenth Circuit before the right can be articulated meaning fully. n268 And in a repeat of Kerns's case that actually makes it up to the Tenth Circuit, it would not yet have been decided by a court with sufficient authority. So, the importance that the *Kerns* court places on this right is in question and Fourth Amendment law articulation stalls, leaving unpredictable protections. This prospect is especially disheartening because *Kerns* was a prime opportunity for a federal court to articulate Fourth Amendment law in the civil context, as opposed to the typical criminal context, and to provide some balance to the articulation of Fourth Amendment law at large. Courts should not leave constitutional rights without a remedy for violations thereof. Constitutional rights are arguably of greater importance than rights deriving from other sources, as demonstrated by their having been enshrined in the country's founding document as guarantees. n269 When a violation is identified, particularly by a federal court, that court should be obligated to take it seriously and to take action to ensure that the immediate case is the only time it is heard but not remedied. By addressing the qualified immunity analysis in an order opposite the *Saucier* sequence, courts are able to recognize constitutional violations but decide the case on the clearly established prong without addressing the constitutional harm at all. This leaves the law unarticulated and unclear for the purposes of qualified immunity moving forward. Thus the right at issue does not become clearly established for subsequent cases and subsequent victims will similarly be left with no remedy for the violations of their constitutional rights. This stalling in constitutional rights articulation leaves individuals suffering constitutional harms at the hands of government actors without a corresponding remedy. The absence of remedy, in turn, defines the right, which means this cycle is self-perpetuating and leads to less protections stemming from constitutional rights.

IV. AND JUSTICE FOR ALL

When courts are faced with a "*Kerns* situation"--where a right exists and has been violated but it is clear that the harmed individual will be left without a remedy or where the law could be blackened regarding that right--there are several possible solutions. To make that determination, in line with the underlying qualified immunity rationales, the question courts should consider is the following: When the person in this case is left with no remedy, is it possible that the next person could also be left with no remedy? To address this issue, I propose the admittedly novel *Kerns* solution. In this solution, appellate courts would be required to decide the constitutional issue. Consequently, the law would be articulated to ensure that another similar harm does not take place without an available remedy for the (subsequently) harmed individual. The *Kerns* solution is similar to the mandated *Saucier* sequence, except that it would not be mandatory in all cases, only in those cases in the *Kerns* situation. The *Kerns* solution would be a balancing test outlined by factors to be weighed. One particularly strong showing on a given factor could make up for a relatively weak showing on another. The factors outlining the proposed *Kerns* solution and an obligatory decision on the constitutional question are as follows:

1. *Will the immediate plaintiff be left without a remedy for a constitutional harm?* Under this factor, the rationales underlying qualified immunity would allow for the harm to take place once without a remedy. But if the immediate plaintiff is left without a remedy, then it is likely that the next one will draw the shortest straw as well. n270

2. *Is this a harm that has the potential to be repeated?* Stated another way: if the constitutional question is left unaddressed here, would that potentially result in another individual being left with no remedy for a constitutional violation in the future? For example, if the issue were so factually anomalous that it is exceptionally unlikely the harm could repeat, this factor would not be met. But, if in the eye of the beholder there is seemingly any chance at all that the harm could repeat, then the appellate courts should be required under this proposed *Kerns* solution test to address the constitutional question for the purposes of clearly establishing the law.

3. *Is this case sufficiently developed for this court to articulate a meaningful legal principle?* Put another way, would there be a risk of making the law less clear, either as a result of failing to address the constitutional issue, as in *Kerns*, or because the factual record is insufficient to articulate a decent legal principle? This factor is designed to ensure that the facts surrounding the constitutional merits are reasonably developed so that the law that does get articulated is useful and consequential. In those cases where there is need for additional factual development, the "procedural trigger" solution, described below, should be incorporated into this step.

Another possible solution, either as a stand-alone solution or in combination with the third factor of the *Kerns* solution, is the procedural trigger solution. Under this solution, if a case needed to be remanded (a) for development of the factual record in order to articulate the legal principle correctly or (b) as in *Kerns*, on the qualified immunity prong and was ultimately decided in a lower court on the constitutional merits where the level of authority would not sufficiently establish constitutional law, it would automatically trigger a demarcated procedural kick, sending the case back up to a circuit court to affirm the ruling at the level sufficient to clearly establish the law for future cases. This solution will ensure a well-developed factual record on the constitutional issue because the case would necessarily have gone through the trial phase on that issue and the parties would be aware of the need to brief it. It would also allow a federal court--one arguably more experienced in constitutional issues--to oversee the issue and the ensuing articulation of rights. This solution would also ensure that in all cases where a constitutional right was at issue--whether a right was found to exist or not--that right would thereafter be clearly established for the purposes of a remedy being available in the future. In the interest of articulating useful constitutional principles, and for cases in which the record is truly insufficient to do so, the procedural trigger solution should be embraced within the third step of the *Kerns* solution for more in-depth factual development at the trial level. In the procedural trigger solution, those cases bearing on important constitutional issues but not developed enough to make good law would be remanded for rehearing on the constitutional merits. Such cases then would automatically be kicked back up to the circuit level for a recognition of the right, thereby establishing the law clearly at the necessary circuit level. One anticipated counterargument to the *Kerns* solution is that the record on appeal may not be factually developed enough. In those cases, the concern is that courts would be prone to getting the constitutional question wrong, articulating bad law. But this factual development concern is already extant to a lesser degree in all appellate cases. If the solution proposed here were to be adopted, the procedural trigger solution accounts for it, necessitates rehearing at trial, and accounts for clearly establishing rights at the circuit level. Diluting constitutional rights and their corresponding remedies for the sake of not re-briefing issues or remanding as part of this solution seems like a precarious ransom when constitutional rights are at stake. Another possible solution is reinstating the mandatory *Saucier* sequencing, but making one of two narrow exceptions to the Federal Rules of Civil Procedure. The first possibility is to allow for an immediate appeal (before addressing the clearly established prong) on the constitutional issue for those parties who lose on that prong. This exception would allow for the non-prevailing party to appeal the constitutional issue while maintaining the incentive for parties to litigate it before even reaching the clearly established prong. n271 Conversely, an exception could be made to allow for an interlocutory appeal after both prongs of the qualified immunity analysis have been decided for those parties who prevail only on the qualified immunity question. Finally, another solution that has been previously suggested is to "provid[e] more specific guidance to lower courts regarding when sequencing is and is not appropriate." n272 The *Kerns* solution provides just that guidance and ensures that plaintiffs suffering constitutional harms are not left without a remedy.

CONCLUSION

"Absence of a remedy is absence of a right." n273 Maintaining the integrity of constitutional rights relies on the real world vindication of those rights when a violation has occurred. When constitutional rights are at stake, courts should be careful to ensure that those rights are strengthened instead of diluted. Rights are strengthened when remedies are afforded that provide a tangible, corresponding resolution for their violation. When courts are given ineffectual guidelines about what it means for a right to be clearly established, or about when to decide the constitutional issues in a qualified immunity case, the integrity of our constitutional rights is put in jeopardy because the result is the opportunity for unremedied, albeit recognized, violations. By ignoring the lesson from *Hope* that general statements of law are not inherently incapable of establishing a law, it gets more difficult to articulate constitutional rights because those available remedies begin to dissolve in the absence of rights articulation, specifically in the context of qualified immunity, and often therefore under the Fourth Amendment at large. The result of leaving rights unarticulated is a diminished availability of remedies for the violations of those rights. Fewer and increasingly unreachable remedies result in incomplete and increasingly unarticulated rights. And so the cycle goes. *Kerns* is an example of this difficulty of rights articulation and the disappointing effect on the underlying right.

### Answers to: Bad to Challenge Police

#### Failure to hold police accountable celebrates fascism

The [White House disagreed](https://www.washingtonpost.com/news/post-nation/wp/2015/10/26/fbi-director-tells-police-chiefs-they-can-learn-from-black-lives-matter-hashtag/)with Comey. And Ta-Nahesi Coates [had some things to say](http://www.theatlantic.com/politics/archive/2015/10/james-comeys-crime-creationism/412585/) about Comey’s remarks, too, saying they reflected an attitude of non-evidence-based policing — a sort of “creationism, crime-fighting on a hunch.” He linked this attitude to longstanding racist police practices, and he ended with these words: “A theory of government which tells citizens to invest agents of the state with the power to mete out lethal violence, but discourages them from holding those officers accountable is not democracy. It is fascism.”

Coates hits the proverbial nail squarely on its head: again it comes down to accountability. So now let’s take a look at what Campaign Zero is asking for on police accountability.

### Limiting for Police Limits in Other Areas

#### If QI is lost by police, there is no rationale to extend it to other government officials – police were the first ones to get it

Andrew Weis, 2014, J.D. Candidate, 2014, Georgia State University College of Law, Georgia State University Law Review, Qualified Immunity for “Private” ;$ 1983 defendants after Filarsky v. Delia, p. 1047

The doctrine of qualified immunity represents further importation of traditional tort immunities as § 1983 defenses stemming from the conclusion that Congress would not have abrogated these immunities without doing so expressly. n46 The doctrine emerged in the Court's 1967 decision of *Pierson v Ray*. n47 In *Pierson*, police officers who made arrests under a statute later held unconstitutional argued that they should not be held liable if they acted in good faith and with probable cause. n48 The Court agreed because police officers enjoyed such a defense at common law, and § 1983 "should be read against the background of tort liability." n49 Under *Pierson*, the police defendants established qualified immunity (as they would defend under the common law) by satisfying a two-part test that required good faith and probable cause. n50 The Court later extended this qualified immunity test to all government officials and employees. n51 In determining the availability of qualified immunity to private § 1983 defendants, the Court employs a two-part test that looks to historical and policy bases for immunity. The Court's first two decisions addressing private party qualified immunity were narrow decisions denying immunity to the private defendant. As a result, lower courts lacked guidance as to when a private defendant *could* assert qualified immunity, if ever. The Court's decision in *Filarsky* brings much needed clarity in this regard. *Filarsky* offers a broad rule in favor of immunity for those private party § 1983 defendants working for the government, and helps define the reach of the Court's earlier decisions. The analysis in *Filarsky* shows that the paramount concern in immunity questions is the function the defendant performs, rather than the defendant's title or status. To avoid conflicting with the Court's earlier decision in *Richardson*, however, *Filarsky* did not explicitly adopt a functional approach to the immunity question, but modified the existing two-part test. As a result, the two-part test is needlessly complicated and redundant, and at least one lower court seems to have misapplied *Filarsky*. n217 In light of the needlessly complex standard, lower courts will likely continue to reach different conclusions as to how to best reconcile *Filarsky* with the Court's earlier decisions denying immunity, and will apply immunities inconsistently to similar factual situations as a result. This could generate needless costs not only for lower courts and the litigating parties, but for local governments privatizing government services and private firms forced to adapt to different jurisdictional approaches.

## Counterplan Answers

### Reform Counterplan Answers

#### All reforms, including civilian review boards, have failed

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Over the last several decades any number of supposed reforms have been tried and all have failed to even put a dent in the rampant racist police terror.

***Demilitarize the police?*** Akai Gurley, Tanish Anderson, Tamir Rice, Walter Scott, and most of those murdered by police have been killed by one or two cops on regular patrol.

***Disarm the police?*** Impossible in racist capitalist America, but beyond that, Eric Garner and 20 years earlier Anthony Baez were killed by a cop’s bare hands.

***Dashboard cameras on police cars?*** When Walter Scott was pulled over in North Charleston on April 4 for a supposed broken taillight, the dashcam showed no such thing – but it didn’t stop him from getting shot in the back and killed by the racist cop.

***Body cameras on police officers?*** This is the latest fad. It didn’t stop the shooting of Eric Harris in Tulsa, Oklahoma on April 2, which was recorded by a bodycam, including the remark by the 73-year-old “reserve” cop that he thought he was firing a Taser.

***A new police chief?*** Under Republican plutocrat Bloomberg New York had Ray Kelly, under liberal Democrat de Blasio it has Bill Bratton, but the killing doesn’t stop. And now the liberal Democratic City Council has voted to hire 1,300 *more* cops than under Bloomberg/Kelly.

***A black police chief?*** ***A black mayor?*** Philadelphia has both, and its “stop and frisk” numbers rival New York’s.

***More black police?*** In the case of Baltimore, on top of a black mayor and police chief, almost half the cops are black, but both black and white officers were guilty of Freddie Gray’s murder.

***New police policies?*** “Stop and frisk” is now officially “reformed,” so now it’s back to “broken windows” – harassing black and Latino youth for minor “quality of life” infractions.

***Residency requirements?*** Instead of holing up in white suburbs like Walnut Creek, California or New York’s Rockland County, police will just congregate in cop enclaves like Howard Beach or Eltingville on Staten Island’s South Shore.

***Community policing?*** So instead of patrolling poor black and Latino areas in convoys, like Israeli occupation forces in the Palestinian West Bank, they will increase the number of cops in permanent outposts while assigning a few community relations officers to coordinate with church leaders … and the SWAT teams are held in reserve.

