

QUALIFIED IMMUNITY OR ABSOLUTE IMPUNITY? THE MORAL HAZARDS OF EXTENDING QUALIFIED IMMUNITY TO LOWER-LEVEL PUBLIC OFFICIALS

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I. INTRODUCTION

Qualified immunity protects public officials acting in the course of their duties from liability for all violations of civil rights under 42 U.S.C. § 1983¹ except those that are determined to violate "clearly established" principles of law.² Because claims of qualified immunity are evaluated under an objective standard, qualified immunity protection extends to some public officials who knowingly violate the civil rights of a citizen. Also, because the doctrine excuses public officials from liability for some behavior that violates citizens' civil rights, it is a social insurance scheme that protects civil rights violators from the consequences of uncertainty in the law.

The qualified immunity doctrine, which is judicially created,³ is unusual in that it brackets issues of fairness and morality. The Supreme Court recognizes, for example, that actions for damages are "the only realistic avenue for vindication of constitutional guarantees."⁴ The doctrine limits such actions because of concerns for efficiency and public welfare.⁵ There are two argu-

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1. 42 U.S.C. § 1983 (1988).

2. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken.") (citation omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). See generally, *infra* Part II.B.

3. See *infra* Part II.B.

4. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

5. See, e.g., *Anderson*, 483 U.S. at 638 ("[P]ermitt[ing] damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."). *But cf.*, *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) ("[Official immunity rests partially on] the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion."). The fairness argument, infrequently advanced, states that it would be unjust to hold public officials liable for action that, though unconstitutional, was pursued under legal principles that were not clearly established at the time of the offense presumably because of the absence of notice of the illegality of the action.

ments offered in support of this position. First, proponents of qualified immunity contend that unqualified liability would undesirably deter vigorous action by public officials in the exercise of their duties.⁶ This problem stems directly from the uncertainty that surrounds the enforcement of constitutional standards.⁷ Second, proponents of qualified immunity argue that unqualified liability would unnecessarily distract officials from their duties, primarily by requiring them to spend large amounts of time in court and tending to other matters pertaining to litigation.⁸

In recent years, some observers have questioned whether these policy considerations can justify the extension of qualified immunity to lower-level public officials. For purposes of this Article, lower-level officials are those public servants who provide a redundant service. Higher-level officials, by contrast, are those officials who provide a unique service.⁹

The controversy stems in part from a 1987 Supreme Court ruling that made clear that qualified immunity applies to all public officials and not only to those who act in some enforcement capacity.¹⁰ Critics of this decision argue that there was no precedential basis for extending immunity to lower-level officials.¹¹

This Article examines the question whether the extension of qualified immunity in its present form to lower-level government officials is justifiable as a matter of public policy. Since the doctrine is self-consciously grounded on considerations of efficiency,

6. When officials are threatened with personal liability for actions taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it. *Forrester v. White*, 484 U.S. 219, 223 (1988).

7. *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (“[O]fficials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability . . .”).

8. *Harlow*, 457 U.S. at 814 (“These social costs include the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”).

9. Put another way, an upper-level official is someone who is solely responsible for the duties of her office. A lower-level official is one of many people employed in a particular capacity. So, the chief of police would be a higher-level official, while a police officer would be a lower-level official. See John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 463 (1990).

10. *Anderson*, 483 U.S. at 641. See also *infra* note 144 and accompanying text.

11. See, e.g., *Anderson*, 483 U.S. at 654 (Stevens, J., dissenting) (“Today this Court . . . makes the fundamental error of simply assuming that *Harlow* immunity is just as appropriate for federal law enforcement officers such as petitioner as it is for high government officials.”) (citations omitted).

this Article relies in part on economic principles in analyzing this question.

The Article begins in Part II with a brief account of the evolution of qualified immunity. Part III sets out a framework for considering qualified immunity as a response to the uncertainty surrounding the legal standards that govern Section 1983 suits. The Part begins by showing that uncertainty, regardless of whether it is biased in one direction or another, systematically and undesirably causes potential defendants to overcomply with legal standards¹² and states the conditions under which overcompliance is likely to be greatest. The Part continues by focusing on two possible responses to the problem of overcompliance: minimizing the uncertainty itself and adopting a standard of strict liability.

By holding public officials accountable only for violations of “clearly established law,” the qualified immunity doctrine departs from ordinary legal principles in two ways. First, it departs from the commonly accepted maxim that all citizens are to be held strictly liable for knowledge of the law. Second, by holding officials to an extremely low standard of care for knowledge of the law, the doctrine is one of gross, rather than ordinary, negligence.

Qualified immunity is designed to combat the effects of the uncertainty that surrounds both the standards underlying Section 1983 claims and, once the choice is made not to hold officials strictly accountable for knowledge of the law, precisely what level of knowledge officials are expected to possess. The Article argues that overall, qualified immunity strikes a poor balance among competing policy concerns. Specifically, the scheme relies too heavily on reducing the standard of care and not enough on minimizing the uncertainty itself. Parts IV through VII demonstrate that certain aspects of the qualified immunity doctrine in its current form act together undesirably to extend virtu-

12. The term overcompliance is used here to refer to a defendant who takes more care than is socially optimal. In the context of this Article, overcompliance might manifest itself in two ways. First, a public official might conduct excessive amounts of investigation into the state of the law in order to determine whether an action he is contemplating is legal. Second, an official might delay in or refrain from taking a socially desirable action, such as declining to make an arrest for which he is not sure probable cause exists, when in fact such probable cause does exist.

ally absolute immunity to public officials. The Article terms these the "moral hazards" of qualified immunity.¹³

Part IV addresses the uncertainty that surrounds the Court's definition of "clearly established law." One aspect of this problem is the ambiguity that surrounds the question of precisely where public officials are supposed to look to ascertain clearly established law. The other is the uncertainty that surrounds the question of how specifically defined a legal principle must be for it to be considered "clearly established."

Part V considers the implications of the fact that the overwhelming majority of courts that consider cases invoking the defense of qualified immunity decline to address the underlying constitutional issues in the case. This problem results in regression in the law and exacerbates the effects of uncertainty.

Part VI argues that qualified immunity not only holds defendants to a lower standard for their state of mind as to the law, but also relaxes the factually specific inquiry into whether an official's conduct in fact complied with an established legal standard.

Part VII puts forward the argument that the combined effect of the problems discussed in Parts IV, V, and VI is to give public officials virtually absolute immunity for their actions. The resultant moral hazard allows potential defendants to act with impunity and shows that the method chosen by the Court for addressing the problem of uncertainty—reducing the standard of care—is difficult to defend.

The Article concludes by offering several suggestions for reform. First, some bifurcation of the qualified immunity standard is needed. The moral hazard problem is of less consequence—and thus the doctrine is more justifiable—with respect to higher-level officials than lower-level officials because independent means, such as public elections, exist to check the behavior of higher-level officials.

13. "Moral hazard" is a term used in insurance literature to refer to the dulling of incentives that occurs when parties are insured from damages and, hence, have less reason to avoid accidents. It specifically refers to the increased probability of loss that results when an insured has less of an incentive to take precautions. An example would be the diminishing effect that car theft insurance has on an owner's frequency of locking her doors. For other more detailed, accessible explanations of the concept of moral hazard see, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 56 (2d ed. 1989) and STEVEN M. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 194-95 (1987).

With respect to lower-level officials, the Article offers two possible courses for reform. First, qualified immunity for lower-level officials might be abandoned entirely, either by contemporaneously creating an indemnification scheme or on the expectation that such a scheme will arise. This argument has special appeal because Section 1983, which contains no state of mind requirement, is itself a strict liability standard.

Alternatively, if immunity is to be retained, we might focus greater attention on reducing uncertainty as a method for preventing overcompliance. Three means are apparent for accomplishing this objective. One method is for the courts to confront constitutional issues in all cases regardless of whether the qualified immunity defense is invoked. Another would be for the courts to recognize a separate indemnification action for negligent failure to inform officials as to the law. A third would be for the courts to give some guidance about what constitutes "clearly established" law. Together, these changes might allow the courts to hold officials to a higher standard of care without deterring vigorous action.

II. HISTORY OF QUALIFIED IMMUNITY

A. *Bases of Liability for Government Officials*

The doctrine of qualified immunity evolved as a response to the Supreme Court's expansion of liability for state and federal officials during the 1960s and 1970s. The Court's expansive reading of Section 1983 during this period increased the limits of personal liability for state officials.¹⁴ The Court's announcement of a new cause of action in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*¹⁵ had the same effect on liability for federal officials.

14. See, e.g., *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980); *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by Monell*, 436 U.S. 658 (1978).

15. 403 U.S. 388 (1971). See *infra* note 28.

Section 1983¹⁶ was enacted as a response to the systematic injustices leveled against blacks in the aftermath of the Civil War.¹⁷ Though written with a narrow constituency in mind, the Ku Klux Klan Act of 1871, which Section 1983 codifies, was written in broad terms and provides a remedy against "any person" who, under color of state law, deprives any person of "any rights, privileges, or immunities secured by the Constitution"¹⁸

In 1961, the Supreme Court began a process of widening the coverage of Section 1983 to match its expansive language.¹⁹ In *Monroe v. Pape*,²⁰ the Court held that Section 1983 provides a remedy for any constitutional violation committed under color of state law.²¹ Prior to this decision, the Court had left unresolved the issue of whether the phrase "under color of state law" includes actions taken by public officials in the course of their duties, but not mandated by the law of their state.²²

Monroe exempted municipal corporations from suit on the theory that Congress had not intended to include municipalities within the scope of Section 1983.²³ This portion of the decision was overruled seventeen years later in *Monell v. Department of Social Services*²⁴ where the Court held that local governing bodies

16. Section 1983 provides in relevant part:

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

42 U.S.C. § 1983 (1988).

17. See generally Cong. Globe, 42 Cong., 1st Sess., pt.2 app. at 78 (1871) (comments of Representative Perry of Ohio, March 31, 1871); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1982).

