PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 126 | Issue 3

Spring 2022

The Neuroscience of Qualified Immunity

Gary S. Gildin

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ABSTRACT

Qualified immunity not only absolves public officials from accountability for the damages caused when they deprive a citizen of their constitutional rights; by virtue of companion doctrines shielding governmental entities from liability, conferral of immunity leaves the victim to bear the loss. Therefore, it is essential that the contours of immunity be carefully calibrated to align with its intended purposes.

The United States Supreme Court has continuously expanded immunity to protect the exercise of discretion where, albeit acting in violation of constitutional norms, the official could have reasonably believed their conduct was constitutional. This Article exposes the implicit assumptions as to the operation of the brain that underpin the evolution of the Court's immunity jurisprudence. It then explains how the Court's suppositions are refuted by recent findings in the field of neuroscience and proposes reforms that would harmonize immunity with the true workings of the minds of government officials.

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* Professor of Law and G. Thomas and Anne G. Miller Chair in Advocacy, Penn State Dickinson Law.

INTRODUCTION

The nationwide protests following the latest spate of police killings of Black citizens brought the doctrine of qualified immunity to public consciousness. While the bulk of the reporting has focused on the effect qualified immunity has on the accountability of law enforcement officials, the defense is available to every person working for the government. Qualified immunity frees federal, state, and local officials of every stripe from liability for damages caused when they violate the fundamental rights guaranteed to citizens by the United States Constitution. The present contours of qualified immunity have been critiqued by academics,[1] judges—including members of the United States Supreme Court,[2]—and legislators.[3] A

1. A March 4, 2022, search request for "qualified immunity" in the Current Index to Legal Periodicals database on Hein Online yielded 450 results. The same search request of secondary materials in the Lexis Secondary Materials database yielded over 10,000 results, with 1,759 of those results published after January 1, 2017. Of course, not every article discredits the doctrine. *See, e.g.*, Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547 (2020). I apologize for my inability to cite to the authors of each article who likely have made observations about qualified immunity similar to many that I will make in the run-up to the central thesis of this article.

2. *See, e.g.*, Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (THOMAS, J., concurring in the denial of certiorari) ("[I]n an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (THOMAS, J., concurring in part and concurring in judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). In *Salazar-Limon v. City of Houston*, JUSTICE SOTOMAYOR dissented from the denial of certiorari and stated:

> Our failure to correct the error made by the court below . . . continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying offices the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on 'society as a whole' than does the erroneous denial of summary judgment in such cases.

137 S. Ct. 1277, 1282 (2017) (SOTOMAYOR, J., dissenting) (citations omitted); *see also* Jamison v. McClendon, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.); Thompson v. Clark, No. 14-CV-7349, 2018 U.S. Dist. LEXIS 105225 (E.D.N.Y. June 18, 2018) (Weinstein, J.).

handful of states have modified or abrogated the defense in civil actions for damages incurred by deprivations of rights protected by state constitutions.[4]

This Article adds to the ongoing debate over the appropriate boundaries of qualified immunity by drawing upon wisdom outside conventional legal sources, methodologies, and critiques. By repeatedly adjusting the standard for qualified immunity to avoid inhibiting the decision-making of governmental agents, the Supreme Court has relied on its own presumptions as to what influences official behavior.[5] New technologies—neuroimaging, optogenetics, and transcranial stimulation—have allowed neuroscientists to see how

3. Bills to eliminate the qualified immunity defenses were introduced in both the House and Senate in 2020. *See* Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2d Sess. 2020); Ending Qualified Immunity Act, S. 4142, 116th Cong. (2d Sess. 2020). On March 23, 2021, the United States House of Representatives passed the broader George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (1st Sess. 2021). Section 102 of that Act amends 42 U.S.C. § 1983 as follows:

> It shall not be a defense or immunity in any action brought under this section against a local law enforcement officer (as such term is defined in section 2 of the George Floyd Justice in Policing Act of 2021), or in any action under any source of law against a Federal investigative or law enforcement officer (as such term is defined in section 2680(h) of title 28, United States Code), that—
>
> "(1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
>
> "(2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful."

Id. On March 1, 2021, the Executive Office of the President issued a Statement of Administration Policy encouraging the passage of the Act. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1280—GEORGE FLOYD JUSTICE IN POLICING ACT OF 2021 (Mar. 1, 2021), https://bit.ly/379x0Cp [https://perma.cc/KG7W-2JSL]; *see also* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10492, Policing the Police: Qualified Immunity and Considerations for Congress (2020) https://bit.ly/3hDDjA3 [https://perma.cc/H3FK-3ZJX].