***Civilian review boards?*** NYC, Philly and Baltimore all have them, and they’re not only utterly worthless in controlling police violence, they actually serve to legitimize it.

A recent article reviewing the experience of civilian review boards noted that this demand going back to the 1950s and ’60s was “sold by liberal reformers as a sort of societal ‘safety valve’ to prevent civil unrest” (Charles Davis, “America’s historic struggle to control its police,” Salon, 25 February). While right-wingers slammed such toothless boards as a communist plot to undermine America, in Philadelphia, which had a review board, then abolished it in 1969, the “police advisory board” was brought back in 1994 as a way to save the city millions of dollars by preventing complaints from going to court. In New York City, where use of the chokehold has supposedly been banned since 1993, the civilian board received over 1,000 complaints of its use from 2009 to 2013 (*New York Times*, 22 July 2014). Only nine cases were raised with the NYPD brass and in only one case was there any action (loss of vacation days).

#### More training and more rules of engagement won’t solve

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

The Justice League NYC, a project of The Gathering for Justice, Inc., one of the foundation-funded “non-governmental organizations” (NGOs) that quickly became involved in the protests over police killings, put forward a list of demands including calls for the city and state of New York to “draft legislation to clarify the rules of engagement” and to “create a comprehensive NYPD training program”—as if more training or clearer rules would have prevented the use of the deadly chokehold on Eric Garner which was already against NYPD regulations. As for its call on U.S. attorney general Eric Holder and the Obama administration to “expedite the federal investigation into the death of Eric Garner,” Holder’s “investigation” of Ferguson exonerated the cop who killed Michael Brown!

#### Oregon proves training programs work

Robert Hennelly, May 13, 2015, Slate, Poisonous Cops, Total Immunity: Why an epidemic of police abuse is actually going unpunished, http://www.salon.com/2015/05/13/poisonous\_cops\_total\_immunity\_why\_an\_epidemic\_of\_police\_abuse\_is\_actually\_going\_unpunished/

Stringer’s ClaimStat webpage cites Portland, Oregon’s, police department as an example of an agency that used their settlement data to effect meaningful and timely reforms. He explained: “[W]hen the police auditor observed a pattern of claims that suggesting that officers did to understand the basis to enter a home without a warrant, the City Attorney’s office made a training video on the issue, and the problem practically disappeared.”

### Body Cameras Counterplan Answers

#### Body cameras work when coupled with limiting immunity

The American Conservative, July 2, 2014, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/>

Coupled with additional reforms, like making officers pay their own settlements and providing better training for dealing with pets, camera use could produce a significant decrease in police misconduct. It is not unrealistic to think that police brutality reports could be made far more unusual—but only once we acknowledge that it’s *not* just a few bad apples.

## Kritik Answers

### Protest Alternatives Fail

#### Protests suppressed by the militarized police

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

This development burst into public consciousness in August 2014 as the media showed hundreds of black residents of Ferguson, Missouri facing down an army of police in full body armor and military fatigues, with high-power rifles and machine guns mounted atop Bearcat armored vehicles. The sight of the same equipment deployed in the U.S. occupation of Iraq and Afghanistan being used against domestic demonstrators protesting against a police killing shocked many. The politicians, however, were shocked by the fact that the protesters didn’t back down. Since then there have been calls to end the Pentagon and Department of Homeland Security programs of supplying military hardware to local police forces. After some initial hand-wringing, in May President Obama issued an order supposedly conditioning (but not banning) the transfer of armored trucks, drones and other aircraft. But just about every police force in the country already has a bulging arsenal of heavy weaponry.

Militarized police in the U.S. are not going away, protests or not, any more than the National Security Agency and other spy shops are curtailing their across-the board-surveillance after the Edward Snowden revelations. The capitalist rulers need them, to use against “the enemy,” including the general population of the United States.

#### The state crushes protestors

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Every time there is an upsurge of popular unrest, the question of the state is posed point-blank. In 2011, leaders of Occupy Wall Street argued that beat cops were part of the “99%.” Substituting income statistics for class analysis, they blinded demonstrators to the fact that the police are the armed fist of capital. They kept insisting on this (and tried to stop the Internationalists from chanting “We are all Sean Bell, NYPD go to hell”) even as cops were arresting hundreds on the Brooklyn Bridge. The populist Occupy “movement” disappeared after a few short months, partly due to coordinated national repression orchestrated from Obama’s Department of Homeland Security, but more fundamentally because protesters did not come to an understanding of the class nature of the capitalist state, and the fact that it cannot be reformed. Similarly with the abrupt collapse of the mass protests against police murder last December.

## Disadvantage Answers

### Crime Disadvantage Answers

#### Tough crime laws have only reduced crime by 2%

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[History has not been kind to this conclusion.](http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/) The rise and fall in crime in the late 20th century was an international phenomenon. Crime rates rose and fell in the United States and Canada at roughly the same clip—but in Canada, imprisonment rates held steady. “If greatly increased severity of punishment and higher imprisonment rates caused American crime rates to fall after 1990,” the researchers Michael Tonry and David P. Farrington have written, then “what caused the Canadian rates to fall?” The riddle is not particular to North America. In the latter half of the 20th century, crime rose and then fell in Nordic countries as well. During the period of rising crime, incarceration rates held steady in Denmark, Norway, and Sweden—but declined in Finland. “If punishment affects crime, Finland’s crime rate should have shot up,” Tonry and Farrington write, but it did not. After studying California’s tough “Three Strikes and You’re Out” law—which mandated at least a 25-year sentence for a third “strikeable offense,” such as murder or robbery—researchers at UC Berkeley and the University of Sydney, in Australia, determined in 2001 that the law had reduced the rate of felony crime by no more than 2 percent. Bruce Western, a sociologist at Harvard and one of the leading academic experts on American incarceration, looked at the growth in state prisons in recent years and concluded that a 66 percent increase in the state prison population between 1993 and 2001 had reduced the rate of serious crime by a modest 2 to 5 percent—at a cost to taxpayers of $53 billion.

#### Locking-up of Black males has a devastating negative impact on Black families

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The emergence of the carceral state has had far-reaching consequences for the economic viability of black families. Employment and poverty statistics traditionally omit the incarcerated from the official numbers. When Western recalculated the jobless rates for the year 2000 to include incarcerated young black men, he found that joblessness among all young black men went from 24 to 32 percent; among those who never went to college, it went from 30 to 42 percent. The upshot is stark. Even in the booming ’90s, when nearly every American demographic group improved its economic position, black men were left out. The illusion of wage and employment progress among African American males was made possible only through the erasure of the most vulnerable among them from the official statistics.

These consequences for black men have radiated out to their families. By 2000, more than 1 million black children had a father in jail or prison—and roughly half of those fathers were living in the same household as their kids when they were locked up. Paternal incarceration is associated with behavior problems and delinquency, especially among boys

“More than half of fathers in state prison report being the primary breadwinner in their family,” the National Research Council report noted. Should the family attempt to stay together through incarceration, the loss of income only increases, as the mother must pay for phone time, travel costs for visits, and legal fees. The burden continues after the father returns home, because [a criminal record tends to injure employment prospects.](http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/) Through it all, the children suffer.

#### Released fathers cannot practically integrate back into society

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Many fathers simply fall through the cracks after they’re released. It is estimated that between 30 and 50 percent of all parolees in Los Angeles and San Francisco are homeless. In that context—employment prospects diminished, cut off from one’s children, nowhere to live—one can readily see the difficulty of eluding the ever-present grasp of incarceration, even once an individual is physically out of prison. Many do not elude its grasp. In 1984, 70 percent of all parolees successfully completed their term without arrest and were granted full freedom. In 1996, only 44 percent did. As of 2013, 33 percent do.

The Gray Wastes differ in both size and mission from the penal systems of earlier eras. As African Americans began filling cells in the 1970s, rehabilitation was largely abandoned in favor of retribution—the idea that prison should not reform convicts but punish them. For instance, in the 1990s, South Carolina cut back on in-prison education, banned air conditioners, jettisoned televisions, and discontinued intramural sports. Over the next 10 years, Congress repeatedly attempted to pass a No Frills Prison Act, which would have granted extra funds to state correctional systems working to “prevent luxurious conditions in prisons.” A goal of this “penal harm” movement, one criminal-justice researcher wrote at the time, was to find “creative strategies to make offenders suffer.”

## “Tricky Affirmative”

### Get Rid of Qualified Immunity Because it is Irrelevant

#### Since officers are indemnified, there is no benefit to QI

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Another critique of **qualified immunity** doctrine is that it **rests on an unfounded premise—that defendants are financially responsible for settlements and judgments entered against the**m. The Supreme Court has taken what it calls a “functional approach to immunity questions,” in that the Justices purport to “examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [they] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.”40 Yet **the Justices appear to have relied on little more than their own intuitions when concluding that the threat of personal liability would have a debilitating effect on law enforcement officers’ decisionmaking.41 Evidence that officers are virtually always indemnified would contradict one of the foundational assumptions underlying the Court’s qualified immunity doctrine.** The Court has even obliquely suggested that evidence of “sufficiently certain and generally available” indemnification might “justify reconsideration of the balance struck in Harlow and subsequent cases.”42 Of course, nonfinancial burdens associated with being named in a lawsuit may influence officers’ behavior.43 But **if officers do not personally satisfy payouts, the Court’s current, stringent qualified immunity standards—already criticized as “complicated, unstable, and overprotective of government officers”44—have significantly weaker justification**.45

#### Failure is a reason to get rid of indemnification

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Evidence of widespread indemnification also has implications for the litigation of civil rights damages actions. Anecdotal evidence suggests that government attorneys may use the possibility that officers will not be indemnified to their advantage during settlement negotiations, trial, and post-trial proceedings. Civil rights litigation practice— like civil rights doctrine—should not rely on flawed assumptions about the likelihood of indemnification. Accordingly, plaintiffs should be allowed to counter the strategic use of possible indemnification denials with evidence of widespread indemnification. For example, assuming punitive damages doctrine does not change,310 evidence of indemnification practices should play a larger role in trial and post-trial decisions in ways that would prevent government attorneys from misleading judges and jurors about who will satisfy punitive damages awards.311 Current law prevents plaintiffs’ attorneys from unilaterally introducing evidence of governments’ indemnification practices.312 Yet courts have also concluded that if a defendant seeks to introduce information about his financial resources—as though to suggest that he will be responsible for the judgment—the door is opened to discovery and possible admission at trial of evidence about indemnification practices.313 As Judge Posner explained in a Seventh Circuit decision: “The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab.”314 At each stage of litigation, courts have allowed evidence of indemnification to counter evidence suggesting that an officer will personally satisfy a punitive damages judgment. In one civil rights action brought against a New York City police officer, the City objected to the plaintiff’s request for discovery about the City’s prior decisions to indemnify punitive damages judgments.

# Negative

## Harms Answers

### Defense of Status Quo

#### When the police abuse their power, the courts will not find they have QI

Eldridge, 2014, Why SCOTUS Qualified Immunity decision is huge f or cops, <https://www.policeone.com/legal/articles/6918062-Why-SCOTUS-qualified-immunity-decision-is-huge-for-cops/> DOA: 10-1-16

Joanne Eldridge has more than twenty years' experience as a government attorney and advocate. She served on active duty with the U.S. Army Judge Advocate General's Corps for over ten years and has extensive experience in criminal and Constitutional law in both federal and state court. She is a graduate of Boston College and the George Washington University Law School and holds a Master of Laws degree in military law. She has been admitted to practice before the Maryland Court of Appeals, the U.S. Army Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, the U.S. Supreme Court, the Colorado Supreme Court, and the Supreme Court of New Hampshire. She is currently practicing law in northern Virginia. Every use of deadly force by the police is analyzed based on the actual circumstances. The Sixth Circuit in *Plumhoff*found that the officers’ use of deadly force was not reasonable against a “fleeing vehicle [that] was essentially stopped and surrounded by police officers and police cars” especially when the police were aware that there was a passenger in the suspect car, thus “doubling the risk of death.” The appeals court thus distinguished the result in *Scott*, where the police used a vehicle to end the chase, and disapproved the police use of shots fired at close range under these specific circumstances. As the Court noted, “the devil is in the details.” Perhaps the Supreme Court’s review of the police videos will lead them to a different conclusion.