18. See *supra* note 16.

19. See generally, ROBERT H. FREILICH & RICHARD G. CARLISLE, SECTION 1983: SWORD AND SHIELD (1983); Eisenberg, *supra* note 17.

20. 365 U.S. 167 (1961), overruled by *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

21. *Id.* at 171.

22. See *The Civil Rights Cases*, 109 U.S. 3 (1883). But see *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941). *Monroe* resolved the issue by holding that "under color of state law" in the context of section 1983 includes actions that are illegal under state law if the abuse of power was made by an official who was "clothed with the authority of state law. . . ." 365 U.S. at 184 (quoting *Classic*, 313 U.S. at 326).

23. The Court interpreted the defeat of the Sherman Amendment, which would have made cities and counties liable for certain acts of violence that occurred within their borders, to mean that Congress had entirely rejected the notion of municipal liability under Section 1983. "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Monroe*, 365 U.S. at 191.

24. 436 U.S. 658 (1978).

could be sued directly under Section 1983.²⁵ But while the *Monell* Court held that local and municipal governments could be sued under Section 1983 for violations for which they were directly liable, the Court also held that municipalities could not be held liable under the theory of *respondeat superior*.²⁶

Monroe, together with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,²⁷ which created a private right of action for violations of constitutional rights by federal officials analogous to that of Section 1983,²⁸ expanded the scope of civil liability for unconstitutional acts. The exclusion of *respondeat superior* claims under *Monell* left the individual offending official as the sole defendant in many cases.

B. Development of the Qualified Immunity Doctrine

With the the threat of increased liability for public officials becoming more real, the Court turned its attention to the question whether the traditional common law immunities that protected public officials applied to these new classes of civil rights claims. Although the language of Section 1983 makes no mention of immunity, the Court, relying primarily on public policy considerations, developed a scheme to protect public officials from Section 1983 and *Bivens*-type liability.

25. The Court concluded that it had misinterpreted the effect of the rejection of the Sherman Amendment. In *Monell*, the Court emphasized that the amendment would have held counties responsible "for private lawlessness" over which they might not have had control. The Court stated that Congress's rejection of the Sherman Amendment, that was viewed at the time as unfair and possibly unconstitutional, did not necessarily imply a rejection of municipal liability for constitutional violations committed by the municipality itself. "From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman Amendment would have prevented holding a municipality liable under Section 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment." *Monell*, 436 U.S. at 683.

26. *Monell*, 436 U.S. at 692. Direct liability, under *Monell*, arises from unconstitutional actions that are the result of the execution of a policy statement, ordinance, or regulation or from an officially adopted decision of the municipality itself. *Id.* at 690.

27. 403 U.S. 388 (1971).

28. In *Bivens*, the Court ruled that the Fourth Amendment guarantees citizens "the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Bivens*, 403 U.S. at 392. For a discussion of the significance of *Bivens* in changing the concept of liability for government officials see, e.g., Note, *Bivens Doctrine in Flux: Statutory Preclusion of A Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988).

Judges,²⁹ legislators,³⁰ prosecutors,³¹ the President,³² and other members of the Executive Branch³³ are all absolutely immune from liability for action taken within the scope of their discretionary authority, provided that the action is one of a judicial, legislative, or prosecutorial nature. The Court has based this immunity on various common-law immunities and on considerations of public policy. In extending absolute immunity to officials performing judicial functions, the Court relied upon the common-law tradition of judicial immunity,³⁴ the absence in the legislative record of any language indicating an intent to abridge this tradition,³⁵ and public policy considerations.³⁶ The Court used similar reasoning in extending absolute immunity to prosecutors³⁷ and legislators.³⁸

29. See *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

30. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

31. See *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976).

32. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding that Presidential immunity extends to all official acts and not only to acts of a judicial, legislative, or prosecutorial nature).

33. See *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (holding that the Attorney General is absolutely immune from liability for performance of prosecutorial, but not investigative duties); *Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (holding that the Department of Agriculture officials are absolutely immune from liability for performance of duties of prosecutorial or judicial nature).

34. *Stump*, 435 U.S. at 356 (noting the importance the Court in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871), placed on the freedom of judges to act without apprehension of personal consequences).

35. *Stump*, 435 U.S. at 356; see also *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine.").

36. The main policy concerns expressed by the Court in *Bradley* and *Stump* are the following: the need for judges to be free from apprehension of personal liability for their judicial decisions; the importance of the issues and their controversial nature; the record keeping judges would be forced to resort to in the absence of immunity; the availability of the alternative remedies on appeal; and the ease with which bad-faith could be alleged.

Several commentators have questioned the validity of these public policy considerations. According to these writers, the policy concerns cited by the Court in *Bradley* and *Stump* could be equally applied to bureaucrats. Hence, they argue, the reasoning of the Court's public policy arguments lead to the conclusion that absolute immunity should be extended to all government officials. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 47, 90-91 (1983). See also Eisenberg, *supra* note 17, at 494-95. This matter is discussed at greater length below. See *infra* Part VII.A.

37. See *Imbler*, 424 U.S. at 422-23.

38. See *Brandhove*, 341 U.S. at 376 ("We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of Section 1983] before us."). The Court also relied on the Speech and Debate Clause, U.S. CONST. art. I, § 6 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.").

In 1967, the Court began a process of extending qualified immunity to law enforcement officers and other government officials for actions taken during the execution of their official duties. Like the absolute immunity extended to judges, legislators, and executive officers, the Court explicitly grounded qualified immunity on considerations of public policy. The Court recognized that the extension of qualified immunity would cause some victims of unconstitutional acts to go uncompensated, but concluded that this cost was outweighed by the need to free public officials from the burden of working in constant fear that actions taken in good faith might violate an individual's constitutional rights and thereby expose the officer to liability.³⁹

In *Pierson v. Ray*,⁴⁰ the Court established a good faith defense for public officials. The *Pierson* Court held that police officers who had arrested several black ministers in a "whites only" area of a train station were immune from damages under Section 1983⁴¹ so long as they "reasonably believed in good faith that the arrest was constitutional,"⁴² even if "the arrest was in fact unconstitutional."⁴³ This standard implicitly contained both an objec-

39. See *Pierson v. Ray*, 386 U.S. 547, 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."); see also *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.").

40. 386 U.S. 547 (1967).

41. This decision to extend the good faith defense was based on similar reasoning to that employed in *Monell*. The Court reasoned that Congress had not intended to abolish the common law defenses of public officials and concluded that the traditional defense to the common law tort of false arrest—that an officer acted in good faith and with probable cause—could be analogously applied to Section 1983 actions. *Pierson*, 386 U.S. at 555-56 ("Under the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the subject is later proved.").

42. *Id.* at 557. The Court upheld the viability of a good faith defense with respect to the police officers. The ministers were arrested under Section 2087.5 of the Mississippi Code which made anyone who congregated with others in a public place and refused to move on when ordered to do so by a police officer, under circumstances that might occasion a breach of the peace, guilty of a misdemeanor. The Court reasoned that the officers were not required to predict that Section 2087.5 of the Mississippi Code would later be ruled unconstitutional, as it was in *Thomas v. Mississippi*, 380 U.S. 524 (1965). The case was remanded, however, because the ministers alleged that they had been arrested solely for attempting to use a "White Only" waiting room.

43. *Pierson*, 386 U.S. at 557. It is far from clear, however, what procedural circumstances would enable the court to make such a determination. If the jury found that the officers acted in good faith, then seemingly that would have been the end of the factual inquiry. The matter of judicial determinations of unconstitutionality in good faith cases, termed regressivity for purposes of this Article, is discussed extensively below. See *infra* Part V.

tive component (reasonable belief) and a subjective component (good faith).⁴⁴

In *Harlow v. Fitzgerald*,⁴⁵ the Court abandoned the subjective prong of the qualified immunity test. The new test shielded government officials performing discretionary functions from liability for civil damages so long as their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁴⁶ Thus, if the right violated by an official was found to be not clearly established at the time of the official's action, the official would be shielded from liability even if a court determined that a violation of constitutional rights had occurred and even if the official knew that his conduct violated the plaintiff's rights.⁴⁷

44. The Court recognized this distinction explicitly in *Wood v. Strickland*, 420 U.S. 308 (1975). In *Wood*, several high school students who were expelled by a school board for spiking punch at a school party alleged that their due process rights had been violated. The Court held that for qualified immunity to apply an official must have acted with "a belief that he is doing right," and also must not have violated "clearly established constitutional rights," either out of ignorance or disregard. *Id.* at 321-22.

The District Court had held that in order to find for the students, the jury must find that the school board members acted with malice in expelling them. The District Court directed a verdict in favor of the defendants because it found no evidence from which malice could be inferred. *Wood v. Strickland*, 348 F. Supp. 244, 253 (W.D. Ark. 1972). The Court of Appeals reversed stating that showing specific intent was not required and that the plaintiffs need only have shown that the defendants had not acted in good faith under the circumstances. "The test is an objective, rather than a subjective one." *Wood v. Strickland*, 485 F.2d 186, 191 (8th Cir. 1973).

The *Wood* Court split the difference:

The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

420 U.S. at 321.

45. 457 U.S. 800 (1982).

46. *Id.* at 818.