4. *See* COLO. REV. STAT. ANN. § 13-21-131(2)(b) (West 2022); N.M. STAT. ANN. § 41-4A-4 (West 2022); 2020 Conn. Acts 143 (Spec. Sess.); Baldwin v. City of Estherville, 915 N.W. 2d 259, 266–75 (Iowa 2018). In March of 2021, the New York City Council passed a bill that created a local right to be free from unreasonable searches and seizures and excessive force, and barred police officers from invoking qualified immunity to shield themselves from liability in a civil action seeking damages for violation of the right. N.Y.C., N.Y., Law 2021/048 (2021), https://on.nyc.gov/3hHU5hq [https://perma.cc/CYB8-VJQ7].

5. *See infra* Part III; *see also* Richardson v. McKnight, 521 U.S. 399 (1997) (denying qualified immunity to guards employed by private prison management firm, reasoning that private sector market forces will ensure that employees are not unduly timid in acting).

the neurons in the brain interact and to experiment on their operation.[6] As Dr. Lisa Feldman Barrett reported in her 2017 work,[7] the findings of neuroscientists have upended centuries-old assumptions as to the workings of both logic and emotion:

> We are, I believe, in the midst of a revolution in our understanding of emotion, the mind, and the brain—a revolution that may compel us to radically rethink such central tenets of our society as our treatments for mental and physical illness, our understanding of personal relations, our approach to raising children, and ultimately our view of ourselves.[8]

A bevy of diverse disciplines have used revelations emerging from neuroscience and neurobiology to revisit and revise settled understandings,[9] including proposals to reform legal doctrine.[10] While most of the extrapolation to law has focused on criminal culpability,[11] neuroscientific findings are fertile territory for—in an objective and non-partisan way—devising a qualified immunity standard that aligns with how the brain of a government official asserting immunity prompts them to behave.[12]

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6. LEONARD MLODINOW, EMOTIONAL: HOW FEELINGS SHAPE OUR THINKING xiii (2022).

7. LISA FELDMAN BARRETT, HOW EMOTIONS ARE MADE (2017).

8. *Id.* at xv.

9. *See* ROBERT SAPOLSKY, BEHAVE 79 (2017) ("There's been a proliferation of 'neuro' fields. Some, like neuroendocrinology and neuro immunology, are stodgy old institutions by now. Others are relatively new—neuroeconomics, neuromarketing, neuroethics, and, I kid you not, neuroliterature and neuroexistentialism."); MLODINOW, *supra* note 6, at xiii–iv (noting the application of a new field of psychology, "affective neuroscience," by the National Institute of Mental Health, National Cancer Institute, Kennedy School of Government, computer scientists, business schools, and marketing organizations).

10. *See* BARRETT, *supra* note 7, at 219–51.

11. The *Fordham Law Review* and the Fordham Law School Neuroscience and Law Center cosponsored the Symposium *Criminal Behavior and the Brain: When Law and Neuroscience Collide*, papers from which are published in Volume 85 of the *Fordham Law Review*. *See, e.g.*, Deborah W. Denno, *Criminal Behavior and the Brain: When Law and Neuroscience Collide*, 85 FORDHAM L. REV. 399 (2016) (providing an overview of the symposium topic and articles). The *Mercer Law Review* published articles and the transcript of proceedings from its symposium, *The Brain Sciences in the Courtroom*. *See, e.g.*, Theodore Y. Blumoff, *Foreword: The Brain Sciences and Criminal Law Norms*, 62 MERCER L. REV. 705 (2011). The *New Criminal Law Review* devoted an entire volume to what it termed *The Neurolaw Issue*. *See, e.g.*, Carrie Leonetti, *Editor's Introduction*, 21 NEW CRIM. L. REV. 209 (2018).

12. Professor Kolber has posited that the significant impact of neuroscience on law will lie outside the realm of criminal responsibility. *See generally* Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807 (2014). For an excellent history of the intersection between neuroscience and law, see generally Francis X. Shen, *The Overlooked History of Neurolaw*, 85 FORDHAM L. REV. 667 (2016). Others have rightfully cautioned against uncritical reliance on extrapola-

Part I of the Article identifies what is at stake in the debate over qualified immunity. Part II traces the origin and evolution of the Supreme Court's immunity doctrine. Part III identifies the implicit assumptions about the workings of the brain of a public official that underlie the Court's legal test for immunity, analyzes whether those assumptions are supported by neuroscience, and proposes modifications to the immunity doctrine to make it congruent with the operation of the brain

I. THE STAKES

In his published conversation with legal writing expert Bryan Garner, the late David Foster Wallace suggested how any work setting forth an argument should begin:

> A good opener, first and foremost, fails to repel. Right? So it's interesting, and engaging. It lays out the terms of the argument, and in my opinion, should also in some way imply the stakes. Right? Not only am I right, but in any piece of writing there's a tertiary argument: Why should you spend your time reading this? Right? "So here's why the following issue might be important, useful, practical."[13]

To appreciate why it is well worth reading or caring about the proper scope of qualified immunity, we must fully comprehend what is at stake.