#### Accidental shootings not protected

ACLU Of Massachusetts, 2016, February 21, Federal appeals court’s ruling put a dent in police officers “qualified immunity” defense, https://www.aclu.org/blog/speak-freely/federal-appeals-courts-ruling-put-dent-police-officers-qualified-immunity-defense

A police officer is not immune from accountability after he points a gun at a non-threatening person, with his finger on the trigger and the safety off, and accidentally fires. So [ruled](https://aclum.org/app/uploads/2015/09/Stamps-v-Framingham-1st-Cir-Opinion.pdf) the First Circuit Court of Appeals in Boston last week, in a case that has far-reaching implications for public safety and police accountability. The [lawsuit at issue](https://aclum.org/cases-briefs/stamps-v-town-of-framingham/) stems from the 2011 Framingham, Massachusetts, [SWAT police killing](https://aclum.org/uncategorized/family-of-elderly-black-man-killed-during-swat-raid-sues-and-the-officers-defense-will-turn-your-stomach/) of 68-year-old African-American grandfather Eurie Stamps. In the early morning hours of January 5, 2011, the Framingham SWAT team raided Mr. Stamps’ home with a search warrant because they suspected his stepson of selling drugs there. Mr. Stamps, whom officers knew would be in the home and posed no known threat, ended up dead. When the Framingham SWAT team entered his home, Mr. Stamps complied with the officers’ demands. He was lying on his stomach, his hands above his head, when officer Duncan accidentally fired his weapon, killing the beloved grandfather. The case highlights the danger of using SWAT teams to conduct searches in routine drug cases — a nationwide problem that [disproportionately impacts Black and Brown Americans](https://www.aclu.org/feature/war-comes-home). In the deadly raid on Mr. Stamps’ home, the SWAT team entered unannounced in the middle of the night, threw a bomb into the home, and broke the door open with a battering ram before charging in, dressed like warriors. In these night-raids, when adrenaline is pumping and officers are decked out in combat gear and carrying powerful weaponry, tragic accidents can happen. But even though Duncan fired accidentally, he isn’t immune from Mr. Stamps’ family’s federal lawsuit, which alleges that the officer’s conduct violated Mr. Stamps’ Fourth Amendment rights. The lawsuit seeks damages from both Officer Duncan and the Town of Framingham — and thanks to last week’s ruling, it will move forward. A jury will now decide whether Paul Duncan’s decisions to take his weapon off safety, place his finger on the trigger, and point it at a compliant Mr. Stamps violated Stamps’ Fourth Amendment rights. As the ACLU of Massachusetts [argued in a friend of the court brief](https://aclum.org/app/uploads/2015/09/2015_9_29-Civil-Rights-Amicus-Brief-Stamps-v-Framingham-Corrected.pdf) to the First Circuit, **"[S]hielding officers from liability for unreasonable actions that cause accidental deaths would acutely threaten the communities that are most frequently subject to militarized police raids and other police actions. Raids like the one that resulted in Stamps’s death increasingly bring military-style equipment and tactics into the homes of ordinary Americans. The risks endemic to these raids are borne especially by people of color, including Stamps himself, and it is these communities who will suffer the consequences [if the court agrees with the defendents]."** Thankfully, the First Circuit agreed. Last week’s ruling is a huge victory for the Stamps family, but it has implications that go far beyond the tragic circumstances of Mr. Eurie Stamps and his surviving loved ones. Thanks to this important decision, police officers in the First Circuit — an area encompassing the districts of Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island — cannot recklessly point their weapons at nonthreatening people and then claim immunity after they kill them, even if the killing is accidental.

#### Deliberate shootings under no threat not protected

Georgia Law Review, February 18, Eleventh circuit finds police officer not entitled to qualified immunity in shooting death, <http://georgialawreview.org/eleventh-circuit-finds-police-officer-not-entitled-to-qualified-immunity-in-shooting-death/> DOA: 10-2-16

In *Perez v. Suszczynski*, No. 14–13619, 2016 WL 125269 (11th Cir. Jan. 12, 2016), the Eleventh Circuit upheld denial of defendant’s summary judgment motion claiming qualified immunity in connection with a shooting death. Officers responded early one morning to an altercation between two women at a sports bar. Upon arrival, the officers ordered everyone in the parking lot of the bar onto the ground. The decedent, Victor Arango, laid down on his stomach as ordered, offered no resistance, with his hands behind his back. After a deputy removed a handgun from Arango’s waistband, defendant officer, Michael Suszczynski, shot Arango in the back, execution-style. Arango’s estate (Plaintiff) sued the officer for use of excessive force under 42 U.S.C. § 1983. Defendant moved for summary judgment on grounds that he enjoyed qualified immunity. The district court denied the motion and defendant appealed. The Eleventh Circuit first noted that because defendant was acting in a discretionary capacity in attempting to restrain the decedent, he could be entitled to qualified immunity. In order to survive summary judgment, Plaintiff had to establish Defendant was not entitled to qualified immunity by showing: 1) Defendant violated a constitutional right of the decedent and 2) the constitutional right was clearly established at the time of the incident. The court first found that Defendant had violated the decedent’s Fourth Amendment right to be free from excessive force. An officer may only use deadly force when the officer: 1) has probable cause to believe the suspect poses a threat of serious harm; 2) reasonably believes deadly force is necessary; and 3) has warned the suspect, if feasible, about possible use of deadly force. The court determined that because the decedent was compliant, laying prostrate, and unresisting, Defendant did not have probable cause to believe the decedent posed a threat of serious harm, nor did Defendant have a reasonable belief that deadly force was necessary. Moreover, there was no indication that Defendant warned the decedent about the potential use of deadly force. The court further found that the constitutional right to be free from excessive force was clearly established at the time of the incident. The court pointed to both Supreme Court and Eleventh Circuit precedent holding that the use of deadly force against a non-resisting suspect who posed no danger violated the suspect’s Fourth Amendment rights. The court went even further and stated that even in the absence of such precedent, the officer’s conduct was so “inherently violative” of the Fourth Amendment that any reasonable officer would have known the conduct was unlawful. As such, Defendant was not entitled to qualified immunity at this juncture.

## Disadvantage Links

### Stare Decisis Links

#### Claims of brutality won’t be pursued

Bonnie, Kristian, 2014, Seven Reasons Police Brutality is Systemic, Not Anecdotal, American Conservative, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/> *Bonnie Kristian is a writer who lives in the Twin Cities. She is a communications consultant for Young Americans for Liberty and a graduate student at Bethel Seminary*

In central New Jersey, for instance, 99 percent of police brutality complaints [are never investigated](http://www.huffingtonpost.com/2014/01/07/police-brutality-new-jersey-report_n_4555166.html?utm_hp_ref=police-brutality). Nor can that be explained away as stereotypical New Jersey corruption. Only [one out of every three](http://www.copblock.org/2841/police-brutality-statistics/) accused cops are convicted nationwide, while the conviction rate for civilians is [literally double that](http://translucence.files.wordpress.com/2011/07/police-brutality-stats.png). In Chicago, the numbers are even more skewed: There were 10,000 abuse complaints filed against the Chicago PD between 2002 and 2004, [and just 19 of them](http://www.copblock.org/17484/infographic-a-neutral-look-police-brutality/) ”resulted in meaningful disciplinary action.” On a national level, [upwards of 95 percent](http://usatoday30.usatoday.com/news/nation/2007-12-17-Copmisconduct_N.htm) of police misconduct cases referred for federal prosecution are declined by prosecutors because, as reported in *USA Today*, juries “are conditioned to believe cops, and victims’ credibility is often challenged.” Failure to remedy this police/civilian double standard cultivates an abuse-friendly legal environment.

## Counterplans

### Body Cameras

#### Body cameras reduce brutality

Bonnie, Kristian, 2014, Seven Reasons Police Brutality is Systemic, Not Anecdotal, American Conservative, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/> *Bonnie Kristian is a writer who lives in the Twin Cities. She is a communications consultant for Young Americans for Liberty and a graduate student at Bethel Seminary*

The good news is that the first step toward preventing police brutality is well-documented and fairly simple: Keep police constantly on camera. A [2012 study in Rialto, Calif.](http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto) found that when officers were required to wear cameras recording all their interactions with citizens, “public complaints against officers plunged 88% compared with the previous 12 months. Officers’ use of force fell by 60%.” The simple knowledge that they were being watched dramatically altered police behavior.

### Training

#### Expanded training needed to avoid the reactions that cause death in the first place

Jason Lee Storts, August 27, 2015, The Atlantic, When Should Cops be able to use deadly force? http://www.theatlantic.com/politics/archive/2015/08/use-of-deadly-force-police/402181/

But those are retrospective remedies. Courts and investigative bodies sort through the consequences as well as they can, but what they cannot do is bring back the dead. So the best solution must include widespread police training that emphasizes deescalation and helps officers win compliance before they ever consider using deadly force.

### Other Reforms

#### Many potential reforms

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

The shooting of Michael Brown by a Ferguson, Missouri police officer in the summer 2014 served as a flashpoint for this debate,4 but it is just one in a spate of recent law enforcementrelated deaths. 5 These deaths, and others, have prompted a call for legal accountability against the officers involved in these killings, but also, more broadly, for systemic police reform on both the federal and state level. President Obama responded by establishing the Task Force on 21st Century Policing in December 2014 to develop best policing practices and recommendations.6 The task force’s final report issued in May 2015 offered a set of policy recommendations focused on training, investigations, prosecutions, data collection, and information sharing. Similarly, the

House Judiciary Committee held a hearing on policing strategies on May 19, 2015, and various measures have been introduced in the 114th Congress to address both use of force tactics and data collection by state and local police departments. The public, too, has been thoroughly engaged on this issue. “Black Lives Matter,” a movement that sprung up in response to the Treyvon Martin shooting and other police-related deaths, has recently released an initiative called “Campaign Zero,” which contains a set of policy proposals to limit police use of excessive force, including a call for a national standard governing the use of deadly force and better reporting requirements on instances of excessive force by law enforcement officers

FINAL REPORT, THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING (2015), available at <http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf>.

Policing Strategies for the 21st Century, Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015), available at http://judiciary.house.gov/index.cfm/hearings?ID=9F5ABE57-E0F0-468E-9B79-F9DFDC448E11.

Campaign Zero, Limit Use of Force (last visited Sept. 28, 2015), http://www.joincampaignzero.org/force

#### Reform legislation

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

Excessive Use of Force Prevention Act of 2015 (H.R. 2052)

The Excessive Use of Force Prevention Act of 2015 (H.R. 2052) would amend 18 U.S.C. § 242 so that “the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air” would be considered “a punishment, pain, or penalty.”192 It is not clear how this statute would operate in practice. Most excessive force prosecutions brought under Section 242 rely on the statute’s first prong, the deprivation of a constitutional right, and not the second prong, the unequal punishment on account of a person’s race, color, or alien status.193 It would appear that prosecutions under H.R. 2052 would occur only when an officer administers a chokehold as a punishment or penalty based on the suspect’s race, color, or alien status.

Police Accountability Act of 2015 (H.R. 1102) The Police Accountability Act of 2015 (H.R. 1101) would create a new federal crime for certain homicides committed by law enforcement officers.194 H.R. 1102 would provide that any state or local officer in a public agency that receives funding under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program who engages in conduct in the line of duty that would constitute murder or manslaughter if it were to occur in the special maritime and territorial jurisdiction of the United States would be punished as provided for that offense under federal law. The constitutionality of this bill has been addressed previously by CRS. 195

National Statistics on Deadly Force Transparency Act of 2015 (H.R. 306) 196

The National Statistics on Deadly Force Transparency Act of 2015 would reduce a state or local government’s JAG funding197 by 10% if it fails to submit data concerning police use of excessive force, including data concerning the following: • identifying characteristics of the person who was the target of the use of deadly force and the officer who used deadly forced; • time, date, and location of the use of deadly force; • alleged criminal activity of the person who was the target of deadly force; • nature of the deadly force used, including the use of a firearm; • explanation, if any, from the relevant law enforcement agency on why deadly force was used; • copy of deadly force guidelines in effect at the time deadly force was used; and • description of any non-lethal efforts employed to apprehend or subdue the person who was the target of the use of deadly force before deadly force was used.

Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) (S. 1476, H.R. 3481)

The Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) (S. 1476, H.R. 3481) would require the collection of data concerning any incident where the use of force by either a law enforcement officer or a civilian results in serious bodily injury or death. Such data shall include the following: • gender, race, ethnicity, and age of each individual who was shot, injured, or killed; • date, time, and location of the incident; • whether the civilian was armed, and, if so, the type of weapon the civilian had; • the type of force used against the officer, the civilian, or both, including the types of weapons used; • number of officers involved in the incident; and • a brief description regarding the circumstances surrounding the incident.

..

Other Reform Proposals

In addition to introduced legislation, academics, civil rights advocates, and others have suggested other reform proposals:

• lower the mens rea standard in 18 U.S.C. § 242; 200 •

create a standalone excessive force statute; 201 •

alter the “deliberate indifference” standard for failure to train claims under Section 1983;202

and • amend 42 U.S.C. § 14141 to permit lawsuits by private citizens. 203

200 See Michael J. Pastor, A Tragedy and a Crime? Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations, 6 N.Y.U.J. LEGIS. & PUB. POL’Y 171 (2002-2003).

201 John V. Jacobi, Prosecuting Police Misconduct, 2000 WISC. L. REV. 789 (2000).

202 U.S. Comm. on Civil Rights, Revisiting Who is Guarding the Guardians: A Report on Police Practices and Civil Rights in America (2000), available at http://www.usccr.gov/pubs/guard/ch5.htm#\_ftnref7.