47. Although the Court eliminated the subjective prong of the qualified immunity test in *Harlow*, it preserved an extraordinary circumstances defense. Thus, even if the court found that an official had violated a clearly established right, he was still entitled to immunity if he claimed extraordinary circumstances and could prove "that he neither knew nor should have known of the relevant legal standard." *Id.*

At least one observer has noted that the effect of the extraordinary circumstances test was an apparent source of confusion among the justices themselves. Justice Powell, writing for the Court, stated that the extraordinary circumstances test should "turn primarily on objective factors." *Id.*

Justice Brennan, who was joined by Justices Blackmun and Marshall in a dissenting opinion, wrote that the standard announced by the Court in *Harlow* "would not allow the official who *actually knows* that he is violating the law to escape liability for his actions,

The Court based this conclusion on two related aspects of the costly nature of conducting subjective inquiries. First, the Court noted that the inquiries into intent themselves were unjustifiably expensive because there is so much information that is relevant to ascertaining the state of mind of a person exercising discretionary authority.⁴⁸ Second, because inquiries into state of mind are questions of fact, the effect of requiring a showing of good faith was to preclude summary judgment motions by public officials.⁴⁹ This effect countered the Court's desire, expressed earlier in *Butz v. Economou*⁵⁰ and later emphasized in *Mitchell v. Forsyth*,⁵¹ to reduce the number of unsustainable claims that proceeded to trial.⁵²

In *Mitchell v. Forsyth*, the Court ruled that a denial of summary judgment when the defendant has raised a qualified immunity defense was an interlocutory order appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*⁵³ In so holding, the Court characterized the primary benefit of quali-

even if he could not 'reasonably have been expected' to know what he actually did know." *Id.* at 821 (Brennan, J., dissenting).

It is difficult to make sense of Brennan's argument, which is apparently directed at the extraordinary circumstances defense, because the majority clearly precluded the possibility of subjective inquiry absent extraordinary circumstances. The most reasonable interpretation of the defense seems to be that an official may be entitled to qualified immunity, even if the court determines that the right he is alleged to have violated was clearly established, if he can show that he did not know he was committing a violation and that because of some unusual circumstance he could not have been reasonably expected to know that the act he was committing was unconstitutional. The defense appears to extend immunity to a small subset of claims that involve allegations of violations of clearly established rights. Brennan's comment indicates that immunity should not extend to the set of officials who knowingly violate rights, even if they are not clearly established.

Some courts have read the defense to pertain to instances where a defendant mistakenly relied on legal advice, a statute, or a regulation. A more complete discussion of the ambiguities that have arisen as a result of the defense is set forth at Kirby, *supra* note 9, at 475 n.99. See generally Sheldon H. Namod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 7 (1982).

48. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there is often no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad ranging discovery and the many depositions including an official's professional colleagues. See *Harlow*, 457 U.S. at 816-17.

49. *Id.*

50. 438 U.S. 478, 506 (1978).

51. 472 U.S. 511 (1985).

52. *Harlow*, 457 U.S. at 815.

53. 337 U.S. 541 (1941). See *Mitchell*, 472 U.S. at 529.

fied immunity as immunity from suit rather than as a shield from liability.⁵⁴

Mitchell also held that in order to overcome a claim of qualified immunity, a plaintiff must allege a violation of law that was clearly established at the time the act was performed.⁵⁵ In 1972, the Court held that warrantless wiretaps conducted to protect domestic security were unconstitutional under the Fourth Amendment.⁵⁶ In *Mitchell*, the Court refused to hold an Executive official liable for a wiretap that was conducted in 1970 and 1971.⁵⁷

Precisely how well defined a right had to be in order to be considered "clearly established" remained an open question until the Court's last important decision on qualified immunity in *Anderson v. Creighton*.⁵⁸ In *Creighton*, the Court held that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."⁵⁹ *Creighton* was also significant because the Court applied the objective standard, developed exclusively through cases concerning upper-level officials, to the conduct of lower-level officials.

Creighton arose out of a warrantless search by FBI agents of the home of a woman whose brother was suspected of armed robbery. The District Court granted a motion by the agents for summary judgment on grounds of qualified immunity because the court concluded that there was probable cause for the search.⁶⁰ The Court of Appeals reversed, holding that there was a factual dispute whether the search was supported by probable cause and that there is a clearly established right to be free from warrantless searches not supported by probable cause.

The Supreme Court reversed in turn, holding that the subjective state of mind of the agents had been improperly considered by the Court of Appeals. The Court held that such subjective intent was irrelevant to the determination of immunity.⁶¹ The

54. *Mitchell*, 472 U.S. at 526 ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

55. *Id.* at 535.

56. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

57. *Mitchell*, 472 U.S. at 535.

58. 483 U.S. 635 (1987).

59. *Id.* at 640.

60. *Id.* at 647.

61. *Id.* at 641.

Court rejected an argument that qualified immunity should not be extended to federal law enforcement officers, and declined to create a bifurcated standard for upper and lower-level officials.⁶²

III. QUALIFIED IMMUNITY AS A RESPONSE TO THE UNCERTAINTY SURROUNDING THE LEGAL STANDARDS GOVERNING SECTION 1983 CLAIMS⁶³

A. Sources of Uncertainty

Uncertainty in the law occurs whenever people cannot be sure what consequences will result from each of their possible courses of action.⁶⁴ Concern with uncertainty is of special relevance to Section 1983 claims because the constitutional standards that underlie such cases are frequently defined in terms of reasonableness or balancing tests.⁶⁵ Court decisions amply reflect recognition of the fact that constitutional standards are often ambiguously defined.⁶⁶

Uncertainty is usually a product of one or more of three general effects. The first source of uncertainty is over where a legal standard will be set.⁶⁷ Statements of law that are expressed as standards rather than as bright line rules may leave parties uncertain as to precisely what amount of care is required of them.⁶⁸

62. *Id.* at 643.

63. The discussion of uncertainty in this section derives primarily from SHAVELL, *supra* note 13 and John E. Calfee & Richard Craswell, *Some Effects of Uncertainty of Compliance With Legal Standards*, 70 VA. L. REV. 965 (1984).

64. Traditionally, law and economic literature has assumed that parties subject to a negligence standard know exactly what level of care is required of them. *See, e.g.*, John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEG. STUD. 323 (1973); Peter A. Diamond, *Accident Law and Resource Allocation*, 5 BELL J. ECON. & MGMT. SCI. 366 (1974); Steven M. Shavell, *Strict Liability versus Negligence*, 9 J. LEG. STUD. 1 (1980).

The first exception to that rule, analyzing legal outcomes that are uncertain because of difficulties in knowing a defendant's level of care, was Peter A. Diamond, *Single Activity Accidents*, 3 J. LEG. STUD. 107, 123-40 (1974).

65. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 89 (1987) (reviewing prison regulations that impinge upon the constitutional rights of inmates for a reasonable relationship to a legitimate penological interest).

66. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 644 (1987) ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment.").

67. Uncertainty about the location of a legal standard would not be a factor under strict liability since defendants are liable regardless of their actual behavior. Other sources of uncertainty may arise under strict liability such as uncertainty of being detected or the amount of damages that might be assessed, but the legal standard itself would not be a source of distortion. *See Calfee & Craswell, supra* note 63, at 968 n.7. *See also infra* Part III.D.

68. Some argue that there are uncertainties inherent in any legal rule stemming from the difficulties of interpreting the language in which a rule is expressed. *See, e.g.*, Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

The legal process itself is a second source of uncertainty because courts occasionally err in assessing a party's true level of care. For example, individuals may not be able to predict the kinds of evidence that will be available to them at trial, the persuasiveness of the witnesses and advocates who may participate in the trial, the temperament of the jury at the time of their decision,⁶⁹ or the level of damages or fines that may be levied. A third source of uncertainty is that which may arise from the behavior of those who are charged with the enforcement of legal rules. A defendant, for example, may be uncertain whether a private plaintiff or a prosecutor will bring them to trial at all.⁷⁰

B. *Consequences of Uncertainty*

The general consequence of uncertainty over the assessment of actual levels of care is that parties will be led to take more care than is socially optimal, since taking additional care will both reduce the potential damages a party faces as well as the likelihood that they will be found negligent at all. This is because both the chance of being held liable and the level of damages assessed will normally vary directly with the egregiousness of the defendant's conduct.⁷¹

The socially optimal level of care for the official to exercise is that amount for which the marginal social benefit of acting more cautiously is equal to the marginal social cost incurred in so adjusting her behavior.⁷² Thus, in determining an appropriate neg-

69. See Calfee & Craswell, *supra* note 63, at 968 n. 9. These uncertainties were first emphasized by the legal realists. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930). For an economic discussion of errors in the factfinding process, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399 (1973). The emphasis here is on the undesirable incentive effects of legal errors, but it should be noted that legal errors are also undesirable, of course, because they reflect a failure to do justice in the case in which the error is made.

70. Professor Shavell suggests that a party's inability to control its momentary level of care may be a fourth source of uncertainty. An example of this is a driver, otherwise proceeding cautiously, who sneezes suddenly and momentarily swerves. Though the driver's behavior was generally not negligent, the sneeze might cause him to slip temporarily below the level of due care. One response to this is that the driver's momentary level of care is reflective of his true level of care. The driver might, for instance, drive more slowly in anticipation of the possibility of a sneeze. See SHAVELL, *supra* note 13, at 81-82.

71. Calfee & Craswell, *supra* note 63, at 970 ("Indeed, a positive (or, at least, non-negative) correlation between the likelihood of liability and the social costs of a defendant's behavior could be the definition of a minimally rational legal system.")

72. This is essentially the "Learned Hand Rule." See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (holding that an actor is negligent if the burden of taking adequate precautions is less than the probability of injury multiplied by the severity of the injury).

ligence standard a court would ask whether a gain in safety resulting, for example, from an incremental decrease in the speed limit, was outweighed by the cost of such a change in behavior (presumably resulting from a driver reaching her destination more slowly).