While securing fundamental individual liberties, the United States Constitution does not prescribe a remedy for when the government violates its mandates.[14] In response to state and local officials' unwillingness or inability to quell the Ku Klux Klan's violent

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tion from neuroscience in crafting legal doctrine. *See, e.g.*, David W. Opderbeck, *The Problem with Neurolaw*, 58 ST. LOUIS U. L.J. 497 (2014); Abigail A. Baird, Christy L. Barrow & Molly K. Richard, *Juvenile Neurolaw: When It's Good It Is Very Good Indeed, And When It's Bad It's Horrid*, 15 J. HEALTH CARE L. & Pol'y 15 (2012); Stephen J. Morse, *Avoiding Irrational NeuroLaw Exuberance: A Plea for Neuromodesty*, 62 Mercer L. Rev. 837 (2011); Steven K. Erickson, *The Limits of Neurolaw*, 11 HOUS. J. HEALTH L. & POL'Y 303 (2011); Daniel S. Goldberg, *Against Reductionism in Law & Neuroscience*, 11 HOUS. J. HEALTH L. & POL'Y 321 (2011).

13. DAVID FOSTER WALLACE & BRYAN A. GARNER, QUACK THIS WAY 80 (2013).

14. The Just Compensation Clause of the Fifth Amendment provides that compensation should be awarded for governmental takings of private property. U.S. CONST. amend. V ("[N]or shall private property be taken for public uses, without just compensation."). The Constitution also preserves the remedy of habeas corpus. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or invasion the public Safety may require it.").

obstruction of guarantees of constitutional amendments designed to secure racial equality, the 1871 Congress enacted what is now codified as 42 U.S.C. § 1983:

> 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 any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[15]

Through Section 1983, Congress sought to redress two deficiencies in state law. First, even where a remedy was available under state law, the civil cause of action Congress created provided compensation for the "significantly different . . . and more serious" deprivations of constitutional rights.[16] Second, because state courts had proven to be unreliable protectorates of civil liberties, Congress authorized federal court jurisdiction over the newly-established civil action through passage of companion legislation.[17]

As the title of the doctrine portends, qualified immunity frees the government agent who has wronged a citizen in violation of the Constitution from paying a sum in damages to the victim.[18] Where

15. 42 U.S.C. § 1983. Section 1983 does not reach unconstitutional actions of federal officials. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court implied a cause of action for damages against federal agents to redress deprivations of Fourth Amendment rights. Unlike Section 1983, the Court has not construed *Bivens* to afford a cause of action for all instances of deprivation of constitutional rights. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (refusing to extend *Bivens* to provide relief against Border Patrol agents who shot plaintiff's son across a culvert separating the United States and Mexico because of its implications for foreign relations and national security and hesitation of Congress to create claims for tortious conduct beyond the national border); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action . . . expanding the *Bivens* remedy is now a 'disfavored' judicial activity."). For purposes of this article, the relevant takeaway is that the United States Supreme Court has held that where *Bivens* actions exist, individual federal officials are sheltered by the same qualified immunity available to state and local officials sued under Section 1983. *See generally* Butz v. Economou, 438 U.S. 478 (1978).

16. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

17. 28 U.S.C. § 1343(3). Congress did not establish general federal court jurisdiction until four years after passage of § 1983 and § 1343(3). *See* 28 U.S.C. § 1331.

18. Immunity is available even where, as is most often the case, the government will indemnify the official. Greer v. Shoop, 141 F. 3d 824, 828 (8th Cir. 1998); *see also* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth*

the officer is immunized, the loss from the deprivation must be allocated either to the governmental entity that employed the officer or to the injured citizen. While it would seem unconscionable to leave the citizen who has suffered an invasion of their most fundamental rights remediless,[19] in most instances this is precisely the consequence of conferring qualified immunity on the individual official.

Where the wrongdoer is employed by a state entity, the citizen will receive no compensation for their injuries.[20] Under Section Five of the Fourteenth Amendment, Congress has the power to abrogate the states' Eleventh Amendment immunity from suit in federal court without its consent.[21] The Supreme Court has held, however, that Congress did not intend to exert that power when it

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of Personal Liability: Who Pays When Bivens Claims Succeed, 72 STAN. L. REV. 561 (2020); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (documenting that the individual official rarely is personally responsible for paying a damage judgment in civil liberties actions). The individual official may not assert qualified immunity where the plaintiff seeks equitable relief. Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975). However, the Supreme Court's prerequisites to Article III standing; its general standards for equitable relief; and its belief that considerations of federalism are heightened when plaintiffs seek injunctive relief rather than damages greatly diminish the viability of a Section 1983 action for equitable relief against an individual official. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Ashcroft v. Mattis, 431 U.S. 171 (1977*)*; Rizzo v. Goode, 423 U.S. 362 (1976).

19. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 8 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the [C]onstitution or by law."); International Covenant on Civil and Political Rights art. 2, ¶ 3, *adopted* Dec. 19, 1966, T.I.A.S. 92-908 ("Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . ."); International Convention on the Elimination of All Forms of Discrimination art. 6, *opened for signature* Mar. 7, 1966, T.I.A.S. 94-1120 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered . . . ."); American Convention on Human Rights art. 25, ¶ 1, *effective* July 18, 1978, 1144 U.N.T.S. 123 ("Everyone has the right to simple and prompt recourse . . . for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation[s] may have been committed by persons acting in the course of their official duties.").

20. Sovereign immunity entirely shelters federal government entities from liability for damages in a *Bivens* action. FDIC v. Meyer, 510 U.S. 471, 475, 484–86 (1994).

21. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

enacted Section 1983.[22] Hence, whenever qualified immunity shields the individual state official from liability, the citizen is left without a remedy for the damages caused by the invasion of their constitutional liberties.[23]

For different reasons, victims of unconstitutional action by local government officials, in most instances, will be left to bear the risk of loss. Unlike their state counterparts, local governments are not protected by the Eleventh Amendment against suit in federal court.[24] Furthermore, a municipality may not assert the "good faith of its officers or agents as a defense to liability under § 1983."[25] However, departing from the treatment of municipalities at common law,[26] the Supreme Court has held that a local government is not vicariously liable for constitutional malfeasance by its employee acting in the scope of their employment.[27] Rather, the entity is liable only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."[28]

22. Quern v. Jordan, 440 U.S. 332, 345 (1979). The Court subsequently held that plaintiff cannot recover damages from a state department by filing the Section 1983 action in state court—where the Eleventh Amendment is inapplicable—because Congress did not intend to include states among the "person[s]" liable under the statute. Will v. Mich. Dep't of State Police, 491 U.S. 58, 68–69 (1989).

23. A plaintiff may avoid the bar of the Eleventh Amendment by suing the state official in their official capacity, but only as long as the relief sought is prospective rather than retroactive. Edelman v. Jordan, 415 U.S. 651, 677 (1974); Ex Parte Young, 209 U.S. 123, 155–56 (1908). While the Court reasoned that the availability of prospective relief did not "render § 1983 meaningless insofar as States are concerned," *Quern*, 440 U.S. at 345, it has erected near-insurmountable obstacles to obtaining equitable relief to redress deprivations of constitutional rights. *See supra* note 18.

24. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.54 (1976). And unlike states, local governmental entities are "persons" suable under the text of Section 1983. *Id.* at n.55.

25. Owen v. City of Independence, 445 U.S. 622, 638 (1980). Some Justices have suggested that while local governments may not invoke qualified immunity, a local government cannot be liable for deliberate indifference to the need for training where the right violated was not clearly established. City of Canton v. Harris, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part); *see* Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 759–60 (5th Cir. 1993) ("There are some indications that *Canton* requires a showing of deliberate indifference to citizens' constitutional rights, not merely the harm inflicted by city employees that gives rise to constitutional claims. It therefore may well be . . . that 'to be "deliberately indifferent" to rights requires that those rights be clearly established.'") (citations omitted); Lewis *ex rel.* Cornfield v. Consol. Sch. Dist. No. 230, 991 F.2d 1316, 1327 (7th Cir. 1993) ("Given the nebulous standards governing student searches, school districts . . . cannot be held accountable on this ground [failure to train] because the particular constitutional duty is not clear.").

26. *See, e.g.*, *Owen*, 445 U.S. 622 (1980).

27. *Monell*, 436 U.S. at 691.

28. *Id.* at 694.

Through a series of decisions interpreting the policy or custom prerequisite to local governmental liability, the Supreme Court has erected almost insurmountable barriers to recovery in all but the most egregious cases.[29] Where the local official is protected by qualified immunity and the official's actions, albeit unconstitutional, did not represent the policy or custom of the local government, the citizen is denied any compensation for the injuries they suffered.

In sum, in most instances where the official is exonerated from liability, the citizen will not be compensated for the injuries caused by the invasion of their constitutional right. If qualified immunity is to be afforded for constitutional violations, then it must be fine-tuned to avoid excusing behaviors of government officials that are not contemplated or justified by the purposes of that immunity. An informed understanding of the workings of the brain through which government officials make their judgments is indispensable if we are to properly prescribe the prerequisites for immunity. The Justices of the Supreme Court have speculated about what animates the decisions of public officials who violate the Constitution. However, neuroscientists, who have literally watched and charted the operation of the brain, are more reliable guides to achieving a standard for immunizing unconstitutional conduct that aligns with the reality of decision-making.