203 Myriam E. Giles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 COLUM. L. REV. 1384, 1386 (2000).

## Kritiks

### Capitalism

#### Violent capitalism is the underlying cause of police brutality

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Tens of thousands of young people, black, white, Latino and others, and many older people as well, participated in the mass mobilizations last summer and fall. Over and over they chanted “black lives matter,” “hands up, don’t shoot” and “I can’t breathe” – slogans that reflect a sense of anguish and impotence. Many were radicalized by the experience, as they could see that Obama’s America is anything but “post-racial,” and the pretense of democracy is a cruel hoax. For that experience of activism not to turn into an exercise in frustration, like the endless antiwar marches that occur every time U.S. imperialism invades another country, it’s vital to draw the lessons of those protests – what they showed about the potential for struggle, but also what they did not, and could not, accomplish, and why not. It requires an understanding of the system of official and semi-official racist violence and murder that has characterized American capitalism ever since it solidified on the bedrock of slavery, and continues today.

#### Can’t solve until capitalism is overthrown

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

No amount of protest will convince the ruling class to muzzle their uniformed guard dogs, whom it requires to keep the poor and working people down. What’s needed is militant class struggle on a revolutionary program. The Internationalist Group has called for an *end to all drug laws*. We call for*labor/black/immigrant mobilization against police terror*. We have acted to carry this out, with the unprecedented port shutdown to “Stop Police Terror” by Local 10 of the International Longshore and Warehouse Union in Oakland this past May Day, and the “Labor Against Police Murder” contingent the same day, organized by Class Struggle Workers – Portland. Bringing to bear workers’ power to stop the wheels of commerce could stay the rulers’ hand for a time. At the height of struggle one can also *mobilize to get the police and military occupation forces out*, as the IG called for in Ferguson last August and again in Baltimore this spring.”[10](http://www.internationalist.org/killercopswstalkblackamerica1507.html" \l "footnote_10) But such actions can only have a temporary effect.

Ultimately, there is no solution to racist police brutality under capitalist rule: it is inherent in the system. Racist vigilantes, from George Zimmerman to Dylann Roof, act as auxiliaries. Whether in the form of slave catchers, KKK nightriders and racist sheriffs under Jim Crow, or mass incarceration combined with paramilitary police forces today, supplemented by massacres, American capitalism has always devised a way to keep its black, Latino and now increasingly immigrant wage slaves in thrall. The killer cops aren’t running amok, in contradiction to their assigned task, they’re doing their job to enforce racist “law and order” which is essential to American capitalism and has been ever since African slaves were brought here in chains. The fact that year after year, from one end of the country to the other, virtually no police are indicted – much less convicted – for killing *over 1,000 civilians a year* is no accident.

As we wrote in [*The Internationalist* No. 1](http://www.internationalist.org/Internationalist01web.pdf) (January-February 1997):

“Trigger-happy cops with Glocks pop anyone they consider ‘suspects’ or ‘perps,’ not to mention bystanders, subway riders, drivers who are parking, drivers who are stopped at stop lights, passengers in cars, pedestrians on the street, patrons in restaurants, young men playing football, young men outside bars, young men inside bars – *particularly if the victims are black, Hispanic or Asian* – as well as roaming around housing projects in off-duty vigilante squads, and not infrequently bumping off their own wives and girlfriends. They think they can get away with murder, and history – recent and past – shows they are right. Why? Because they are the enforcers of the monopoly of violence in the hands of the capitalist state, the apparatus set up to guarantee the profits and the rule of the bourgeoisie….

“To get rid of racist cop terror, you have to sweep away the system that spawns it. That system is capitalism, and what’s needed is a socialist revolution to make the working class and its allies the rulers of society.”

While various pseudo-socialists are always seeking to build a new “movement,” adapting their politics to whatever is the flavor of the day, such amorphous “coalitions” always end up reducing their program to the lowest common denominator. This may at times bring many people into the street, but it cannot point the way forward to actually win. The struggle for socialist revolution requires a leadership, a multi-racial workers party with a clear revolutionary program, a party that champions the cause of all the oppressed and can overcome the rulers’ attempts to set one ethnic group against another, employed workers against the unemployed, etc. In short, we need, as we wrote in 1997, to “forge a revolutionary leadership, with a core of cadres tested in the class struggle, like the Bolshevik Party of Lenin and Trotsky which led the October 1917 Russian Revolution. ■

## Prosecutor Immunity Neg

#### Prosecutor immunity is not *qualified* immunity, it is *absolute* immunity – this is not topical

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

This study additionally prompts questions about the empirical foundations for related doctrines. As just one example, prosecutors \\jciprod01\productn\N\NYU\89-3\NYU303.txt unknown Seq: 77 28-MAY-14 11:25 June 2014] POLICE INDEMNIFICATION 961 enjoy absolute immunity from suit in part because “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”353 The absolute immunity granted to prosecutors makes it exceedingly difficult for plaintiffs to civilly challenge wrongful convictions and other constitutional violations.354 Yet, assuming that prosecutors would be indemnified as frequently as police officers currently are, absolute immunity may be an unduly strong protection. Judges and legislators also have absolute immunity,355 but are as likely—if not more likely—than police officers to be indemnified.

## Capitalism K Links/Impacts/Implications

#### Reformism fails – need to challenge the racist capitalist state

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Leftists chant “indict, convict, send the killer cops to jail” misleading protesters into thinking this is possible, although all of U.S. history shows the contrary. In the exceedingly rare case where a cop does time, it will be a slap on the wrist. And when they add “the whole damn system is guilty as hell” they don’t say what that system is. Yet for there to be a real struggle against the systematic racist police murder it is crucial to understand that this is rooted in racist American capitalism. Chants like “we want freedom, freedom – these racist cops, we don’t need ’em, need ’em” suggest that there could be non-racist cops, when the reality is that it is not just a matter of individual attitudes: all police are part of a machine of racist repression. The rhyming reformism serves to mask the stark reality – as revolutionaries from Marx and Engels to Lenin and Trotsky have stressed – that the state enforces the rule of the economically dominant class.

#### Reforms have all failed

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

Most of the mobilizations against police murder have been led by liberals, black and white, and reformists – that is, leftists who may call themselves socialist and even communist, but whose actual program is only to reform (and thus ultimately uphold) capitalism. While revolutionaries support genuine reforms (from the minimum wage to the right to same-sex marriage), the idea that state repression can be reformed away is characteristic of *reformists*. One of the problems liberals and reformists face in turning the often massive protests into an ongoing “movement” like the civil rights movement they seek to emulate is the absence of any even remotely credible reform demands. Over the last several decades any number of supposed reforms have been tried and all have failed to even put a dent in the rampant racist police terror.

### Solvency Answers – Removing Qualified Immunity Won’t Deter

#### Independent of qualified immunity established by the courts, many jurisdictions *indemnify* officers, making getting any significant settlement from officers difficult

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf

I found that **indemnification of officers is virtually certain and universal. During the six-year period across the 81 jurisdictions, there were over 9,200 civil rights cases in which plaintiffs received payments. The total awarded was over $730 million, but there were just 37 to 39 cases in which officers contributed something. When they contributed, it was a rather small amount. The median payment was just over $2,000 by officers per case**. And those could be cases where there were five- or six-figure settlements for the plaintiffs in most cases. So the officers really contributed, when they contributed—which was very infrequent—they contributed a rather small amount. **No officer paid more than $25,000 in any case**. The next-highest amount was $16,500, and the next amount was $12,000. And most of the amounts in most cases were far smaller. So, as you said, it was sort of what I imagined, but more. **Those findings amazed me, but what I found particularly amazing was jurisdictions indemnified officers for punitive damages.** Punitive damages are awarded in cases in which officers are found by a jury to have engaged in reckless conduct, intentional misconduct; and punitive damages are intended not compensate victims, but to punish wrongdoers. **I found 20 cases** in that six-year period, in those 81 jurisdictions, **in which a jury had awarded punitive damages** against one or more defendants, and the jurors awarded over $9.3 million in punitive damages in those 20 cases. **In many instances those awards were reduced by the courts, often based on argument by defense counsel that the punitive damages awarded would be a financial hardship for the individual officer–but not one officer paid a nickel toward any of those punitive damages. They were either indemnified, paid by the cities and counties that employed them, or the cities and counties entered into some post-trial settlement that waived the punitive damages judgment, and essentially the city paid the entirety of the settlement**—which was a settlement in the shadow of the punitive damages judgment. The other thing that I suppose really shocked me, there has been an assumption, even with people who believe that officers are usually indemnified, there’s usually some sort of caveat, that of course officers wouldn’t be indemnified if they were fired, if they were criminally prosecuted, if they were criminally convicted. What I found during my study was that in multiple instances in which officers were terminated, when they were indicted, when they were criminally prosecuted, even when they went to prison, they did not suffer these financial consequences of the suits. They were nonetheless indemnified. **There are cases in which officers planted evidence**. There is one case out of Atlanta where officers planted evidence in the home of a 92-year-old woman who was killed by Atlanta police officers. **Officers went to prison for between five and 10 years for their conduct, but they were indemnified in the civil case**. Another example out of Albuquerque: A police officer raped a woman who had called the department seeking assistance in a domestic dispute, and he was later criminally indicted for assaulting multiple women, and was sentenced to 15 years in prison. When the jury awarded $873,000 in punitive damages against this officer, for the sexual assault, the city of Albuquerque assumed those costs, indemnified the officer for those punitive damages.

#### Idemnification is completely independent of qualified immunity

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

Note that even if an officer is held liable under Section 1983 in his personal capacity, he may be indemnified by state or local government.177 The right to indemnification is not governed by federal law, but is a matter of state or local law

#### Turn -- If QI is eliminated, it will be more difficult for plaintiffs to win claims and there will be even more idemnification

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Any prescriptions should also be made with the understanding that modifications to one area of the law will likely have secondary effects.256 **If,** for example, **it became more difficult for a defendant to win a motion to dismiss on qualified immunity grounds,257 courts might create more stringent liability rules to reduce the number of successful claims; Congress might impose damages caps to reduce payouts; cities might settle fewer claims in an effort to discourage weak suits or indemnify fewer officers to reduce costs.**

#### Lawsuits don’t deter – multiple studies

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Studies have found that “the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices.”281 -- VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (citing several studies); see also Arthur H. Garrison, Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers, 18 POLICE STUD. INT’L REV. POLICE DEV. 19, 26 (1995) (finding that 62% of a sample of fifty officers from state, municipal, and university law enforcement agencies in Pennsylvania believed that civil suits deter police officers, but 87% of state police officers surveyed, 95% of municipal police officers surveyed, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their “top ten thoughts” when stopping a vehicle or engaging in a personal interaction); Daniel E. Hall et al., Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability, 26 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 529, 545 (2003) (surveying sheriff’s deputies, corrections officers, and municipal police officers in a southern state and concluding that “most public safety officers are not impacted on a day-to-day basis by the threat of civil liability”); Tom “Tad” Hughes, Police Officers and Civil Liability: “The Ties that Bind”?, 24 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 240, 253 (2001) (reporting that a survey of Cincinnati police officers revealed that most officers “think civil liability impedes effective law enforcement” but that most do not “consider liability concerns when stopping a citizen”)

#### Idemnification and other policies means there is no deterrent value to lawsuits

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award

Indeed, some will contend that **widespread indemnification, in combination with other characteristics of policing and police misconduct litigation, reduces the deterrent effect of lawsuits nearly to zero. Officers across the country engage in tens of millions of civilian interactions—and use force against civilians hundreds of thousands of times—each year.267 Yet even people who believe the police have mistreated them rarely take legal action.268 And even when officers are sued, the suits have limited—if any—negative ramifications for officers’ employment**.269 Moreover, as Daniel Meltzer has observed, there are limited regulatory and other external influences “reinforcing the incentive, created by potential tort liability, to avoid harm-causing activities.”

CONTINUES

ously been sued were more aggressive than officers who had not.282 Some may argue that these studies show qualified immunity to be performing its intended function—lessening the impact of the threat of liability on officer behavior. But if officers’ mindsets regarding the prospect of being sued can be attributed to qualified immunity, the doctrine is overperforming: **Although qualified immunity is intended to protect against overdeterrence, available studies indicate that officers’ behavior is currently not influenced to any substantial extent by the threat of litigation. Evidence that police officers almost never financially contribute to settlements and judgments, evidence that lawsuits have little negative impact on police officers’ employment, and evidence that officers’ behavior is not influenced to any substantial extent by the threat of being sued all undermine the Supreme Court’s current rationales for qualified immuni**ty.283 Even if one believes that police officers need some manner of protection against the ill effects of litigation, there is no doctrinal, empirical, or logical basis for current stringent qualified immunity standards, which are designed to “provide[ ] ample protection to all but the plainly incompetent or those who knowingly violate the law.”

#### Since police don’t have to pay, there is no reason we need QI

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Given that law enforcement officers in my study only rarely—and only in a few jurisdictions—contributed to settlements or judgments, their median contribution was $2250, and no officer paid more than $25,000,259 qualified immunity can no longer be justified as a means of protecting officers from the financial burdens of personal liability.260 Supreme Court doctrine supports the conclusion that there is less—if any—need for qualified immunity if police officers are not financially responsible for settlements and judgments entered against them.