Actual behavior will often vary from the social optimum in situations where there is uncertainty in the law. Under such conditions, a potential defendant will not consider the marginal benefit of driving more slowly, but rather the marginal decrease in expected liability that will result from taking an increased level of care. If that decrease in liability exceeds the decrease in social costs then the potential defendant may exercise a level of care that exceeds the social optimum.⁷³

One common response to this line of reasoning is that the best a defendant could do would be to exercise a level of care that would be found reasonable in the average case. Thus, if the level of care is set properly, and errors are not biased in one direction or the other, the potential defendant will still exercise an optimal level of care.⁷⁴

The reason that excessive care will still normally be exercised is that the probability of being held liable varies directly with the egregiousness of the defendant's conduct. Thus, from the standpoint of a potential defendant, an increase in care produces both a marginal reduction in total damages, thereby reducing the amount a defendant may have to pay if found liable, *and* a reduction in the probability that the defendant will have to pay for any of those costs at all.⁷⁵

This is not to say that uncertainty will always lead to the exercise of excessive care. Obviously, if there is a strong enough chance that a court will overassess the level of care exercised by a potential defendant, and a small enough chance of underassessment, the parties will take less than due care.⁷⁶ As a general proposition, however, if uncertainty is unbiased, parties will take more than due care.

73. For a numerical illustration of this proposition see Calfee & Craswell, *supra* note 63, at 983.

74. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 431-32 (2d ed. 1977).

75. See Calfee & Craswell, *supra* note 63, at 974-984. See also SHAVELL, *supra* note 13, at 80 n.9, accompanying text, and Proposition 4.4. in Appendix.

76. See SHAVELL, *supra* note 13, at 80 n.9.

C. Responses to Overcompliance

There are two general means by which the legal system can respond to the problem of overcompliance. One approach attacks the problem at its source by attempting to eliminate uncertainty in legal standards. Another method is to abandon the negligence standard altogether in favor of a standard of strict liability.

1. Minimizing Uncertainty

The direct approach to the problem of overcompliance is to attempt to reduce the uncertainty itself. One manner of accomplishing this is to reduce court-generated uncertainty by improving the fact-finding process. Another approach is to improve the predictability of enforcement decisions. This might be accomplished by promulgating enforcement guidelines or making legal rules more predictable by changing them from a flexible standard to a bright line rule.⁷⁷

There may be some costs attached to reducing uncertainty. It would, of course, be costly to appoint special masters, or some other judicial officers, to conduct factual investigations into pending matters. There may also be some costs attached to selecting rules over standards.⁷⁸ While bright line rules, like "no cars may drive over fifty-five miles per hour," are certainly more predictable than analogous standards, such rules may in some instances fail to set the socially optimal level of care. That is, there may be some instances (medical emergencies, for example) in which it would be desirable for drivers to exceed fifty-five miles per hour, and others (such as instances where the driver has poor eyesight) where it would be preferable for the driver to proceed more slowly. Using the terms discussed above, bright line rules will create more centered distributions of probabilities, but they will often be less effective at centering the mean at the socially optimal level.

All of this, however, speaks only to the level of the benefit that may be gained by reducing uncertainty. In situations where minimization is not costly, it offers a useful means of combatting the effects of overcompliance.

77. Calfee & Craswell, *supra* note 63, at 999-1000.

78. For a thorough discussion of this topic see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

2. Adopting a Standard of Strict Liability

Another approach to reducing uncertainty is to adopt a standard of strict liability. In thinking about what a strict liability standard would look like, it may be helpful to keep in mind the distinction between immunity for a public official's state of mind as to the law governing his or her conduct in a particular situation and immunity for the official's general state of mind in the same situation. To illustrate this distinction, consider the case of a police officer who is uncertain whether she may conduct a warrantless entry into a house. One aspect of the police officer's state of mind is her knowledge of the law governing her conduct. She may believe that only probable cause is required for the entry or she may know that exigent circumstances are required. This aspect of the officer's state of mind is distinct from her general level of care, including her state of mind as to the facts of a particular case, such as whether she believes a person to be dangerous or in possession of weapons, and what amount of care she has exercised to ascertain these facts.

The debate over qualified immunity is concerned exclusively with an agent's state of mind as to the law—that is, over who should be liable for unpredictable legal outcomes. This represents a departure from the common case in which the relevant question is what standard should govern a defendant's general level of care.

This is because Section 1983 does not, by itself, require a plaintiff to plead or prove anything with respect to a defendant's state of mind. A plaintiff must only establish the following: (1) the status of the defendant as a representative of state government, (2) the existence of the right, privilege, or immunity and deprivation thereof, and (3) causation.⁷⁹ As such, the statutory language imposes strict liability on public officials acting under color of state law who deprive another of a constitutional right.⁸⁰ It is only when Section 1983 is taken in conjunction with qualified immunity that it acts to hold public officials to a standard of negligence.

Because few legal maxims are more familiar than "ignorance of the law is no excuse," the following question seems especially

79. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 829 (1985) (Brennan, J., concurring).

80. Susannah Mead, *Evolution of the 'Species of Tort Liability' Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 *FORDHAM L. REV.* 1, 4 n.14 (1986).

relevant in the context of our discussion of qualified immunity: Why should ignorance on the part of those entrusted with enforcing the law be excused?

There are several compelling reasons why a regime of strict liability may be preferable to one of negligence. Most importantly, strict liability avoids the problem of uncertainty entirely by creating a clear legal standard (albeit an unfavorable one from the standpoint of public officials).⁸¹ It may also reduce the amount of time spent by defendants in court because, even though more plaintiffs would be successful in prosecuting civil rights suits, state of mind, the issue that creates the most discovery problems, would no longer be a factor in the case.⁸²

Because of the ease of administering a strict liability standard, cost-benefit analyses commonly favor strict liability over negligence in cases where accidents are unilateral in nature; that is, where injurers' behavior is assumed to affect accident risks but victims' behavior does not.⁸³ Theoretically, in cases where accidents are unilateral in nature, strict liability and negligence each lead injurers to exercise optimal amounts of care.⁸⁴ This is because individuals acting under strict liability and policymakers setting the level of care under a negligence standard will each seek to exercise the level of care that minimizes the sum of costs of care and expected accident losses.⁸⁵

It is only in instances where both the injurer's and the victim's levels of care affect the chances of an injury that this assumption is suspended. In such situations, generally termed bilateral, strict liability is undesirable because it leaves victims without incentives to take due care.⁸⁶ Because of this, the choice in bilateral cases is generally between negligence, which creates an incentives for victims to take care by holding them strictly liable for all accidents that occur where the injurer takes due care, and strict liability

81. *See supra* note 67.

82. Objectification of the negligence standard accomplishes a similar purpose to a lesser degree. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

83. *See, e.g., Frank J. Vandall, Applying Strict Liability to Professionals: Economic and Legal Analysis*, 59 *IND. L.J.* 25, 38 & n.80 (1984).

84. SHAVELL, *supra* note 13, at 7-9.

85. Strict liability may nonetheless be preferred in a regime of unilateral accidents since it is often costly to ascertain the optimal level of care (since injurers may sometimes be in a better position to understand the risks associated with their own behavior) and to ascertain the level of care actually exercised by an injurer. *See id.* at 9.

86. *Id.* at 11.

with a defense of contributory negligence, which is the converse of that rule.⁸⁷

Civil rights suits fall into the former category because there is little, if anything, victims can do to lessen the chance of misconduct by public officials. Victims of Fourth Amendment violations cannot reasonably be expected to do anything to prevent a police officer from conducting an unconstitutional search or entry. Victims of uses of excessive force are likewise powerless. Hence, a victim's knowledge of the law and her conduct are irrelevant to the possibility of an "accident."

It may also be worthwhile to note in the context of this discussion that strict liability would insure that all victims of civil rights violations would be compensated for their losses (excluding, of course, the possibility of error). There may be an indirect efficiency gain from this derived from increased confidence in the legal system.⁸⁸

D. *Qualified Immunity as a Gross Negligence Standard*

The doctrine of qualified immunity encompasses two policy choices. First, it reflects a decision that public officials should not be held strictly liable for knowledge of the law. Second, it represents a decision that the level of care be set at a low level by holding officers accountable only for "clearly established" principles instead of, for example, "reasonably ascertainable" principles.

Presumably, the decision to hold officials to only a standard of gross negligence is made on the premise that officials will overcomply with an ordinary reasonableness standard because of the uncertainty that would surround such a standard. That uncertainty, it should be noted, is separate from the uncertainty that surrounds the underlying constitutional standards.

The defense of the first of these two decisions turns on two empirical claims. First, indemnification schemes do not exist to reimburse lower-level public officials for their culpable conduct.⁸⁹ Second, because Section 1983 claims based on *respondeat*

87. *Id.* at 10-16.

88. See, e.g., Charles R. Nesson, *Correspondence: Kaplow and Shavell on Legal Advice in Litigation*, 103 HARV. L. REV. 2082, 2083 (1990) (suggesting that the value to society of having fair legal processes is fairly included in a cost-benefit calculus).

89. See 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.9, 664 n.20 (2d ed. 1986) (describing various state indemnification programs).

superior are barred,⁹⁰ lower-level officials will generally be the sole defendants in Section 1983 suits.

In *Anderson v. Creighton*, Justice Scalia rejected a contention by the plaintiff that qualified immunity should not be extended to lower-level officials because the state and federal governments had indemnification schemes for reimbursing officials for actions taken in their official capacity.⁹¹ He wrote:

Even assuming that conscientious officials care only about their personal liability and not the liability of the government they serve, the *Creightons* do not and could not reasonably contend that the programs to which they refer make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases.⁹²

The consequence of the absence of indemnification schemes is that strict liability may be inefficient because it will excessively deter public officials. Consider, for example, the case of a police officer who is considering conducting a warrantless search of a house under a regime of strict liability. The officer is uncertain whether exigent circumstances are present to justify the search. She correctly concludes that there is a ten percent chance that a court will find the search constitutionally infirm. The cost of a violation of Fourth Amendment rights of this sort is estimated to be \$100,000. The public benefit from the search is estimated at \$15,000.⁹³

Under these conditions, it would be desirable for the officer to conduct the search because the estimated social benefit of the search (\$15,000) exceeds the estimated costs (\$10,000).⁹⁴ Suppose, however, that the private benefit to the officer of conducting the search is only \$1,000, a reasonable assumption to make because it is unlikely that the officer's personal benefit from the search would be anywhere near the benefit that society as a whole would gain. The officer might perceive a small benefit from being recognized for having done a good job. She might even get some small satisfaction out of performing the search.