II. THE ORIGIN AND EVOLUTION OF THE QUALIFIED IMMUNITY STANDARD

To identify the hypothesized working of the brain that underlies the Supreme Court's qualified immunity jurisprudence, it is necessary to trace the evolution of the Court's legal test for when

29. Connick v. Thompson, 563 U.S. 51, 64 (2011) (requiring "proof of a pre-existing pattern of violations" by untrained employees to establish a policy of deliberate indifference in training); Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 412 (1997) (concluding that a county is liable for a policymaker's hiring decision only where the policymaker was deliberately indifferent to the risk that hiring the employee would result in the violation of the *particular* constitutional right asserted in the Section 1983 action); *Harris*, 489 U.S. at 390, 390 n.10 (1989) (finding that a city could be liable for its failure to train where a) the need for training is "'so obvious" that failure to do so amounted to "deliberate indifference," or b) officers "so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."); City of St. Louis v. Praprotnik, 485 U.S. 112, 127–31 (1988) (finding that the single act of an official constitutes policy only if a judge makes the finding that the official has final authority under codified state and local law).

an official is excused from liability for infringement of a constitutional right.

A. The Origin of Qualified Immunity

The text of Section 1983 makes no mention of immunity. To the contrary, it prescribes that "every person" acting under color of state law who deprives a citizen of rights secured by the United States Constitution "shall be liable to the person injured in an action at law."[30] Consistent with the plain meaning of the statutory text, the legislative history counsels that courts are to liberally construe Section 1983 in favor of affording relief to the citizen who suffers injuries from the invasion of their constitutional rights.[31]

Notwithstanding the unqualified language of the statute, the legislative instruction to broadly construe its terms to afford relief, and Congress' underlying purpose to remedy deficiencies in common law protection,[32] the United States Supreme Court in *Pierson v. Ray*[33] held that the 1871 Congress intended to allow officials sued under Section 1983 to assert immunities available to their office at common law at the time that the act was passed.[34] The Court reasoned that although the language of Section 1983 imposes liability on "every person[,] . . . . [t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[35]

B. The Evolution of the Test for Qualified Immunity

Given its origin, we should not expect the test for qualified immunity to change. Because the immunity was founded in the 1871 Congress' intent to incorporate then-settled common law doctrine, the requisites to the immunity should be fixed. At the very least, any alteration of the criteria for immunity under Section 1983

30. 42 U.S.C. § 1983.

31. *See Monell*, 436 U.S. at 683–87.

32. Monroe v. Pape, 365 U.S. 167, 173–74 (1961).

33. Pierson v. Ray, 386 U.S. 547 (1967).

34. *Id.* at 554–55, 557. While sporadically inquiring whether the particular official sued under Section 1983 was sheltered by a common law immunity, *see, e.g.*, Tower v. Glover, 467 U.S. 914 (1984) (concluding that public defenders may not assert qualified immunity because no immunity existed at common law for analogous counsel); Richardson v. McKnight, 521 U.S. 399 (1997) (prohibiting guards employed by a private management company from asserting immunity in a Section 1983 action because private jailers were not afforded immunity at common law), the Supreme Court has largely abandoned that prerequisite, instead assuming that any official not protected by absolute immunity may assert qualified immunity. *See* Procunier v. Navarette, 434 U.S. 555, 568–69 (1978) (Stevens, J., dissenting).

35. *Pierson*, 386 U.S. at 554.

should be attributed to subsequent adjustment of the legal test for immunity under the common law. Instead, the Supreme Court took it upon itself to create a new immunity standard that: was not grounded in any common law;[36] ignored the legislative exhortation to construe Section 1983 broadly and liberally in favor of furnishing relief; and continually expanded the conditions under which officials could evade liability for harm caused by their unconstitutional conduct.

1. The Original Immunity Test: Absolving Police Officers Who Arrest in Good Faith and with Probable Cause for a Violation of a Then-Valid State Law

The qualified immunity afforded by the *Pierson* Court was available in a highly circumscribed situation; it exonerated only police officers who fully complied with constitutional limits on their authority while enforcing a state law that was ruled unconstitutional after the arrest.[37] *Pierson* arose out the effort of 15 white and Black Episcopal clergy to breach segregated facilities in the Jackson, Mississippi bus terminal.[38] City of Jackson police arrested the clergymen for violating a Mississippi law that prohibited "congregat[ing] with others in a public place under circumstances such that a breach of peace may be occasioned thereby, and refus[ing] to move on when ordered to do so by a police officer."[39] Four years after these arrests, the Supreme Court held the Mississippi statute unconstitutional.[40]

The Supreme Court reversed the court of appeals' ruling that the arresting officers could assert no immunity in the Section 1983 damages action brought by the arrested clergymen.[41] The Court reasoned that, at common law, an officer was not liable for false arrest when the defendant was acquitted, as long as the officer had

36. *See* Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (THOMAS, J., concurring in the denial of certiorari) ("[W]e have 'substitute[d] our own policy preferences for the mandates of Congress' by conjuring up blanket immunity and then failed to justify our enacted policy."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (THOMAS, J., concurring in part and concurring in the judgment) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpreting the intent of Congress in enacting' the Act."); Anderson v. Creighton, 483 U.S. 635, 645 (1987) (acknowledging the Court has "completely reformulated qualified immunity along principles not at all embodied in the common law").

37. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

38. *Pierson*, 386 U.S. at 549.