CONTIUES….

The logic of these decisions translates convincingly to the police indemnification context. Just as insurance “reduces the employmentdiscouraging fear of unwarranted liability”264 for those seeking jobs as private prison guards, near-certain indemnification should reduce the employment-discouraging fear of unwarranted liability for those seeking jobs as law enforcement officers. When officers are indemnified and settlements and judgments are paid from the “public treasury,” there is less injustice in “subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion.”265 Moreover, current indemnification practices seem in themselves to achieve the stated goals of qualified immunity doctrine: Indemnification allows for compensation of wronged plaintiffs while lessening the impact of damages actions on officers.266

### Extensions – No Deterrence

#### Even when there are judgments against police, they do not pay

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

In this Article, I report the findings of a national study of police indemnification. Through public records requests, interviews, and other sources, I have collected information about indemnification practices in forty-four of the largest law enforcement agencies across the country, and in thirty-seven small and mid-sized agencies. My study reveals that police officers are virtually always indemnified: During the study period, governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement. Law enforcement officers in my study never satisfied a punitive damages award entered against them and almost never contributed anything to settlements or judgments— even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct. After describing my findings, this Article considers the implications of widespread indemnification for qualified immunity, municipal liability, and punitive damages doctrines; civil rights litigation practice; and the deterrence and compensation goals of 42 U.S.C. § 1983.

#### Police do not pay in any type of settlements

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

By “police misconduct cases,” I refer to cases brought against law enforcement agents and agencies under 42 U.S.C. § 1983 and, additionally or in the alternative, cases brought alleging corresponding state law torts of assault, battery, false imprisonment, intentional infliction of emotional distress, and the like. This study does not focus on other types of litigation, including automobile accidents and internal employment actions brought by officers, although my data suggests that the findings would be the same for all types of cases in which law enforcement officers are named as defendants. See infra notes 129–30 and accompanying text (finding that officers almost never contribute to settlements in any type of case); Appendix B (setting out the amount paid to plaintiffs in all types of cases, not only civil rights cases, and the amount contributed by officers to those settlements and judgments in large jurisdictions that provided such information); see also note 131 and accompanying text (finding that officers did not contribute to settlements or judgments in any type of case in the small and mid-sized jurisdictions in my study)

#### Officers in most jurisdictions more likely to be struck by lightening than to pay a settlement

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

The likelihood that an officer would have to contribute to a settlement or judgment over the course of his career is also exceedingly remote. Extrapolating from the study data, an officer employed by the NYPD has a 1 in 308 chance of contributing to a settlement during a twenty-year career.126 In Cleveland, an officer has 1 in 242 chance of being required to contribute to a settlement during a twenty-year career.127 And in the other jurisdictions in my study—Cook County, San Francisco, Baltimore, Phoenix, Miami, Atlanta, and Boston among them—officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit.128 Although this study focuses on the indemnification of officers in civil rights cases, my data indicates that officers are as likely—if not more likely—to be indemnified for settlements and judgments in cases that do not allege civil rights violations. Twenty-seven of the forty-four largest jurisdictions that responded to my public records requests did not limit their responses to payouts and indemnification decisions in civil rights cases, and so included cases involving employment discrimination, motor vehicle accidents, and the like. In these twenty-seven jurisdictions, no officer was required to contribute to a non–civil rights case.129 Officers were responsible for contributing to settlements and judgments in less than .13% of the approximately 3074 civil rights and non–civil rights cases resolved in these twenty-seven jurisdictions during the study period, and officers contributed just .01% of the over $296 million paid in settlements and judgments in these cases.130 Indemnification practices in the thirty-seven small and mid-sized jurisdictions in my study are consistent with practices in the larger departments.131 None of the 8141 officers employed by these thirtyseven jurisdictions contributed to a settlement or judgment in any type of civil claim resolved from 2006 to 2011. Nine of the thirty-seven responding smaller departments did not know how many cases there were in which plaintiffs had recovered money or how much plaintiffs had been paid. Respondents in each jurisdiction were confident, however, that officers had not contributed. Based on available evidence, these thirty-seven departments paid at least $9,387,611 in at least 183 cases. Available evidence indicates that law enforcement officers are also almost always provided with defense counsel free of charge when they are sued. Many statutes appear to require governments to provide officers with legal representation for claims brought under § 1983 or conduct within the scope of officers’ employment, regardless of whether the department ultimately indemnifies the officer.132 And although my public records requests did not seek information about who bears the cost of defense counsel, several government employees and plaintiffs’ attorneys noted in their responses that officers are almost always represented by the city’s or county’s attorneys, or by attorneys hired by union representatives.133

#### Police only pay .02 of awards

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Between 2006 and 2011, in forty-four of the seventy largest law enforcement agencies across the country, officers paid just .02% of the dollars awarded to plaintiffs in police misconduct suits. In thirty-seven small and mid-sized law enforcement agencies, officers never contributed to settlements or judgments. No officer in any of the eighty-one jurisdictions satisfied a punitive damages judgment entered against him. Officers did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy. And officers were indemnified even when they were disciplined, terminated, or prosecuted for their misconduct. Although government attorneys may strategically employ the threat that officers will be denied indemnification, governments almost always satisfy settlements and judgments in full. Although I do not know for certain whether my findings are consistent with the practices in all jurisdictions nationwide, the eighty-one jurisdictions in my study are broadly representative in size, location, agency type, indemnification policy, and indemnification procedure. My findings therefore at least support the presumption that officers across the country, in departments large and small, are virtually always indemnified

#### Many police can’t pay anyhow

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Widespread indemnification facilitates § 1983’s goal of compensating plaintiffs after a settlement or judgment in their favor. If officers were not indemnified, they would be personally responsible for satisfying six- and seven-figure settlements and judgments from their relatively modest annual salaries. Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated.

#### No financial deterrence because the government pays the court costs

Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 GEO. WASH. L. REV. 453, 473 (2004) (“Individual officials, however, almost never reap the financial consequences of § 1983 suits that are brought against them because the government handles their legal defense and indemnifies them for any damages assessed against them.”);

Richard Emery & Ilann Margalit Maazel, Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution, 28 FORDHAM URB. L.J. 587, 590 (2000) (“[P]olice officers almost never pay anything out of their own pockets to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs.”)

Martin A. Schwartz, Should Juries Be Informed That Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?, 86 IOWA L. REV. 1209, 1217 (2001) (“States and municipalities often indemnify officers found personally liable for compensatory damages under § 1983.”).

#### When local governments just pick-up the tab there is no deterrence to poor behavior

Bonnie, Kristian, 2014, Seven Reasons Police Brutality is Systemic, Not Anecdotal, American Conservative, <http://www.theamericanconservative.com/2014/07/02/seven-reasons-police-brutality-is-systematic-not-anecdotal/> *Bonnie Kristian is a writer who lives in the Twin Cities. She is a communications consultant for Young Americans for Liberty and a graduate student at Bethel Seminary*

Those officers who are found guilty of brutality typically find the settlement to their victims paid from city coffers. Research from Human Rights Watch [reveals that](http://www.columbia.edu/itc/journalism/cases/katrina/Human%20Rights%20Watch/uspohtml/uspo30.htm) in some places, taxpayers “are paying three times for officers who repeatedly commit abuses: once to cover their salaries while they commit abuses; next to pay settlements or civil jury awards against officers; and a third time through payments into police ‘defense’ funds provided by the cities.” In larger cities, these settlements easily cost the public tens of millions of dollars annually while removing a substantial incentive against police misconduct.

#### Police have never paid

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

1 See Lant B. Davis, John H. Small & David J. Wohlberg, Suing the Police in Federal Court, 88 YALE L.J. 781, 810–12 (1979) (finding, in a 149-case sample of § 1983 lawsuits brought in the District of Connecticut from 1970 to 1977, that “[t]he individual defendants were almost always indemnified” and, “in almost every case, the individual defendant suffered no financial loss because of the suits”); Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 686 (1987) (finding no evidence of officers paying directly for a judgment in the court records of civil rights cases filed in the Central District of California in 1980 and 1981).

#### Police pay in less than1% of cases

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Although my data has some arguably inevitable limitations, it resoundingly answers the question posed: Police officers are virtually always indemnified. **Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor**, and **their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases. Officers did not pay a dime of the over $3.9 million awarded in punitive damages. And officers in the thirty-seven small and mid-sized jurisdictions in my study never contributed to settlements or judgments in lawsuits brought against them. *Governments satisfied settlements and judgments in police misconduct cases even when indemnification was prohibited by statute or policy*.** And **governments satisfied settlements and judgments in full even when officers were disciplined or terminated by the department or criminally prosecuted for their conduct.**

#### Taxpayers foot the bill

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

My findings of widespread indemnification undermine assumptions of financial responsibility relied upon in civil rights doctrine. Although the Court’s stringent qualified immunity standard rests in part on the concern that individual officers will be overdeterred by the threat of financial liability, actual practice suggests that these officers have nothing reasonably to fear, at least where payouts are concerned.18 Although the Court’s municipal liability doctrine rests on the notion that there should not be respondeat superior liability for constitutional claims, blanket indemnification practices are functionally indistinguishable from respondeat superior. And although the Court’s prohibition of punitive damages against municipalities is rooted in a sense that imposition of punitive damages awards on taxpayers would be unjust, my study reveals that taxpayers almost always satisfy both compensatory and punitive damages awards entered against their sworn servants.

#### If someone it is not indemnified, it is rare

Joann Schwartz, 2014, Police Idemnification, New York University Law Review, June 2014, http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-89-3-Schwartz.pdf , Joanna Schwartz is a Professor of Law at UCLA School of Law. She teaches *Civil Procedure*, the *Civil Rights Litigation Clinic*, and a variety of courses on police accountability and public interest lawyering. In 2015, she received UCLA’s Distinguished Teaching Award. Professor Schwartz is one of the country’s leading experts on police misconduct litigation. Her studies examine the frequency with which police departments gather and analyze information from lawsuits, and the ways in which litigation-attentive departments use lawsuit data to reduce the likelihood of future harms. She has also examined the financial effects of police misconduct litigation, including the frequency with which police officers contribute to settlements and judgments in police misconduct cases, and the extent to which police department budgets are affected by litigation costs. Professor Schwartz has also looked more broadly at how lawsuits influence decision-making in hospitals, airlines, and other organizational settings. Professor Schwartz additionally studies the dynamics of modern civil litigation. Recent scholarship examines the degree to which litigation costs and delays necessitate current civil procedure rules, and compares rhetoric with available evidence about the costs and burdens of class action litigation. She is co-author, with Stephen Yeazell, of a leading casebook, *Civil Procedure* (9th Edition). Professor Schwartz is a graduate of Brown University and Yale Law School. She was awarded the Francis Wayland Prize for her work in Yale Law School’s Prison Legal Services clinic. After law school, Professor Schwartz clerked for Judge Denise Cote of the Southern District of New York and Judge Harry Pregerson of the Ninth Circuit Court of Appeals. She was then associated with Emery Celli Brinckerhoff & Abady LLP, in New York City, where she specialized in police misconduct, prisoners’ rights, and First Amendment litigation. She was awarded the New York City Legal Aid Society's Pro Bono Publico Award for her work as co-counsel representing a class of inmates challenging conditions at Rikers Island. Immediately prior to her appointment, Professor Schwartz was the Binder Clinical Teaching Fellow at UCLA School of Law.

Even though key civil rights doctrines rely on the assumption that officers personally satisfy settlements and judgments entered against them, we have little information about whether this assumption has any basis in reality. Two decades-old studies of civil rights actions litigated in two districts found few instances in which officers were not indemnified.11 Professor John Jeffries informally polled police officers he trained at the FBI Academy for over twenty years, and none reported knowing anyone who had been denied indemnification

### Racial Justice Solvency Answers

#### Policy changes will not solve racial justice issues

**Michelle Alexander, 9-30**-16, Life After ‘The New Jim Crow,’ CityLab, <http://www.citylab.com/crime/2016/09/life-after-the-new-jim-crow/502472/> [When Michelle Alexander released her [book](https://www.amazon.com/gp/product/1595586431/ref=as_li_qf_sp_asin_il_tl?ie=UTF8&tag=lawproblo-20&camp=1789&creative=9325&linkCode=as2&creativeASIN=1595586431&linkId=d6b425f714bba22d8dd911efdb33f824) The New Jim Crow: Mass Incarceration in the Age of Colorblindnessin 2010, she had a difficult time getting anyone to pay attention to it. The book was re-released in 2012 and it became a certified hit, topping almost every best-seller list and winning numerous awards..Alexander was just awarded the [Heinz Award](http://heinzawards.net/recipients/michelle-alexander), a $250,000 grant given for groundbreaking work that shifts the public’s understanding of important issues  She stepped away from her civil rights law professor post at Ohio State University—and away from the legal profession in general—earlier this month to join the [Union Theological Seminary in New York](https://utsnyc.edu/michelle-alexander-joins-union-theological-seminary/) as a visiting professor.]