90. See *supra* note 26.

91. *Anderson v. Creighton*, 483 U.S. 635, 641-42 n.26 (1986).

92. *Id.*

93. There is some public benefit regardless of whether a constitutional violation occurs since the evidence sought after will be obtained. It is a separate question whether the costs of the invasion of privacy outweigh the benefits.

94. The latter figure is simply the product of the damages and the percentage chance that a violation will be found to have occurred.

Those gains, however, will be small in comparison to society's interest in the deterrence of criminal acts and the incapacitation of a dangerous criminal. Under this added assumption, the officer will not conduct the search because the costs perceived personally by the officer (\$10,000) exceed the potential gain (\$1,000).

This problem is a motivating concern behind the policy favoring qualified immunity. For example, in *Forrester v. White*,⁹⁵ the Court stated:

When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.⁹⁶

Excessive care may take the form of action, perhaps by studying the law excessively, or inaction. Examples of inaction include failing to conduct searches or execute arrests, behaviors that could potentially be quite costly if the beneficiary of the inaction is a person who represents a public threat. One might reasonably predict that this effect will be especially severe where, as here, the officials stand to benefit only minimally by performing the action in question.

There may be a countervailing concern of even greater significance. This problem, generally ignored by the courts, is that strict liability will be inefficient because defendants will often not have sufficient assets to induce them to take adequate care.⁹⁷ Consider the above example again. This time, however, assume that the chance of an accident is twenty percent. Assume also that the police officer has personal assets amounting to only \$4,000. Under these conditions, the search is undesirable. The cost of the search, \$20,000, is greater than the public benefit, \$15,000. The police officer may nonetheless conduct the search

95. 484 U.S. 219 (1988).

96. *Id.* at 223 (stating also that "[the] threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties") (emphasis in original); *Anderson*, 483 U.S. at 638 ("permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

97. See generally SHAVELL, *supra* note 13, at 167-170.

because her expected loss is only \$800—limited by the fact that the maximum judgment she can pay is \$4,000 (which she will pay twenty percent of the time). Because the private benefit to her, \$1,000, exceeds this figure, she will conduct the search even though it is socially undesirable. This will not be a problem under a negligence standard because potential defendants will choose to exercise optimal care to avoid the prospect of liability.

This discussion suggests that, accepting the absence of indemnification schemes as a premise, qualified immunity is a rational response to the problems created by uncertain constitutional standards. The question remains, of course, whether it is the preferable response. There also remains the additional question whether the doctrine deals reasonably with the uncertainty that surrounds precisely what officials will be expected to know once the decision is made to excuse them from strict liability for knowledge of the law. The remaining Parts address three issues that reflect on these two questions.

IV. UNCERTAINTY OVER RESTRICTION OF RECOVERY TO CLAIMS THAT ALLEGE VIOLATIONS OF "CLEARLY ESTABLISHED LAW"

This Part considers two different types of uncertainty that surround the term "clearly established." Section A concerns the ambiguity that surrounds the question of where public officials are supposed to look to determine what law is clearly established. Section B considers the uncertainty that surrounds the separate question of precisely how well defined a legal principle must be for it to be considered clearly established. The Part concludes with a brief consideration of the relation between the different means by which courts and public officials discover legal principles and the effect those differences may have on the incentives for public officials to learn and comply with the law.

A. *Ascertaining Clearly Established Legal Principles*

The Supreme Court has been silent on the question of where one is to look to ascertain clearly established legal principles,⁹⁸ and the circuit courts have adopted different approaches. The precise definition of "clearly established" is not clearly estab-

98. On at least two occasions, the Supreme Court has specifically declined to address this issue. See *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 800 (1982).

lished.⁹⁹ Some circuits have resolved the issue by concluding that courts should look to all available decisional law.¹⁰⁰ Others have finessed the issue entirely.¹⁰¹ A few circuits have been a bit more specific. Those that have generally given emphasis to decisions of the Supreme Court and pronouncements of the court of the circuit in which the alleged violation occurred.¹⁰²

The uncertainty surrounding the "clearly established" standard has two effects. The first is that public officials will tend to overcomply with the clearly established standard because they will act as if some principles of law are clearly established which, in fact, are not.¹⁰³ If one accepts the premise that it's desirable to limit public officials' liability for knowledge of the law to those matters that are clearly established, then any such overcompliance would be undesirable.

The more serious problem is that, even with some amount of predictable overcompliance, officials will be permitted to take an undesirably low level of care. The absence of a definition of the set of principles for which officials will be held accountable

99. The D.C. Circuit has noted this ambiguity. See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 25-26 (D.C. Cir. 1984) ("It is not clear, for example, how a court should determine well-established rights: should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?"). See also *Zweibon v. Mitchell*, 720 F.2d 162, 169 (D.C. Cir. 1983) (noting that "clearly established law" is difficult to define and declining to attempt a definition since illegality of conduct at issue "was not 'clearly established' by any reasonable definition of the phrase").

100. See, e.g., *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985) ("... [i]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test."); *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986); *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (citing the *Capoeman* test).

101. See, e.g., *Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1123 (11th Cir. 1992) ("In deciding whether a constitutional right is clearly established, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law.")

102. See, e.g., *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ("Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."); *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988) ("In determining whether the law was clearly established, we look to federal constitutional, statutory or case law existing at the time. When the focus is on decisional law, we examine initially, and most importantly, the decisions of the Supreme Court and the courts of this circuit. If case law from these sources is unavailable, we may also look for guidance to the cases from other circuits."); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) ("law enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors, where the controlling law had not been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state . . .").

103. See *supra* Part III.B.

leaves public officials with virtually absolute immunity. This lowers the standard too far.

In practice, there is a large class of cases in which the ambiguity surrounding the "clearly established" standard will not have a detrimental effect. The circuit courts appear to be most concerned with instances where the question is whether a general principle has been defined with sufficient specificity to be binding. A court may ask, for example, whether it was clearly defined in this circuit that depriving a prison inmate of cigarettes constitutes a violation of the Eighth Amendment. In these cases, the "clearly established" standard will not normally create an incentive for undercompliance because it will ordinarily not act to excuse officers from liability.

But the decisions ignore the class of cases where there is a conflict over the constitutionality of a particular course of action. In these situations, the ambiguous definition of "clearly established" law acts to undermine the incentive of public officials to study the law. So long as there is a dispute over a matter, an official has no reason to study it. That will be true even if the matter is one that is well-settled within the circuit in which the official is employed. Indeed, a public official might forcefully point to uncertainty over the standard of certainty as a basis for a finding that the law was not clearly established on a particular point.

B. *The Requirement of Specificity*

The effect discussed in the preceding section may be exacerbated by the lack of a clear definition as to what level of specificity is required for an area of law to be considered "clearly established."

In *Anderson v. Creighton*, Justice Scalia noted that the operation of the "clearly established" standard depends substantially upon the level of generality at which the relevant legal rule is to be identified.¹⁰⁴ The scope of protection afforded by qualified immunity depends upon whether a plaintiff is required merely to allege the violation of a quite general, though perhaps well-established, rule such as the right to due process of law, or a more specific principle, such as the right to a disciplinary hearing prior to termination of welfare benefits. If the former ap-

104. *Anderson*, 483 U.S. at 639.

proach is chosen, then qualified immunity offers virtually no protection from liability.¹⁰⁵

Consequently, the Court determined that some level of specificity was required to overcome qualified immunity:

It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized sense: 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 light of preexisting law the unlawfulness must be apparent.¹⁰⁶

This definition leaves a significant number of cases unaccounted for because, even if it were possible conclusively to determine what actions are "apparently unlawful," instances where "the very action in question" had previously been held unlawful must compose only a very small subset of that class.

Courts have differed to some extent over how to deal with the lacuna created by *Anderson*. For the most part they have adopted a standard that requires a plaintiff to show a close relationship between the conduct in question and prior cases.¹⁰⁷ The precise definitions, however, and the manner in which they have been implemented have differed widely. Some circuits have required quite a close fit between the alleged misconduct and prior

105. In *Anderson*, the Court stated:

[I]f the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

See id.

106. *Id.* at 640.

107. *See, e.g., Hilliard v. City and County of Denver*, 930 F.2d 1516, 1518 (10th Cir. 1991) ("the plaintiff 'must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.'") (quoting *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990)); *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) ("closely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional right is clearly established.") (quoting *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987)).

The standard in the Second Circuit is a bit more favorable to plaintiffs. *See Molinelli v. Tucker*, 901 F.2d 13, 15 (2d Cir. 1990) ("A finding of apparent unlawfulness does not require that an earlier decision of this court be directly on point with the current facts; however, the absence of such a decision militates against that finding when, in addition, there have been no cases in this Circuit 'foreshadowing' a rule on the issue, nor many cases in other circuits taking a certain stand.").

caselaw. Others, a bit more permissively, have considered analogous caselaw as only one factor among several to be considered in determining whether a defendant had fair notice that his conduct was constitutionally infirm.