39. *Id.* at 548.

40. *Id.* at 550.

41. *Id.*

probable cause to make the arrest. While finding the matter "not entirely free from doubt," the Court concluded that an officer similarly should be "excus[ed] . . . from [Section 1983] liability for acting under a statute that he reasonably believed to be valid but was later held unconstitutional."[42]

The immunity the *Pierson* Court endorsed was limited to protecting a police officer from the Hobson's choice of "being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[43] The Court properly recognized that the Freedom Riders' claim for relief was not limited to asserting that the officers arrested them for disobeying an unconstitutional state law.[44] Rather, the plaintiff clergy also contended that the police officers lacked probable cause that the Freedom Riders had violated the statute, as no crowd (other than reporters) was present at the bus terminal and their attempt to use the "White Only" waiting room posed no threat of violence or disturbance.[45] The Supreme Court instructed that on remand, the officers were entitled to immunity only if the jury found that: 1) the police "did not arrest the [Freedom Riders] for the purpose of preserving the custom of segregation in Mississippi," and 2) "that a crowd gathered and that imminent violence was likely."[46] The Supreme Court offered no avenue for the police officers to avoid liability if they had acted in bad faith or had failed to comply with the constitutional requirement of probable cause.

2. *Expanding the Scope of Immunity for High-Level Executive Officials Through a Test of Good Faith and Reasonableness Under All the Circumstances*

In *Scheuer v. Rhodes*"[47] the Supreme Court crafted a test for qualified immunity that extended more generous refuge from liability to upper-level officials of the executive branch. *Scheuer* arose out of a Section 1983 damages action filed by the estates of Kent State University students who were shot and killed by Ohio Na-

42. *Id.* at 555.
43. *Id.*
44. *Id.* at 557.
45. Video footage clearly confirmed that after the Freedom Riders peaceably entered the bus terminal, police officers immediately placed them under arrest and escorted them into paddy wagons without incident. *See Eyes on the Prize: Ain't Scared of Your Jails (1960-1961)*, (PBS Apr. 11, 2021). On the trial *de novo* following the appeal from one of the convictions, the trial judge directed a verdict of acquittal at the close of the prosecution's case and the government dropped the cases against the remaining Freedom Riders. *Pierson*, 386 U.S. at 549.
46. *Pierson*, 386 U.S. at 557.
47. Scheuer v. Rhodes, 416 U.S. 232 (1974).

tional Guardsmen in May of 1970 during a protest against the war in Vietnam. Plaintiffs alleged that the defendants—the Governor of the State of Ohio, the Adjutant General and his assistant, officers and enlisted members of the Ohio National Guard, and the President of Kent State University—"'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and . . . ordered the Guard members to perform allegedly illegal actions."[48]

The district court granted the motion to dismiss the Complaint.[49] While plaintiffs had named individual officials as defendants, the trial court ruled that the action was against the State of Ohio and therefore was barred by the Eleventh Amendment to the United States Constitution, which deprives federal courts of jurisdiction over an action against a state without its consent.[50] The court of appeals affirmed.[51] Its opinion proffered an added ground for upholding the district court's ruling by reasoning that the common-law doctrine of executive immunity afforded defendants absolute protection against suits under Section 1983.[52]

The Supreme Court reversed, holding that: 1) the Complaint sought to impose liability on the state officials in their personal capacities and therefore was not an action against the State barred by the Eleventh Amendment;[53] and 2) executive officials are not absolutely shielded from liability under Section 1983 but may assert only a qualified immunity.[54] Because neither the district court nor court of appeals had considered the qualified immunity defense, the Court acknowledged that "[t]hese cases in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of [immunity] principles to the [defendants] here."[55] Nonetheless, the *Scheuer* Court proceeded to articulate what it deemed to be the governing test.

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48. *Id.* at 235.

49. *Id.* at 234.

50. U.S. CONST. amend. XI.

51. *Scheuer*, 416 U.S. at 234.

52. *Id.* at 234–35.

53. *Id.* at 239.

54. *Id.* at 243–44.

55. *Id.* at 249. In support of their motion to dismiss, defendants had submitted a proclamation issued by the Governor spelling out the prevailing conditions at Kent State as well as a proclamation calling up the National Guard in response to violence erupting from strikes in the trucking industry. *Id.* at 236.