**In retiring from law, you recently wrote that litigation and legislation**[**are no longer enough**](http://taxprof.typepad.com/taxprof_blog/2016/09/michelle-alexander-resigns-from-ohio-state-law-faculty-for-seminary-valuing-publicly-accessible-writ.html)**to fix racial justice problems. Can you unpack that?**

I don’t view mass incarceration as just a problem of politics or policy, I view it as a profound moral and spiritual crisis as well. I think that racial justice in this country will remain a distant dream as long as we think that it can be achieved simply through rational policy discussions. If we take a purely technocratic approach to these issues and strip them of their moral and spiritual dimensions, I think we’ll just keep tinkering and tinkering and fail to realize that all of these issues really have more to do with who we are individually and collectively, and what we believe we owe one another, and how we ought to treat one another as human beings. These are philosophical questions, moral questions, theological questions, as much as they are questions about the costs and benefits of using one system of punishment or policing practice over another.

#### Police reforms fail because those reforms are grounded in a racist society

Ta-Nehisi Coates, author, July 2015, Between the World and Me, Kindle edition, page number at end of card

At this moment the phrase “police reform” has come into vogue, and the actions of our publicly appointed guardians have attracted attention presidential and pedestrian. You may have heard the talk of diversity, sensitivity training, and body cameras. These are all fine and applicable, but they understate the task and allow the citizens of this country to pretend that there is real distance between their own attitudes and those of the ones appointed to protect them. The truth is that the police reflect America in all of its will and fear, and whatever we might make of this country’s criminal justice policy, it cannot be said that it was imposed by a repressive minority. The abuses that have followed from these policies— the sprawling carceral state, the random detention of black people, the torture of suspects— are the product of democratic will. And so to challenge the police is to challenge the American people who send them into the ghettos armed with the same self-generated fears that compelled the people who think they are white to flee the cities and into the Dream. The problem with the police is not that they are fascist pigs but that our country is ruled by majoritarian pigs. Coates, Ta-Nehisi (2015-07-14). Between the World and Me (pp. 78-79). Random House Publishing Group. Kindle Edition.

#### Need to release millions of prisoners to solve

**Michelle Alexander, 9-30**-16, Life After ‘The New Jim Crow,’ CityLab, <http://www.citylab.com/crime/2016/09/life-after-the-new-jim-crow/502472/> [When Michelle Alexander released her [book](https://www.amazon.com/gp/product/1595586431/ref=as_li_qf_sp_asin_il_tl?ie=UTF8&tag=lawproblo-20&camp=1789&creative=9325&linkCode=as2&creativeASIN=1595586431&linkId=d6b425f714bba22d8dd911efdb33f824) The New Jim Crow: Mass Incarceration in the Age of Colorblindnessin 2010, she had a difficult time getting anyone to pay attention to it. The book was re-released in 2012 and it became a certified hit, topping almost every best-seller list and winning numerous awards..Alexander was just awarded the [Heinz Award](http://heinzawards.net/recipients/michelle-alexander), a $250,000 grant given for groundbreaking work that shifts the public’s understanding of important issues  She stepped away from her civil rights law professor post at Ohio State University—and away from the legal profession in general—earlier this month to join the [Union Theological Seminary in New York](https://utsnyc.edu/michelle-alexander-joins-union-theological-seminary/) as a visiting professor.]

Brentin Mock, 9-30-16, Life After ‘The New Jim Crow,’ CityLab, http://www.citylab.com/crime/2016/09/life-after-the-new-jim-crow/502472/

**The grand bulk of the incarceration problem is in** [**state prisons**](http://www.prisonpolicy.org/reports/pie2016.html) **and** [**local jails**](http://www.citylab.com/crime/2015/05/what-incarceration-costs-cities/394235/)**, but most of the sentencing reform is happening at the federal level. What will it take for that type of reform to trickle down?** I think if you step back and look at how deeply entrenched the system of mass incarceration is, it becomes fairly evident that there’s no way we would even get back to the incarceration rates of the 1970s, before the war on drugs and “get tough on crime” movement really kicked off, without a major upheaval. We would have to release the overwhelming majority of people who are in prisons and jails today in order to get back to that rate. Millions of people who are currently employed by law enforcement or in prisons would be forced to find new jobs. Prisons would have to close down in rural areas that have become dependent on prisons as their economic base. All of these things won’t happen simply by making changes to sentencing practices for certain low-level drug offenses. Even as important as the legalization of marijuana has been, if we are going to dismantle this mass incarceration apparatus, it’s going to require a real upheaval in our politics and a level of change that I think won’t happen unless a real movement emerges that forces it into being.

#### Fundamental societal change is needed to solve. Otherwise, the means of social control just shift

**Michelle Alexander, 9-30**-16, Life After ‘The New Jim Crow,’ CityLab, <http://www.citylab.com/crime/2016/09/life-after-the-new-jim-crow/502472/> [When Michelle Alexander released her [book](https://www.amazon.com/gp/product/1595586431/ref=as_li_qf_sp_asin_il_tl?ie=UTF8&tag=lawproblo-20&camp=1789&creative=9325&linkCode=as2&creativeASIN=1595586431&linkId=d6b425f714bba22d8dd911efdb33f824) The New Jim Crow: Mass Incarceration in the Age of Colorblindnessin 2010, she had a difficult time getting anyone to pay attention to it. The book was re-released in 2012 and it became a certified hit, topping almost every best-seller list and winning numerous awards..Alexander was just awarded the [Heinz Award](http://heinzawards.net/recipients/michelle-alexander), a $250,000 grant given for groundbreaking work that shifts the public’s understanding of important issues  She stepped away from her civil rights law professor post at Ohio State University—and away from the legal profession in general—earlier this month to join the [Union Theological Seminary in New York](https://utsnyc.edu/michelle-alexander-joins-union-theological-seminary/) as a visiting professor.]

**Political conservatives have lately been** [**heavily invested**](http://www.theatlantic.com/politics/archive/2016/07/the-precarious-position-of-the-new-gop-orthodoxy-on-crime/491735/) **in** [**criminal justice and sentencing reform**](http://www.citylab.com/crime/2015/10/130-police-chiefs-declare-war-on-mass-incarceration/411790/)**—are there reasons to be skeptical of this?**

There’s certainly room for skepticism for the role of right-wing political advocates who are now claiming to be part of this coalition for meaningful criminal justice reform. There are those who say that motivations don’t matter—that all that matters is that a deal is struck, some sentences are reduced, some people are able to go home to their families and reunite, and that some kind of reform happens in this political moment. I disagree.

There are Republican governors among others who are concerned about raising taxes on the predominantly white middle class in order to maintain this prison apparatus that’s been created. So now they’re interested in finding cheaper alternatives. I think that motivation is highly problematic. If those folks are able to come up with a solution that makes it possible for us to cage people more cheaply, they’ll take that. For those folks, if there are technical innovations that make it possible to keep people under perpetual surveillance for much of their lives— if it’s cheaper and it keeps crime rates down they’ll take it regardless of the impact on human beings.

I think we have to be clear-eyed and recognize that many of those folks are not true allies. They’re not actually interested in reinvesting the money that’s saved from downsizing prisons back into our communities and to our schools and for job creation, and better housing and healthcare. And until a moral consensus is built that says that our society should be organized in such a way to ensure that everyone has meaningful work, has quality education, has access to healthcare, especially mental healthcare, and not treated as disposable, we’re going to just keep seeing versions of these systems of racial and social control over and over again.

#### Systemic discrimination in the job market

[Ta-Nehisi Coates](http://www.theatlantic.com/author/ta-nehisi-coates/) is a national correspondent at The Atlantic, where he writes about culture, politics, and social issues. He is the author of The Beautiful Struggle and [Between the World and Me](http://www.randomhousebooks.com/campaign/between-the-world-and-me/?ref=966D062CEB2C&utm_source=Random_House_Group&utm_medium=Internal&utm_content=Featured_Banner&utm_term=&utm_campaign=Between_the_World_and_Me_Campaign_Page), October 2015, The Atlantic, The Black Family in the Age of Mass Incarceration, <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> DOA: 9-15-15

Ex-offenders are excluded from a wide variety of jobs, running the gamut from septic-tank cleaner to barber to real-estate agent, depending on the state. And in the limited job pool that ex-offenders can swim in, blacks and whites are not equal. For her research, Pager pulled together four testers to pose as men looking for low-wage work. One white man and one black man would pose as job seekers without a criminal record, and another black man and white man would pose as job seekers with a criminal record. The negative credential of prison impaired the employment efforts of both the black man and the white man, but it impaired those of the black man more. Startlingly, the effect was not limited to the black man with a criminal record. The black man withouta criminal record fared worse than the white man with one. “High levels of incarceration cast a shadow of criminality over all black men, implicating even those (in the majority) who have remained crime free,” Pager writes. Effectively, [the job market in America regards black men who have never been criminals as though they wer](http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/)

#### Formally, racism ended, but it continued in the form of debt peonage, convict lease-labor, and mass incarceration

[Ta-Nehisi Coates](http://www.theatlantic.com/author/ta-nehisi-coates/) is a national correspondent at The Atlantic, where he writes about culture, politics, and social issues. He is the author of The Beautiful Struggle and [Between the World and Me](http://www.randomhousebooks.com/campaign/between-the-world-and-me/?ref=966D062CEB2C&utm_source=Random_House_Group&utm_medium=Internal&utm_content=Featured_Banner&utm_term=&utm_campaign=Between_the_World_and_Me_Campaign_Page), October 2015, The Atlantic, The Black Family in the Age of Mass Incarceration, <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> DOA: 9-15-15

For African Americans, unfreedom is the historical norm. Enslavement lasted for nearly 250 years. The 150 years that followed have encompassed debt peonage, convict lease-labor, and mass incarceration—a period that overlapped with Jim Crow. This provides a telling geographic comparison. Under Jim Crow, blacks in the South lived in a police state. Rates of incarceration were not that high—they didn’t need to be, because state social control of blacks was nearly total. Then, as African Americans migrated north, a police state grew up around them there, too. In the cities of the North, “European immigrants’ struggle” for the credential of whiteness gave them the motive to oppress blacks, writes Christopher Muller, a sociologist at Columbia who studies incarceration: “A central way European immigrants advanced politically in the years preceding the first Great Migration was by securing patronage positions in municipal services such as law enforcement.” By 1900, the black incarceration rate in the North was about 600 per 100,000—slightly lower than the national incarceration rate today.

#### Focusing on imprisonment won’t solve racism, must also deal with economics

[Ta-Nehisi Coates](http://www.theatlantic.com/author/ta-nehisi-coates/) is a national correspondent at The Atlantic, where he writes about culture, politics, and social issues. He is the author of The Beautiful Struggle and [Between the World and Me](http://www.randomhousebooks.com/campaign/between-the-world-and-me/?ref=966D062CEB2C&utm_source=Random_House_Group&utm_medium=Internal&utm_content=Featured_Banner&utm_term=&utm_campaign=Between_the_World_and_Me_Campaign_Page), October 2015, The Atlantic, The Black Family in the Age of Mass Incarceration, <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> DOA: 9-15-15

Mass incarceration is, ultimately, a problem of troublesome entanglements. To war seriously against the disparity in unfreedom requires a war against a disparity in resources. And to war against a disparity in resources is to confront a history in which both the plunder and the mass incarceration of blacks are accepted commonplaces. Our current debate over criminal-justice reform pretends that it is possible to disentangle ourselves without significantly disturbing the other aspects of our lives, that one can extract the thread of mass incarceration from the larger tapestry of racist American policy.