This is a difference of some importance. Courts that have gone the way of adopting a more restrictive standard from the point of view of the plaintiff threaten to create absolute immunity, the opposite of the absolute liability that Justice Scalia was concerned about in *Anderson*. When taken to its logical extension, the restrictive view of immunity virtually excludes the entire class of Section 1983 claims that concern constitutional rights governed by balancing tests. Because an argument can be made for the reasonableness of virtually all balancing attempts, and because reasonableness for qualified immunity purposes is governed by an objective standard, no plaintiff will be able to succeed on such a claim unless she can find a nearly identical prior case. That possibility is especially unlikely in light of the tendency of the courts to avoid explication of underlying constitutional issues in cases involving a claim of qualified immunity.¹⁰⁸

An excellent example of this problem is *Rakovich v. Wade*.¹⁰⁹ In *Rakovich*, the plaintiff alleged that Greenfield, Wisconsin police officials charged him with crimes in retaliation for his criticisms of the local police department. The standard governing such claims involves a balancing of First Amendment interests against proper law enforcement interests.¹¹⁰ The Seventh Circuit directed a verdict for the defendants, recognizing that the basis of their decision would make it exceedingly difficult for plaintiffs to succeed on similar claims:

There is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the 'law' can rarely be considered 'clearly established.' It would appear that whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under Harlow. With Harlow's elimination of the inquiry into actual motivations of the official, qualified im-

108. See *infra* Part VI.

109. 850 F.2d 1180 (7th Cir. 1988).

110. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

munity typically casts a wide net to protect government officials from damage liability whenever balancing is required.¹¹¹

Courts that adopt highly restrictive requirements of specificity undermine incentives for study of and compliance with the law. They also finesse the question whether an officer could reasonably be said to have been on notice of the culpability of his conduct.

C. *The Moral Hazard in Practice*

The cumulative effect of these ambiguities is to undermine any incentive that public officials have to become knowledgeable in the law. This is a significant problem. Because reasonableness is judged by an objective standard, the question in cases in which qualified immunity is claimed is generally whether the action was *a priori* reasonable. Hence, some actions taken in bad faith by public officials will be excused.

With respect to the source problem, one solution would be to create a simple standard that adopted the decisions of the Supreme Court and the local circuit as the source of law. Any rule would be preferable to no rule, but the proposal seems especially meritorious in light of the empirical evidence that demonstrates that officers generally have only the most basic knowledge of the law.¹¹² Courts generally take a lawyer's view in determining what principles of law are clearly established, but that may only excuse culpable conduct by officials who themselves perceive no ambiguity in the law.

At the least, it is clear that there are serious incentive problems posed by the uncertainty that surrounds the two principles described above. A sizable benefit could be gained at minimal, if any, cost by defining precisely what law is "clearly established."

V. THE PROBLEM OF LEGAL REGRESSION

Qualified immunity inhibits development of the law. The overwhelming majority of courts that consider cases invoking the defense of qualified immunity decline to address the underlying

111. *Rakovich*, 850 F.2d at 1213 (quoting *Benson v. Allphin*, 786 F.2d 268, 276 n.18 (7th Cir. 1986)).

112. See generally, H. RICHARD UVILLER, *TEMPERED ZEAL* 98-101 (1988) (describing the "confident misunderstandings" of police officers).

constitutional issues.¹¹³ The resulting regressivity in the law contributes to uncertainty in the law.

Bryant v. U.S. Treasury Dept. Secret Service,¹¹⁴ a case that attracted attention in the Ninth Circuit, illustrates this problem. *Bryant* concerned an investigation by the Secret Service into a letter indicating that "Mr. Image," presumed by the agents to be the defendant, intended to assassinate President Reagan. The letter rambled, and one matter at issue was whether it could be reasonably interpreted that the author was planning to kill the President. A second issue was whether the law was clearly established in 1985 that a warrantless arrest inside an arrestee's residence violated the warrant requirement of the Fourth Amendment, where the arrestee had consented to the agents' entry into the residence (as *Bryant* had).¹¹⁵

On the basis of a trend in the circuits courts favoring the upholding of warrantless arrests following consensual searches,¹¹⁶ the *Bryant* court concluded that the "relevant case law strongly suggested that the officers could have believed that their warrantless arrest was lawful so long as they had probable cause and consent to enter the residence."¹¹⁷ Despite the fact that the only Ninth Circuit case to have addressed the issue did so tangentially

113. Presumably, were judges able to defend themselves on the issue, they would say that the reason they do not address the underlying issues is that to do so would be mere dicta. There are legitimate policy reasons underlying the disfavor of issuing dicta. The wisdom of the Cases and Controversies Clause of the Constitution, and the related doctrine of standing, is that it ensures that issues decided by courts will be vigorously litigated by requiring the parties to a case to have a significant interest in the outcome. The concern with dicta is that the court not decide matters which have not been honed by exposure to the full adversarial process.

Those concerns are minimized here by the fact that defendants asserting qualified immunity almost always argue (often as a primary argument, but at least in the alternative) that, regardless of the clarity of the law on point, their conduct was in fact constitutional. A district judge rarely encounters a case where the defendant concedes that his act was unconstitutional, but argues that he is nonetheless entitled to immunity.

A more cynical view of the court policy is offered by Professor Black. See H. Allen Black, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 765 n.214 (1991) and accompanying text:

The unspoken assertion in [cases that declined to determine the fundamental question of whether the acts complained of were in fact lawful] was that the courts themselves did not know what the law was in the situation at bar and would not go to the trouble of determining the law because a motion for summary judgment did not require such a determination.

114. 903 F.2d 717 (9th Cir. 1990) *rev'd sub nom.*, *Hunter v. Bryant*, 112 S. Ct. 534 (1992).

115. *Id.* at 723.

116. *Id.*

117. *Id.*

and in dicta,¹¹⁸ the *Bryant* court gave no indication of its opinion of what the law actually was.

One might argue that there is nothing undesirable about this because the whole point of qualified immunity is to limit public officials' liability to knowledge of clearly established principles. In a sense, the underlying legality is irrelevant to the officials' behavior.

There is some force to this argument. While courts could reduce general uncertainty over the law by addressing the underlying issues in cases in which qualified immunity is claimed, the reduction in uncertainty might have a minimal impact on conduct by officials because they are only held accountable for clearly established principles. By devoting their attention to this issue, courts may deal better with the law as it is understood by public officials.

The problem is that no statement is ever made about what the law really is. In effect, two bodies of doctrine are created: clearly established law and ordinary law. Because only the former is addressed in qualified immunity cases, the latter is unlikely to change.¹¹⁹ As time progresses it may become obvious what law is "clearly established," but the law itself will infrequently change. In *Bryant*, the Ninth Circuit would presumably have followed the prevailing trend of upholding warrantless yet consensual searches had it addressed the underlying constitutional issue. Thus, the court's decision, while failing to eliminate uncertainty over what the law is regarding consensual in-house arrests, probably did not create a division between "law" and "clearly established law." But in cases where the source of uncertainty is the absence of a factually specific precedent for conduct that is illegal, the regression problem may cause the body of "clearly established law" to diverge from actual constitutional principles.

Anderson concerned a warrantless search by FBI agents of the home of a woman whose brother was suspected of armed robbery. The Supreme Court declined to address the issue of

118. *Id.* (citing *United States v. Gray*, 626 F.2d 102 (9th Cir. 1980)).

119. The good faith exception to the exclusionary rule, derived from *United States v. Leon*, 468 U.S. 897 (1984) presents an analogous problem. See Joan G. Levenson, *The Good Faith Exception: Should It Enable Courts to Avoid Explication of Underlying Fourth Amendment Issues?*, 52 *BROOK. L. REV.* 799 (1986). Professor Levenson argues that courts that choose to analyze good faith claims without considering the underlying issue of probable cause effectively supplant the concept of probable cause with the good faith standard. *Id.* at n.16 and accompanying text.

whether exigent circumstances justified Anderson's lack of a search warrant.¹²⁰ There is reason to think that the Court declined because it was not clear that Anderson was in "hot pursuit" of the plaintiff, and Anderson had not showed that he had a reasonable basis for believing that evidence might be destroyed.¹²¹ Since the underlying issue of exigent circumstances was never addressed by the Court, no officer can subsequently be held liable on the facts of the case because the law is not clearly established for that scenario. Thus, it is quite possible that "clearly established law" differs from "real law."

This matter is especially problematic in light of the factual specificity of precedent that is required for a plaintiff to overcome a claim of qualified immunity.¹²² As noted above, public officials can successfully invoke qualified immunity for conduct that violates clearly established general principles such as "excessive force," which have not been extended to the factual circumstances of a particular case. At any given time, there may be countless factual scenarios which, though violative of such a right, have not been litigated. Qualified immunity, as currently interpreted, precludes the possibility of extending the right in question to cover those cases.

By failing to explicate the constitutional issues underlying cases in which qualified immunity is claimed, courts may also inadvertently confuse two bodies of doctrine. In *Anderson*, for example, the district court stated: "Based upon those facts and accepting plaintiffs' version of the disputed facts as true, defendant's search of the Creighton house was objectively reasonable."¹²³ That statement appears to state Fourth Amendment law on the facts of the case, but in fact it is only a statement of the result of the narrower inquiry asked by qualified immunity: whether a reasonable officer *could* have concluded that there was probable cause to search the home and that exigent circumstances existed.

The effect of these problems is to undermine the incentive of public officials to comply with the law. This incentive will not be

120. Neither did the Eighth Circuit Court of Appeals, but that is because the Eighth Circuit held that the lawfulness of the search could not properly be decided on summary judgment because of unresolved factual issues. *Creighton v. St. Paul*, 766 F.2d 1269, 1272-1276 (8th Cir. 1985).

121. *Id.* at 1275-1276.

122. See *supra* notes 58-59 and accompanying text.

123. *Creighton v. Anderson*, 724 F. Supp. 654, 661 (D.Minn. 1989).

undermined because the courts decline to address underlying constitutional issues. Rather, because there will often be decisions excusing officials from liability and none finding a basis for liability, the effect of this policy on the law will be to decrease significantly the potential liability that an official faces. This may negatively impact on officials' incentive for compliance.