The *Scheuer* Court first asserted that the immunity test of good faith and probable cause it afforded police officers in *Pierson* should not apply to "higher officers of the executive branch."[56] Qualified immunity, the Court reasoned, was designed to promote "the public interest [that] requires decisions and actions to enforce laws for the protection of public," with the attendant assumption "that it is better to risk some error and probable injury from such error than not to decide or act at all."[57] Because upper-level executive officials possess a far broader scope of responsibilities, duties, and options than line police officers, they must be entitled to exercise a wider swath of decision-making free from the specter of liability.[58] While *Pierson* allowed officers to avoid liability only by pointing to a then-valid state law that authorized their conduct, the *Scheuer* Court promulgated a test that considered all the variables that went into the officials' decision to act:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and *all the circumstances* as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of *all the circumstances*, coupled with good-faith belief, that affords a basis for qualified immunity.[59]

While expressly declining to rule on or suggest how this immunity standard would apply to the *Scheuer* litigation, the Court identified several criteria it deemed relevant. The Court offered that state executive officials "are entitled to rely on traditional sources for the factual information" used to make their decisions, including relying upon facts supplied by others in instances where immediate action was necessary.[60] It further indicated that state law should be

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56. *Id.* at 246.

57. *Id.* at 241–42. Common law immunity, the Court noted:

> rested, in its genesis on two mutually dependent rationales: (1) 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; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 240.

58. *Id.* at 246.

59. *Scheuer*, 416 U.S. at 247 (emphasis added). Earlier in the opinion, the Court likewise noted that whether the officers were immune should turn on "*all of the circumstances* that may be revealed by the evidence." *Id.* at 239 (emphasis added).

60. *Id.* at 246.

consulted to ascertain the breadth of the official's duties and the discretion required to carry out those responsibilities.[61] As to the line officers, the Court concluded that further proceedings would be needed to determine whether these officials "acted in good-faith obedience to the orders of their superiors."[62]

At no point did the *Scheuer* Court prescribe or imply that lack of clarity as to whether the official's actions violated the federal constitutional right was a relevant, much less dispositive, factor in the immunity calculus. To the contrary, the Court acknowledged that "final resolution of the immunity question must take into account . . . the purposes of § 1983,"[63] and "[w]hen there is a substantial showing that the exertion of state power has overridden private rights secured by [the Federal] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."[64] Yet in *Wood v. Strickland,*[65] the Court gratuitously injected a new element into the analysis of immunity—whether the constitutional right violated was "clearly established."

3. *A Spiked Punchbowl at a High School Event Gives Rise to the Unprecedented Concept of "Clearly Established Rights"*

If not for the fact that it proved to be an inflection point for the prodigious expansion of qualified immunity, *Wood*[66] would make no one's list of the thousand most consequential Supreme Court opinions. The case arose out of a failed high school prank. Plaintiffs were high school students who purchased two 12-ounce bottles of malt liquor, combined them with soft drinks, and surreptitiously added the mixture to the punch served at a parent-student function sponsored by the school's Home Economics Department.[67] The alcohol was so diluted that no one attending the gathering recognized

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61. *Id.* at 250. The Court stated:

> The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; [and] whether they acted within the range of discretion permitted the holders of the office under Ohio law . . . .

Id.

62. *Id.*

63. *Id.* at 243.

64. *Id.* at 249 (quoting Sterling v. Constantin, 287 U.S. 378, 397–98 (1932)).

65. Wood v. Strickland, 420 U.S. 308 (1975).

66. *Id.*

67. *Id.* at 311.

the punch had been spiked.[68] Even so, the school board upheld the suspension of the students for violating its regulation prohibiting the possession of "intoxicating beverages" at school or school activities.[69]

The students filed a Section 1983 action against members of the school board, alleging their suspension violated both substantive and procedural due process guarantees of the Fourteenth Amendment of the United States Constitution.[70] In short, the students alleged that because the amount of alcohol in the spiked punch was 0.91 percent (well below the minimum 5-percent level that Arkansas law defined as "intoxicating liquor,") there was no evidence supporting the board's suspension of the students under the school regulation.[71]

At the conclusion of the trial, the jury was unable to reach a verdict.[72] The district court then entered a verdict for the school board officials, finding there was no evidence that the officials had acted with malice in expelling the students.[73] The court of appeals reversed, ruling that the school board members violated the substantive due process rights of the students because: a) no evidence was presented as to the alcoholic content of the mixture the students used to spike the punch; and b) the board made no finding that the malt liquor/soda combination the students added to the punch was intoxicating.[74]

In addition to ordering the students' records cleared and any continuing punishments lifted, the court of appeals remanded the case for a new trial on the claim for damages.[75] The court of appeals held that the trial court erred in requiring that, to override immunity, the students must prove specific intent to harm.[76] Rather, plaintiffs "need only [establish] that the defendants did not, in light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one."[77]

At no point did the court of appeals suggest that the settled or unsettled status of decisions interpreting the substantive due process rights of the students should be considered, much less determi-

68. *Id.*
69. *Id.* at 313.
70. Strickland v. Inlow, 485 F.2d 186, 190 (8th Cir. 1973).
71. *Wood*, 420 U.S. at 323.
72. *Id.* at 310.
73. *Id.*
74. *Id.* at 323–24.
75. *Id.* at 310.
76. *Id.* at 314.
77. *Strickland*, 485 F.2d at 191.