### First Amendment Advantage Answers

#### Two-party consent states block First Amendment solvency

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, p. 255-6

Two-party consent state wiretapping statutes reject the federal wiretapping statute's differential treatment of citizen and governmental recording. n55 To satisfy the federal wiretapping law, a third-party citizen recorder needs only to obtain consent from one party they are recording, for example, either from the officer being recorded or the citizen interacting with that officer. To satisfy a two-party consent state statute, a third-party citizen recorder needs to obtain consent from both parties they are recording. For example, Illinois District Attorneys charged Tiawanda Moore with wiretapping for using her phone to record a police officer that prevented her from filing an Internal Affairs complaint about another officer who sexually harassed her. n56 In Massachusetts, Suffolk County District Attorneys charged Simon Glik with wiretapping for using his phone to record what he believed to be excessive force by police officers making an arrest on the Boston Common, a public park. n57 Neither citizen obtained consent from the officers, but the District Attorney dropped the charges against Mr. Glik, n58 and Ms. Moore was acquitted. n59

The arrest of Mr. Glik on the Boston Common and the fourteen days of jail time for Ms. Moore, however, were likely sufficient to deter other citizens from recording. The Massachusetts and Illinois wiretapping statutes are emblematic of an uneven statutory framework nationwide in which citizens may record police officers in certain states but not others. n60 Such a system is likely to have a nationwide chilling effect on citizen recordings. It is entirely rational and risk-averse for citizens without knowledge of each state's laws on consent to turn off their recorders. The unsettled application of state wiretapping laws means "the threat of sanctions may deter ... almost as potently as the application of sanctions." n61

Even in one-party consent states where wiretapping charges cannot attach to citizen recording, police officers can charge citizens under catchall criminal provisions like interfering with a police investigation, disorderly conduct, refusing to comply with an officer's order, or stalking. n62 The breadth of these catchall criminal statutes and the fact that the trier of fact may be more likely to believe a police officer than a citizen n63 make it extremely difficult to refute catchall charges. n64 This difficulty for defendants charged with catchall criminal offenses is compounded by plea-bargaining and release-dismissal agreements n65 whereby defendants may contract away their right to file a civil rights lawsuit for the dismissal of their criminal charge. n66 Release-dismissal agreements allow police to wash their hands of overreaching and the excessive use of catchall charges, insulating such conduct from judicial review. While catchall charges may not invoke the same severity of incarceration associated with wiretapping, they can similarly deter citizens from recording and

### First Amendment Advantage Counterplan

#### Counterplan – the courts should rule the right to record police in public is clearly protected by the First Amendment

#### Establishing a clear right to record police would meet the *existing* qualified immunity standard, not limit it

Geoffrey J. Derrick Fellow, Center for Appellate Litigation, New York, NY, Summer 2013, The Boston University Public Interest Law Journal, Qualified Immunity and the First Amendment Right to Record Police, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202388>, **p. 244-51**

**Citizens nationwide have begun using cell phones to make audio and audiovisual recordings of police officers in public** in order to document police misconduct and police heroism alike. n4 **Officers in some states have responded to these recordings by arresting citizens for violating state wiretapping statutes that prohibit audio recordings absent the consent of every recorded party** n5 (so- called "two-party consent" or "all party consent" n6 statutes). n7 In states without two-party consent statutes where police officers cannot substantiate wiretapping charges, police officers have arrested citizens who record them under catchall criminal statutes, such as statutes that prohibit interfering with a police investigation, n8 disorderly conduct, n9 refusing to comply with a police order, n10 or stalking. n11

**These nationwide arrests have triggered civil litigation concerning the First Amendment right to record public citizen-police encounters**. Several individuals arrested or threatened with arrest under state wiretapping statutes have brought constitutional tort n12 lawsuits under *42 U.S.C. § 1983* alleging violations of the First Amendment. n13 **The police officers named as defendants in their individual capacities n14 in these lawsuits have uniformly raised a qualified immunity defense, alleging that the asserted First Amendment right was not "clearly established" in the Circuit at the time of the citizen's arrest.** n15

Qualified immunity is a common law doctrine that shields government officials from liability for civil damages in constitutional tort cases. n16 **A plaintiff can overcome an official's qualified immunity defense only if (1) the complaint's allegations state a federal constitutional violation, and (2) the constitutional right in question was clearly established at the time of the alleged violation.** n17 The "constitutional violation" prong of the qualified immunity inquiry requires the plaintiff to allege facts that, if proven at trial, would constitute a violation of a right guaranteed by the federal Constitution. The "clearly established" prong of the qualified immunity inquiry requires that the right be one about which a reasonable government official in the defendant's position should have known. n18 A right is "clearly established" if the government official had "fair warning" that his or her actions violated a right protected by the federal Constitution. n19

The Supreme Court's 2001 decision in Saucier v. Katz required that courts in qualified immunity cases assess whether the plaintiff had established a constitutional violation before addressing whether the right the plaintiff claims the government official violated was clearly established. n20 Saucier followed several qualified immunity cases in which the Court held that the law stagnates when courts only address whether the right was "clearly established" at the time of the alleged violation. n21 In 2009, however, Pearson v. Callahan abandoned Saucier's mandatory sequencing, known as the "rigid order of battle," in favor of judicial discretion to assess either the merits or the "clearly established" prong first. n22 Pearson identified numerous problems with Saucier's rigid order of battle, but gave lower courts discretion to assess the constitutional merits of an alleged constitutional violation where doing so would "promote[] the development of constitutional precedent." n23

Pearson did not provide lower courts any guidance concerning the types of constitutional cases in which they ought to reach the merits. n24 In fact, Pearson's reliance on the "general rule of constitutional avoidance" counsels lower federal courts not to reach the merits of a right unless that right is already "clearly established" in the Circuit. n25 Since Pearson, the Courts of Appeals have opted to address the second prong of the Saucier qualified immunity analysis and avoid the merits in a wide variety of civil rights lawsuits. n26

The doctrinal shift from Saucier to Pearson coincides with the increase in civil rights litigation nationwide concerning the First Amendment right to record police officers in public. n27 Two recent cases, *American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012),* cert. denied, *133 S. Ct. 651 (2012),* and *Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011),* have affirmed a First Amendment right to record police in public. **Most other lower federal courts to address the issue since Pearson have avoided the merits of whether arresting or threatening to arrest citizens for recording the police violates the First Amendment, instead finding a qualified immunity defense because the First Amendment right to record was not clearly established in their respective Circuits**. n28 Indeed, the Circuits are split over whether the First Amendment right to record police is clearly established in their case law. n29 The uneven recognition of this federal right is likely to generate further litigation in the federal courts and make it a recurring constitutional question that has important consequences for both First Amendment doctrine and the traditional role of citizens to monitor the conduct of government officials.

Pearson's flexible qualified immunity analysis impedes the resolution of this open issue because the unguided discretion of lower courts may never result in adjudication on the merits. The common law development of this and other federal constitutional rights ossifies when courts repeatedly reach the question of immunity but not the merits. n30 The current nationwide civil rights litigation concerning the First Amendment right to record police officers in public illustrates the pressing need for standards to guide judicial discretion over whether to reach the merits in First Amendment cases. n31

Judges that choose to decide these cases on immunity grounds - that the First Amendment is not "clearly established" in their Circuit - risk chilling protected speech by leaving the right in limbo. Citizens are less likely to record police in two-party consent states if First Amendment doctrine is not sufficiently developed in their Circuit to provide a defense to wiretapping charges or to sustain a later civil lawsuit.

T**he thesis of this article is that the unique consequence of chilling protected speech that flows from immunity findings in First Amendment qualified immunity cases demands Saucier's merits-first adjudication. Saucier's mandatory sequencing would counteract the ossification of the First Amendment right to record because a determination of whether the right actually exists is the strongest evidence for future courts in assessing whether such a right was "clearly established"** in the Circuit. n32 At the very least, courts deciding civil rights lawsuits alleging a violation of the First Amendment should use their discretion under Pearson to consider whether an immunity finding might have a chilling effect.

Qualified immunity doctrine is a trans-substantive barrier to suits against government officials insofar as it applies equally to all underlying federal rights. n33 But the chilling consideration arises only in qualified immunity cases concerning First Amendment rights, suggesting an analysis tailored to the First Amendment. A rights-specific analysis does not mean that an officer's immunity is more or less strong depending on the right involved. n34 Rather, mandating Saucier's merits-first procedure in First Amendment cases would harness Pearson's unguided discretion and better notify citizens about the extent of their recording rights.

### ETC

#### Police can’t be sued for gross negligence

The Internationalist, Summer 2015, Killer Cops, White Supremacists: Racist Terror Talks Strike Black America, <http://www.internationalist.org/killercopswstalkblackamerica1507.html> DOA: 10-2-16

The entire legal system is based on the recognition that the police are the first line of defense of capital. As shown by the refusal of a grand jury to indict the cops who killed Eric Garner, even in the face of irrefutable evidence, the process is rigged to ensure impunity for the police. In *Rise of the Warrior Cop*, *Post*reporter Balko points out that, “Under the qualified immunity from civil lawsuits currently afforded to police under federal law, a police officer can’t be sued for mere negligence – or even for gross negligence that results in a fatality.”

#### Courts allowing many exceptions to warrants

United States v. Leon, 468 U.S. 897, 922–23 (1984) (refusing to apply the exclusionary rule where police reasonably rely on a defective warrant); *see also* Davis v. United States, 131 S. Ct. 2419, 2424, 2429 (2011) (applying good- faith exception where police reasonably rely on “binding appellate precedent” that is later overturned); Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (extend- ing good-faith exception to police reliance on court clerk’s out-of-date computer records); Illinois v. Krull, 480 U.S. 340, 349–50 (1987) (applying good-faith ex- ception where police reasonably rely on an unconstitutional statute authorizing warrantless searches).

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FORDHAM L. REV. 643, 669–76 (2011)

See, e.g., John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 VA. L. REV. 207, 256 (2013)

Marc L. Miller & Ronald F. Wright, Secret Police and the Mysterious Case of the Missing Tort Claims, 52 BUFF. L. REV. 757, 760 (2004) (“[T]he most important and revealing features of litigation against the police [are] hidden in the dark: who pays, and who is held accountable for the payments?”). 16 Richard H. Fallon, Jr., Asking the Right Questions About Officer Immunity, 80 FORDHAM L. REV. 479, 496 (2011).

Erwin Chemerinsky & Karen M. Blum, Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity, *25 Touro L. Rev. 781, 782 (2009).*

## Private Prison Guards Neg

### QI Doesn’t Apply to Private Prison Guards

#### Qualified immunity does not protect action by private prison guards

Bethany Corbin, 2013, , J.D. Candidate, Wake Forest School of Law, Winter 2013, Charlotte Law Review, An Unqualified Applicant: The Inequitable Application of **Qualified Immunity** to Bail Bondsmen in Light of Filarsky v. Delia and Gregg v. Ham, <http://www.bradley.com/insights/publications/2013/01/an-unqualified-applicant-the-inequitable-applica__>, p. 352-4

In Richardson v. McKnight, the Supreme Court determined that "history [did] not reveal a firmly rooted tradition of immunity" in the case of private prison guards. n104 In Richardson, Tennessee privatized management of correctional facilities, and outsourced the employment of prison guards to a private firm. n105 Examining both the history and policy concerns applicable in qualified immunity cases, the Court concluded that private individuals had been involved in the operation of jails since the eighteenth and nineteenth centuries. n106 States had previously leased their entire prison system to private companies without ever affording the employees qualified immunity. n107 The Court explained: Our research, including the sources that the parties have cited, reveals that in the 19th century (and earlier) sometimes private contractors and sometimes government itself carried on prison management activities. And we have found no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. History therefore does not provide significant support for the immunity claim. n108 In making this determination, the Court decided that the qualified immunity policy of encouraging unwarranted timidity was not present with private employers. n109 Private companies are subjected to competitive market pressures, n110 and are better able to offer salaries that compensate for the accompanying liability. n111 The Court found a very limited threat of deterrence, noting that "privatization helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." n112 Furthermore, private companies are often protected by comprehensive insurance-coverage requirements, insulating employees from exposure to unlimited liability. n113 Thus, the Court concluded that "government employees typically act within a different system," and that the harms necessitating qualified immunity were not present in this circumstance. n114 Although the Court in Richardson narrowed its holding, n115 it broadly denied immunity in the context of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms." n116 This holding left open the possibility of qualified immunity being extended to a private individual "briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." n117 Expanding on this interpretation, the United States Court of Appeals for the Ninth Circuit determined that a contract between the City of Los Angeles and Lockheed Information Management Services, which provided Lockheed with control over project activities while the city maintained general oversight, was not the type of "close official supervision" with a "private individual" that would entitle Lockheed to qualified immunity. n118 The Ninth Circuit reasoned that Lockheed fit the description of a firm rather than an individual, and therefore the ruling in Richardson was controlling. n119 Even if a court were to determine that the holding in Richardson was inapplicable, the court must still conduct the two-part qualified immunity test set forth above.