VI. THE HAZARDS OF THE QUALIFIED IMMUNITY DOCTRINE'S MODIFICATION OF THE INQUIRY INTO THE DEFENDANT'S CONDUCT

Another aspect of the qualified immunity doctrine is its alteration of the standard by which courts judge whether conduct was in compliance with a legal standard. Because uncertainty, separate from that concerning what standard governs an individual's conduct and what that person's state of mind was with respect to the standard, may surround the question whether an individual's conduct was in compliance with a legal standard, there may be some justification for responding to the problem of overcompliance that is likely to result. As with the problem of ascertaining legal standards, however, there may also be undesirable incentive consequences involved in altering the standard by which compliance is determined.

Ordinarily, a court determines the legal standard governing a defendant's conduct and then asks the jury to determine whether that conduct was in compliance with that standard. In a medical malpractice case, for example, while deciding upon jury instructions the court may determine that a doctor's conduct is to be judged against the average standard of care exercised by doctors across the nation.¹²⁴ The jury is then left to determine whether the defendant's conduct conformed with that standard.

Qualified immunity alters that process in three ways. First, as is discussed above, it changes the method by which the legal standard itself is ascertained. Second, it changes the inquiry into whether a defendant's conduct conformed with the law. Instead of asking whether a defendant's conduct is reasonable, qualified immunity alters the inquiry to ask whether a reasonable person in the position of the defendant could have believed that her conduct was reasonable. Third, some courts have concluded that

124. See GRAHAM DOUTHWAITE, *JURY INSTRUCTIONS ON MEDICAL ISSUES* 55 (4th ed. 1992) ("Ordinarily . . . proof of breach of duty by a physician or surgeon must rest on the testimony of an expert witness qualified to state what the particular standard of care required . . .").

the question whether "a person acted reasonably under settled law in the circumstances" is a question for the court and not the jury, as is ordinarily the case.¹²⁵

A common critique of the qualified immunity doctrine is that the second of these changes effectively gives defendants "two bites at the apple" by allowing them two opportunities to establish reasonableness.¹²⁶ In his dissent to *Anderson*, Justice Stevens referred to this as the problem of double counting the interest of the public.¹²⁷ The problem has also been referred to as "duplication of the probable cause standard."¹²⁸

The argument goes as follows. The standards underlying most Section 1983 claims already make some allowance for the need to give leeway to public officials. The concept of probable cause, for example, "leaves room for mistakes, provided that they are mis-

125. This third issue is not addressed in detail since the incentive effects of shifting the question from the judge to the jury are unclear. Note, however, that the change is a source of controversy in several circuits. See, e.g. *Act Up!*/Portland v. Bagley, No. 90-35888, slip op. (9th Cir. filed March 11, 1993) (Norris, J., dissenting from court's failure to hear case en banc). By holding that whether agents acted reasonably under settled law in the circumstances is no longer a jury question, *ActUp!* repudiates the settled law of seven circuits, including our own. *ActUp!* also defies our common law tradition, which since time immemorial has considered the reasonableness of human conduct to be a quintessential jury question. Finally, by dividing the fact-bound question of the reasonableness of official conduct into two parts—with the jury resolving questions of evidentiary fact such as what officers knew and what they did and the court deciding the ultimate question of the reasonableness of their actions—*ActUp!* divides the decision-making process between judge and jury in a way that will cause procedural nightmares for district judges and civil rights litigants.

126. See *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc).

127. See *Anderson*, 483 U.S. at 664 (Stevens, J. dissenting). Justice Stevens noted that the issue was first raised by Judge Posner in *Llaguno v. Mingey*. The issue in *Llaguno* was the propriety of the following instruction issued by the court on immunity:

The law allows a defendant to defend a charge of unconstitutional entry by claiming a good faith belief that, under the circumstances, it was reasonable to enter the Llaguno house without a warrant. The defendant also must prove that such good faith belief was reasonable.

763 F.2d at 1569. In overturning the instruction, Judge Posner noted:

The good sense of *Harlow* in withdrawing the issue of immunity from the jury is particularly evident in a case such as this, where the police are charged with having acted without probable cause. The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.

Id. Posner may have been referring to a slightly different point than Stevens. The problem for Posner with the above instruction is that it excludes subjective inquiry into state of mind for purpose of determining liability but allows inquiry into subjective state for purpose of establishing immunity. This one-way ratchet may have been the double count that Posner was referring to rather than the problem of duplication of the standard.

128. See Black, *supra* note 113, at nn. 197-213 and accompanying text.

takes that could have been made by a reasonable officer."¹²⁹ If an act is found to be unreasonable, qualified immunity then allows an officer a second chance to evade liability by showing that a "reasonable officer could have believed it was reasonable."¹³⁰ The problem with creating this second layer of immunity is that it allows federal agents to "ignore the limitations of the probable-cause and warrant requirements [and presumably other constitutional provisions as well] with impunity."¹³¹ It is not possible, the argument concludes, to say that one reasonably acted unreasonably.¹³²

The response to this argument is that the problem is really one of semantics. Justice Scalia offered this rebuttal in *Anderson*:

[The surface appeal of the argument] is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of 'unreasonable' searches and seizures. Had an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term 'reasonable process of law' had been employed there.¹³³

Scalia's argument may undermine the catchiness of the "two bites at the apple argument," but it says nothing about the practical measure of immunity afforded and its consequences for the level of care that will be exercised by public officials. For several reasons, those consequences may have been underestimated even by the proponents of the view suggesting that qualified immunity duplicates protection already afforded by constitutional standards.

First, the qualified immunity standard does not merely objectify the inquiry into the reasonableness of an official's conduct: It also incorporates an additional degree of deference to the judgment of public officials. The subjective inquiry into a defendant's conduct would be: "*Did* this official reasonably believe in the con-

129. *Anderson*, 483 U.S. at 661 (Stevens, J., dissenting) (citing 1 WILLIAM LAFAVE, SEARCH AND SEIZURE 567 (2d ed. 1987)).

130. *Id.* at 660.

131. *Id.*

132. *Id.* at 659. See also *United States v. Leon*, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting) ("an official search cannot be both 'unreasonable' and 'reasonable' at the same time").

133. *Anderson*, 483 U.S. at 643.

stitutionality of his action?" Ordinarily, the objective equivalent of this question would be: "Would a reasonable official in the position of the defendant have believed in the constitutionality of his action?"¹³⁴ Instead, qualified immunity asks: "Could a reasonable official in the position of the defendant have believed in the constitutionality of his action?"¹³⁵

The specific formulation of the inquiry seems arguably a matter of importance. One might respond that, technically, the terms "would" and "could" are the same for a "reasonable person" because there is only one conclusion that could be reached. In practice, however, it is far less likely that a jury would find liability when the inquiry is formulated by using "could."

The derivation of the specific formulation is oddly unclear. Justice Scalia refers to it as a clearly established principle in *Anderson*,¹³⁶ and indeed it is now well-established,¹³⁷ but no case prior to *Anderson* had ever addressed the specific formulation of the inquiry. To the contrary, *Harlow* seemed to suggest that the "would" formulation should be favored.¹³⁸

Second, the measure of protection afforded by the alteration of the factual inquiry duplicates the protection offered by the requirement of factual specificity in the law. As noted above, the means by which compliance with a legal standard is judged is presumably relaxed as a response to the problem of overcompliance generated by uncertainty. That problem should be nonexistent, however, because qualified immunity precludes liability except for clearly established and factually specific legal principles. This limitation would nearly eliminate uncertainty faced by

134. See, e.g., RESTATEMENT (SECOND) OF TORTS § 298 (1965):

When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another. (Emphasis added).

135. See *Anderson* 483 U.S. at 641. ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officials possessed.")

136. See *Anderson*, 483 U.S. at 642.

137. See, e.g., *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1992) ("Our cases establish that qualified immunity shields agents Hunter and Jordan from suit for damages if a 'reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.'")

138. *Harlow*, 457 U.S. at 818 ("We therefore hold that government officials performing discretionary functions generally are shielded 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.") (emphasis added).

an official in considering the question whether his conduct will be found to be in compliance with a legal standard.

In combination with the protection for individual judgment already built into most constitutional standards, these added layers of protection offer virtually absolute immunity to public officials. That result may not be entirely unanticipated,¹³⁹ but it is difficult to justify an added layer of immunity when, as is the case here, it offers additional protection to public officials without any offsetting public benefit.

VII. CONCLUSIONS AND PRESCRIPTIONS FOR REFORM

This Part offers several suggestions for reform of qualified immunity doctrine. Section A states the premise that some bifurcation of the qualified immunity standard is needed because the policy rationale for offering immunity to lower-level officials differs significantly from the rationale with respect to higher-level officials, and because the measure of protection offered to lower-level officials by the existing doctrine is vastly overbroad.

Section B considers the issue of what the standard for lower-level officials should be. The preferred suggestion is that qualified immunity be abandoned entirely for lower-level officials in favor of a strict liability standard. If qualified immunity for lower-level officials is to be retained, however, then it should be reformed to devote greater attention to the usefulness combatting uncertainty as a means of reducing overcompliance with the law.

The Article concludes with a word about fairness and argues that considerations of equity and justice support the conclusion that extending qualified immunity to lower-level officials in its current form is unjustifiable.

A. *Bifurcating the Qualified Immunity Standard*

The qualified immunity standard should be bifurcated. In its current form, the doctrine extends virtually absolute immunity to public officials. The resulting moral hazard leaves public officials with virtually no incentive to ascertain or comply with the law governing their conduct.

In light of the analysis in the preceding three Parts, the relevant question seems to be: Why should immunity be extended to

139. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.").

anyone at all? Bifurcation is preferable to complete abandonment because the policy considerations behind extending immunity to higher-level officials differ in two significant respects from the rationale for extending immunity to lower-level officials.

First, the behavior of higher-level public officials is checked to some degree by the political process.¹⁴⁰ While it is uncertain precisely what deterrent effect the threat of being removed from office has on an official's behavior, it does at least offer some check independent of the tort system.

Second, exposing higher-level officials to suit involves peculiar costs to society.¹⁴¹ The time of higher-level officials is unusually valuable, and in many instances the officials are uniquely able to perform the tasks for which they are selected. If, for example, the Secretary of State is called on to testify in court, there is no one who can step into her shoes. There may also be sensitive government matters that would be undesirable to expose to the discovery process.

These concerns are not present for lower-level officials.¹⁴² The decisions of lower-level officials tend to affect only those with whom they have direct contact. Further, because the task of a lower-level official is frequently duplicated, the time she spends defending suits will ordinarily not unduly disrupt government operations.¹⁴³

No convincing affirmative argument has yet been offered in support of maintaining a uniform standard for qualified immunity claims. In *Anderson*, Justice Scalia rejected an argument in favor of a bifurcated qualified immunity standard on the ground that a split standard might cause unnecessary confusion.¹⁴⁴

140. See *Anderson*, 483 U.S. at 662 (Stevens, J., dissenting):

... [T]he political constraints that deter high government officials from violating the Constitution have only slight, if any, application to police officers, and may actually lead to more, rather than less, vigorous enforcement activity. It is thus quite wrong simply to assume that the considerations that justified the decision in *Harlow v. Fitzgerald* also justify an equally broad rule of immunity for police officers.

141. See *id.* ("Testifying in court is a routine part of an officer's job; his or her participation in litigation does not occasion nearly as great a disruption of everyday duties as it would with those of a senior government official.")

142. See Stephen J. Shapiro, *Public Official's Qualified Immunity In Section 1983 Actions Under Harlow v. Fitzgerald and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REF. 249, Part III.B (1989).

143. Kirby, *supra* note 9, at nn. 203-205 and accompanying text.

144. In rejecting the proposal, the Court stated:

Although we have in narrow circumstances provided officials with an absolute immunity, we have been unwilling to complicate qualified immunity analysis by

Scalia's argument made no reference to considerations of policy despite the obvious differences in the nature of the duties of lower- and higher-level officials. Furthermore, it seems unlikely that bifurcating the qualified immunity standard would cause any significant amount of confusion because the proposed basis for separating the classes is well defined.

B. *Defining the Standard for Lower-Level Officials: Two Courses for Reform*

1. Strict Liability¹⁴⁵

Part II outlined some of the theoretical reasons why strict liability might be preferred as a response to the problem of overcompliance with uncertain legal standards. It stated the general proposition that a standard of strict liability is generally preferable to a standard of negligence where, as is the case in Section 1983 suits, only one party can exercise care to reduce the possibility of injury. In the context of conduct by lower-level officials, a standard of strict liability would eliminate the uncertainty surrounding the question of precisely what officials are expected to know, and might reduce court costs by reducing the number of issues to be litigated in Section 1983 suits. In order to combat the effects discussed in Part III.D, it would be necessary either to allow *respondeat superior* claims or to mandate indemnification schemes. Alternatively, the courts could create a separate cause of action against municipalities for negligent failure to inform officials of the risks associated with their action.¹⁴⁶ This would

making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson, 483 U.S. at 642-643. See also *id.* at 642 ("We have emphasized that the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'").

145. Several scholars have suggested that qualified immunity be abandoned for lower-level officials. All of these proposals, however, have turned on considerations of fairness. See Black, *supra* note 113, at 733, n. 233 and accompanying text (arguing that constitutional torts are within the Federal Torts Claims Act); Kirby, *supra* note 9, at 485 ("The most sweeping, and ultimately most satisfying, long-term reform of the qualified immunity doctrine would be its eventual abrogation for lower level officials in view of the increasing availability of insurance and government indemnification programs . . ."); Shapiro, *supra* note 142, (arguing that *Monell* should be overturned to allow respondeat superior claims against municipalities and hence effectively indemnifying state officials).

146. See Peggy W. Corn, *Anderson v. Creighton and Qualified Immunity*, 50 OHIO ST. L.J. 1, 3 & nn. 127-143 and accompanying text (1989).

place the duty on municipalities to research legal standards and to disseminate them to public officials.

An additional advantage of a strict liability scheme in this context, related to the moral hazard problems discussed above, is that it reduces the problem of redundant legal research. Under existing doctrine, municipalities and government agencies have virtually no incentive to conduct research into the law for the benefit of individual public officials. If public officials are inclined to ascertain the standard governing their conduct, they will often be required to engage in that undertaking on their own. This may result in costly duplication of research.

Still another advantage of strict liability is that it places the burden of liability on the government, which is better able than private citizens to spread the losses that result from constitutional injuries.¹⁴⁷ While the government can, and in some instances does, indemnify public officials for Section 1983 violations and pass on the costs to the general public in the form of taxes, no scheme is available for private citizens to insure themselves against constitutional injuries. The result of this is that victims are generally forced to bear the costs of their own injuries. While it is doubtful that this result has a direct economic effect on the behavior of injurers and victims, it may have the undesirable side effect of decreasing confidence in the legal system. That may have an undesirable, indirect economic effect.

In any event, the result that many victims of constitutional injuries go uncompensated seems particularly absurd because the underlying negligence scheme creates undesirable incentives for public officials to behave with disregard for the law. Were this not the case, loss-spreading considerations might justifiably be overlooked. But in light of the fact that the negligence scheme created by qualified immunity leads officials to exercise sub-optimal levels of care, the result that most victims of constitutional injuries go uncompensated is indefensible.

147. Though this is clearly an advantage of a strict liability regime, it cannot properly be characterized as an economic advantage. Loss-spreading may help to insure that victims receive needed compensation, but it has no effect on the incentives that parties have to exercise care. See, e.g., Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 360 (1990) ("Liability insurance is hence an essential part of tort law if victim compensation is assumed to be the law's purpose.") (emphasis in original).

2. Reducing Uncertainty

If some measure of immunity is to be retained, there remains the separate issue of precisely what officials will be expected to know. Qualified immunity adopts the first of the two approaches, discussed above,¹⁴⁸ to attacking the problem of overcompliance. It presumably adopts a low standard of care on the expectation that overcompliant officials will end up exercising approximately the optimal level of care. The law makes virtually no attempt, however, to attack the problem directly by reducing the uncertainty surrounding the legal standard. The latter approach would enable courts to raise the level of expected care without fear that uncertain officials would become complacent.

There are several means by which courts might reduce the uncertainty surrounding legal standards. One is for courts to acknowledge their own instructive abilities and to confront constitutional issues directly whenever possible. That is relevant not only in cases in which qualified immunity is invoked as a defense, but also in the significant number of cases in which the good faith exception is invoked.¹⁴⁹

Second, while it is not possible for courts to promulgate enforcement guidelines, the creation of a separate indemnification action for negligent failure to inform would create an incentive for municipalities to research and disseminate legal standards for the same reasons as discussed in the preceding section. That would accomplish essentially the same objective as promulgation of enforcement guidelines.

Third, courts could offer a precise definition of the term "clearly established" so that officials would be held responsible for a specific set of legal principles.

With these changes, public officials might reasonably be held to a higher standard of care—for example, "knowledge of legal principles of which a reasonable person would have been aware"—than the gross negligence to which they are currently held. That would be a significant step toward eliminating the moral hazard of the current standard.

Additionally, the requirement of factual specificity should be somewhat relaxed. As it is, the protection of the requirement is duplicated through the combination of the "clearly established"

148. See *supra* Part III.

149. See Levenson, *supra* note 119.

standard with the deference afforded officials in resolving the factual question whether their conduct conformed to the legal standard. The redundancy is unjustified. Taken by themselves, the standards undermine the incentive of officials to conduct inquiry into the law.

One objection to this suggestion would be that it undermines the objective of freeing officials from the burden of participating in frivolous lawsuits. That argument, though often raised, is without force for two reasons. First, Rule 12(b)¹⁵⁰ has always provided a public official protection against frivolous lawsuits.¹⁵¹ Second, the concern with disrupting government function does not apply to lower-level officials to the same extent as higher-level officials.¹⁵²

C. *A Concluding Word About Fairness*

The legal system presumptively holds people strictly liable for knowledge of the law. Qualified immunity departs from that principle as a response to the problem of uncertainty in the law facing government officials. That response, however, goes too far. The doctrine of qualified immunity extends a measure of protection to lower-level public officials that undermines any incentive they may have to exercise care to avoid causing constitutional injuries.

An obvious response to that statement is that it is unfair to hold public officials liable for conduct that they could not anticipate would violate a citizen's constitutional rights. One rebuttal is that qualified immunity extends considerably more protection than this because it immunizes officials for some conduct that they could have known was constitutional and, in some instances, for conduct that they actually knew was unconstitutional. The second reply is that it is no more fair to hold victims liable for injuries that they could not have taken any steps to avoid.¹⁵³

150. Fed. R. Civ. P. 12(b).

151. See Shapiro, *supra* note 142, at Part III.B.:

Even before *Harlow*, the court in a section 1983 case would not reach the immunity question until it was first determined, as a matter of law, whether the plaintiff had pleaded a violation of a constitutional right. . . . The Harlow defense has the unwanted side effect of protecting some undeserving defendants from liability.

152. See *supra* Part VII.A.

153. See George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 543 (1972) (Professor Fletcher terms this the problem of nonreciprocal risk.).

The simple fact is that someone has to bear the costs of unforeseeable constitutional injuries, and public officials have no better claim on immunity from that burden than private citizens. The problem with qualified immunity from the standpoint of efficiency is that it protects officials from accidents that are foreseeable, and hence affords an inappropriate measure of protection.

It is indefensible that the doctrine of qualified immunity places the burden of liability on the shoulders of private citizens who are unable to spread the losses that result from constitutional injuries. Victims go uncompensated for the sake of public officials who have no superior claim on immunity from either the standpoint of efficiency or fairness.