### More Information on QI and Private Actors

#### In Flarsky v. Delia, the Supreme Court said qualified immunity can extend to private individuals working for the government as long as certain conditions are met

Bethany Corbin, 2013, , J.D. Candidate, Wake Forest School of Law, Winter 2013, Charlotte Law Review, An Unqualified Applicant: The Inequitable Application of **Qualified Immunity** to Bail Bondsmen in Light of Filarsky v. Delia and Gregg v. Ham, <http://www.bradley.com/insights/publications/2013/01/an-unqualified-applicant-the-inequitable-applica__>, p. 354-7

III. Case Background

A. Emergence of Modern Qualified Immunity Precedent: Filarsky v. Delia

On April 30, 2012, the Supreme Court shed light on when a private individual is entitled to qualified immunity. In Filarsky v. Delia, the City of Rialto, California hired attorney Steve Filarsky to assist in a formal internal affairs investigation. n121 Filarsky, an experienced employment attorney, had previously represented the City in several investigations, though he was not a governmental employee. n122 The present investigation sought to determine if firefighter Nicholas Delia missed three weeks of work due to illness or to undertake a home construction project. n123 Investigators observed Delia purchasing building supplies, including rolls of fiberglass insulation, from a home improvement store during his absence from work. n124 When confronted by Filarsky about the fiberglass insulation, Delia admitted to purchasing the product, but denied having started the project. n125 In response, Filarsky recommended that the City verify Delia's claim by requiring Delia to produce the fiberglass insulation. n126 Delia, however, refused to cooperate, even when Filarsky suggested Delia place the fiberglass insulation out in his yard. n127 Frustrated by Delia's unwillingness to assist with the investigation, Filarsky then ordered Delia to produce the materials. n128 Delia's counsel subsequently responded by threatening to sue the City and Filarksy, and eventually filed suit for violation of Delia's Fourth Amendment rights. The district court granted summary judgment based on qualified immunity to all individual defendants, including Filarsky, holding "that Delia had not demonstrated a violation of a clearly established constitutional right, because Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered his house." n130 The Ninth Circuit affirmed the district court's ruling with respect to all defendants except Filarksy. n131 Agreeing that Filarsky's order violated the Fourth Amendment, the Ninth Circuit ruled that because Filarsky was not a city employee, he was not entitled to qualified immunity. n132 Filarsky subsequently appealed to the United States Supreme Court. n133 **The question presented to the Supreme Court was whether an individual temporarily hired by the government to perform a specific, limited function was prohibited from seeking immunity simply because he did not work for the government on a full-time basis**. n134 In answering this question, the Supreme Court engaged in an extensive historical analysis of special prosecutors and systematically examined the policy rationales underlying the defense of qualified immunity. n135 Prior to the passage of § 1983 in 1871, the scope and size of government were smaller, and employees had fewer obligations. n136 Governmental budgets were tight, and there was no need to maintain a bureaucracy staffed by attorneys and officials. n137 Instead, **the Court concluded, "government was administered by members of society who temporarily or occasionally discharged public functions." n138 In particular, private citizens frequently undertook government work, and criminal prosecutions were performed by both government and private citizens**. n139 The Attorney General even maintained his own private law practice until 1853, when the governmental position became full time. n140 The Court found no common law distinction between a private citizen who worked for the government full time and a citizen who worked part time. n141 Thus, the Court authorized the applicability of qualified immunity to individuals working with the government on a part-time basis. Additionally, the Court found that Filarsky had over twenty-nine years of experience in the area of employment law - far more experience than any City employee - and possessed expertise in conducting internal affairs investigations. n142 Because individuals have freedom to explore non-governmental careers that will not expose them to liability, **the Court determined that the policy rationale for applying qualified immunity was present in this circumstance.** n143 According to the Court, the fact that an individual can pursue private employment with less liability "makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts." n144 The threat of full liability could significantly deter participation in government projects. n145 In reversing the Ninth Circuit's holding, the Supreme Court further distinguished this case from Richardson. The Court noted that this was not a situation in which a private firm managed an administrative task with limited direct government supervision. n146 Instead, this was a case where the government pursued a private individual for assistance in a narrow and specific task. n147 Filarsky worked directly with city officials constantly during the internal investigation, and thus was not subjected to limited government oversight. n148 Therefore**, given the historical protection afforded to private citizens serving as temporary attorneys, n149 the Court concluded that qualified immunity extended to special prosecutors. n**150 However, it is important to note that in her concurrence, Justice Sotomayor cautioned against affording qualified immunity to every private individual who works in conjunction with the government. n151 The historical "roots" and policy rationales of qualified immunity must still be present.

#### Private individuals cannot claim immunity when they have no working support from the government, even if they are doing something that benefits the government

Bethany Corbin, 2013, , J.D. Candidate, Wake Forest School of Law, Winter 2013, Charlotte Law Review, An Unqualified Applicant: The Inequitable Application of **Qualified Immunity** to Bail Bondsmen in Light of Filarsky v. Delia and Gregg v. Ham, <http://www.bradley.com/insights/publications/2013/01/an-unqualified-applicant-the-inequitable-applica__>, p. 357-9

B. A Fourth Circuit Caveat: Gregg v. Ham

**Although the Supreme Court's ruling seemingly suggested that private individuals working in concert with the government should be afforded qualified immunity, the Fourth Circuit distinguished this holding in Gregg v. Ham, determining that bail bondsmen were not entitled to immunity**. n153 Ham, an employee for Quick Silver Bail Bonds LLC, posted a $ 20,000 bond for Tyis Rose who subsequently failed to appear in court. n154 After the court issued a fugitive warrant for Rose's arrest, Ham initiated a search for Rose in the community where Rose's parents lived. n155 Following months of searching, Ham saw Rose flee from a vehicle parked next to Gregg's home and into a nearby wooded area. n156 Gregg, who suffered from rheumatoid arthritis and other ailments that confined her to the house, lived only one and a half miles away from Rose's parents. n157When Ham failed to apprehend Rose in the woods, he returned to Gregg's property two days later with Justin Yelton, Sumter County Sheriff's Deputy. n158 Ham had not asked Yelton to obtain a search warrant, and a warrant was never issued. n159 Ham and Yelton approached Gregg's home and requested entry. n160 Hesitant initially, Gregg eventually acquiesced after perceiving that Ham was armed with a gun. n161 Upon gaining entry, Ham allegedly kept his shotgun raised during the search. n162 When neither Ham nor Yelton could locate Rose, Ham became agitated and screamed questions at Gregg regarding Rose's location. n163 Yelton eventually intervened, but Gregg called 911 after the two men departed to complain about the search and her treatment. n164 Although Gregg's brother warned Ham not to return to the property, Ham later approached Gregg to let her know that the reward for Rose's capture had been increased. n165 As a result of these unwanted encounters, Gregg suffered from severe anxiety, depression, and post-traumatic stress disorder. n166 In response to these events, Gregg filed suit in the Court of Common Pleas in Sumter County, South Carolina, against Ham, Quick Silver, the Sumter County Sheriff's Department, and Yelton. n167 Among the various causes of action alleged, Gregg maintained that the defendants violated her Fourth and Fourteenth Amendment rights and filed suit under *42 U.S.C. § 1983.* n168 The action was removed to federal court based on the federal question presented by Gregg's § 1983 claim. n169 While the claims against the Sheriff's Department and Yelton were subsequently settled, the claims against Ham and Quick Silver were tried to a jury. n170 The jury ruled in Gregg's favor on the § 1983 claim, awarding her a total of $ 100,000 in compensatory and punitive damages. n171 On appeal, Ham challenged the jury instruction on qualified immunity, arguing that this legal doctrine should have been applied to him prior to trial by the court. n172 Following Supreme Court precedent both in Richardson and Filarsky, the Fourth Circuit conducted a historical and policy-based examination of the application of qualified immunity to bail bondsmen at common law. n173 The Fourth Circuit determined that the history of supporting the extension of qualified immunity to bondsmen was scarce and almost non-existent. n174 However, the court neglected to perform an in-depth analysis of this history, summarily concluding that there was no "firmly rooted tradition" of applying this doctrine to bondsmen. n175 Moreover, the court determined that the policy justifications were insufficient to grant bondsmen immunity. n176 Noting that the bondsman's work was fueled by a "strong profit motive," the court decided that bondsmen were not entrusted with a public function. n177 However, even assuming arguendo that bail bondsmen performed a public function, "the economic incentives ... would ensure an ample number of qualified persons willing to assume the occupational risks of apprehending fugitives." n178 Bondsmen therefore did not represent an "arm of the court," n179 but instead operated purely out of financial self-interest. n180 Thus, a bondsman would not be deterred from pursuing this employment given the established profit motive. n181 Furthermore, Ham did not act according to Yelton's direction. n182 Yelton was not in charge of the apprehension, and had not obtained a formal search warrant. n183 According to the court, "[Ham] was not employed by the Sheriff's Department and did not report to law enforcement. Moreover, the sheriff did not call on Ham to assist in its efforts to apprehend Rose ... ." n184 Ham therefore did not exercise his right to capture a fugitive as a result of government orders. **Unlike Filarsky, who was temporarily hired and pursued by the government, Ham actively sought governmental assistance and received no government compensation. n185 Thus, Ham was not a private individual assisting the government in a highly supervised task. Ham was a private actor who had simply obtained governmental backup to fulfill his contractual right of pursuing and apprehending a fug**itive.

### FYI – Fourth Amendment Relevance

#### ALL police conduct is determined based on its reasonableness under the Fourth Amendment, as either a search or a seizure

Richard Thompson, legislative attorney, Congressional Research Service, October 30, 2015, Police Use of Force: Rules, Remedies, and Reforms, <https://www.fas.org/sgp/crs/misc/R44256.pdf>

Fourth Amendment “Objective Reasonableness” The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures.”15 While this provision is best known for providing restraints on government searches and surveillance and the procedures under which they may be conducted, in a series of cases beginning in the 1980s the Supreme Court interpreted the Fourth Amendment as the primary federal legal restraint on excessive force. Prior to these cases, the lower circuit and district courts largely applied the substantive component of the Due Process Clause to all claims of excessive force, deadly or otherwise. 16 However, in Tennessee v. Garner and Graham v. Connor, the Court grounded all excessive force claims in the Fourth Amendment’s right to be free from unreasonable seizures.17

Deadly Force Under Tennessee v. Garner

In the 1985 case Tennessee v. Garner, the Court assessed whether Tennessee’s deadly force statute—which, like those of other states at the time, permitted police to use deadly force to shoot a fleeing felon—passed constitutional muster.18 In that case, police were responding to a reported burglary when an officer at the scene saw a young African American male fleeing the back of the house, apparently unarmed.19 In an effort to prevent his escape, the officer yelled for the suspect to halt and, when he failed to do so, shot him in the back of the head as he was climbing over a fence. The shot was fatal. The victim’s family brought a civil suit under Section 1983 for the alleged violation of the deceased’s constitutional rights. The federal district and circuit courts both held that the officer had acted in good faith on Tennessee’s use of force statute, which provided that “[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” 20 In a 6-3 decision authored by Justice White, the Supreme Court reversed and held that the use of deadly force against a fleeing felon is unconstitutional. With little discussion of prior excessive force cases, Justice White noted that the use of deadly force is a “seizure” under the Fourth Amendment that must be “reasonable,” the touchstone of all Fourth Amendment protections. 21 To determine a seizure’s reasonableness, a reviewing court must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”22 On the individual’s side of the ledger, the Court noted that the “intrusiveness of a seizure by means of deadly force is unmatched.”23 On the government’s side, the Court highlighted the government’s various law enforcement interests, including arresting suspects peacefully without putting the public at risk. Balancing these interests, the Court ultimately held that the “use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.”24Rather than furthering the goals of the criminal justice process, Justice White noted that killing a suspect ensures that this system will never be put in motion as the government cannot bring a deceased person to justice. While rejecting the application of deadly force against an individual for merely committing a felony, the opinion went on to describe when such force is permissible: Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.25 Note that Garner arose in the context of the use of deadly force. Four years later, the Court in Graham v. Connor addressed whether this same rule should extend to the use of non-deadly force.26

All Uses of Force Under Graham v. Connor

In Graham v. Connor, police officers pulled over an individual suspected of shoplifting.27 In response to his erratic behavior, one of the officers forcefully slammed him on the hood of a police cruiser and threw him headfirst into the car. The suspect sustained significant injuries and sued the police for excessive force under Section 1983. Resolving a dispute in the lower federal courts about whether the Fourth Amendment applied outside the context of deadly force, the Supreme Court held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’standard.”28 Writing for the Court, Chief Justice Rehnquist observed that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” 29 Instead, “its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”30 These three factors have taken on considerable importance in use of force jurisprudence in the lower courts. Additionally, Chief Justice Rehnquist described the interpretive lens through which excessive force cases must be viewed. First, the “‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”31 Second, the “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”32 Finally, the reasonableness inquiry must be an objective one: “the question is whether the officer’s actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” 33 “An officer’s evil intentions,” the Court concluded, “will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” 34 This last interpretive rule adheres to the traditional Fourth Amendment principle that an officer’s subjective intent will not invalidate otherwise lawful conduct.35 Based on Garner and Graham, lower courts consistently applied the following tests: if deadly force was used, the court would assess whether the suspect posed a threat to the safety of the officers or others; if non-deadly force was used, a reviewing court would assess the three factors from Graham. However, in the 2007 case Scott v. Harris, the Court rejected these multi-factor tests and reiterated that the Fourth Amendment’s more general free-form reasonableness test should apply.

**Qualified immunity explained**

Andrew Weis, 2014, J.D. Candidate, 2014, Georgia State University College of Law, Georgia State University Law Review, Qualified Immunity for “Private” ;$ 1983 defendants after Filarsky v. Delia

p. 1038-9

*42 U.S.C. § 1983* provides a cause of action against any person who deprives an individual of federally guaranteed rights "under color" of state law. n1 Because courts interpret the statute "against the background of tort liability[,]" n2 immunity doctrines apply to § 1983. n3 As under common law tort liability, certain categories of defendants are afforded *absolute* immunity from suit. n4 In determining whether absolute immunity is available, courts apply a "functional approach"--looking to the nature of the challenged conduct, rather than the title or position of the defendant. N Government officials and employees not entitled to absolute immunity can instead assert *qualified* immunity, n6 which shields them from civil liability insofar as their conduct does not violate "clearly established" federally guaranteed rights of which a reasonable person would have known. n7 Qualified immunity aims to avoid (or limit) three main social costs: (1) the distractions that even insubstantial claims [\*1040] can cause, (2) over-deterrence in the exercise of discretion, and (3) the deterrence of talented candidates from public service. n8