native, in evaluating the immunity defense.[78] Nor did the parties so argue in their submissions to the Supreme Court.[79] Nonetheless, the Supreme Court *sua sponte* interposed whether the federal constitutional right at issue was "clearly established" as an element of immunity.[80]

Resolving the disagreement between the district court and the court of appeals, the Supreme Court held that to be relieved from civil liability, the official must satisfy both: a) the requirement that the official has acted subjectively in good faith; and b) the objective immunity standard.[81] As to the latter, the Court approvingly invoked the test for immunity set forth in *Scheuer v. Rhodes*,[82] reasoning that "the immunity must be such that public school officials understand that action taken . . . within the bounds of reason *under all the circumstances* will not be punished."[83] In elaborating on the application of the immunity standard, however, the Court, for the first time, introduced the state of the law into the equation. The Court offered that school board members "must be held to a standard based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of [their] charges."[84] It similarly volunteered that:

> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation *or with such disregard of the student's clearly established constitutional rights* that his action cannot be reasonably be characterized as being in good faith.[85]

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78. The court of appeals did observe that "the law with respect to rights of students is still developing," but noted that the general principle that students may not be given lengthy suspensions for violating a valid rule without being afforded substantive and procedural due process was "reasonably well established." *Strickland*, 485 F.2d at 189.

79. During oral argument, the board members' counsel conceded that *Scheuer v. Rhodes* supplied the applicable immunity standard. Transcript of Oral Argument at 11, Wood v. Strickland, 420 U.S. 308 (1975) (No. 73-1285).

80. *Wood*, 420 U.S. at 323.

81. *Id.* at 321.

82. Scheuer v. Rhodes, 416 U.S. 232 (1974).

83. *Wood*, 420 U.S. at 321 (emphasis added). The *Scheuer* Court had promulgated the immunity test for high executive officials. The *Wood* Court, however, found the *Scheuer* test applicable without inquiring into the nature of the duties of school board officials. JUSTICE THOMAS has criticized the Courts' abandonment of an inquiry into the scope of the responsibilities of the official invoking immunity in favor of a "one-size fits all doctrine." Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (THOMAS, J., concurring in the denial of certiorari); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (THOMAS, J., concurring in part and concurring in the judgment).

84. *Wood*, 420 U.S. at 322.

85. *Id.*

The Court cited no authority for deeming the state of federal constitutional law germane to immunity analysis, and the Court had no occasion to consider the explicitness of the rights at issue in its ruling.[86] The four dissenting Justices, however, were exorcised over what they construed as the automatic loss of immunity for failure to satisfy the subjective prong whenever the right violated was clearly established:

> The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, though the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."[87]

The dissenters denounced the majority's test as less protective of government officials than what they viewed as the appropriate test the Court had set forth less than a year earlier in *Scheuer*—"whether in light of the discretion and responsibilities of the office, and under all the circumstances as they appeared at the time, the officer acted reasonably and in good faith."[88]

4. Flip-flopping Who Is Victimized by Assigning the State of the Law a Preeminent Role in Immunity Analysis

The dissenters in *Wood v. Strickland* were deeply troubled that the impossibility of determining whether a constitutional right was clearly established would unfairly impose liability on public officials. Two years later, and without confessing that they were enlarging the scope of immunity, the Court in *Procunier v. Navarette*[89] rendered the citizen whose rights were infringed the victim of implanting the notion of "clearly established rights" into the legal test for qualified immunity.

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86. The Court ruled that the school board had not violated the substantive due process rights of the students because there was sufficient evidence to support the charge that the students had violated the school regulation prohibiting the use or possession of intoxicating beverages at a school activity. *Id.* at 325. Because the lower courts had failed to rule on the students' claimed violation of procedural due process, the Court remanded that issue to the court of appeals. *Id.* at 328.

87. *Id.* at 329 (Powell, J., dissenting).

88. *Id.* at 330 (Powell, J., dissenting).

89. Procunier v. Navarette, 434 U.S. 555 (1978).

Navarette, an inmate at California's Soledad prison, alleged that subordinate and supervisory officials had violated his First Amendment and Fourteenth Amendment rights by failing to send Navarette's outgoing mail to legal assistance groups, law students, news media, inmates at other prisons, and Navarette's personal friends.[90] State regulations permitted inmates to send letters to ten people on an approved list, as well as to correspond with their attorneys.[91] Contrary to these regulations, the warden harbored the view that officials had the right to confiscate any mail "if we don't feel it is right or necessary."[92] Navarette contended that guards confiscated his outgoing mail because they considered Navarette to be a "troublesome 'writ-writer.'"[93]

Navarette's lone claim before the Court averred that the negligence of supervisory and subordinate officials caused the interference with his mail.[94] The court of appeals had reversed the district court's grant of summary judgment to defendants, ruling that Section 1983 provides a cause of action for negligent deprivations of constitutional rights. The court of appeals further had found that there were issues of material fact as to the "reasonable and good faith belief" of the officials that their conduct was lawful.[95] The Supreme Court granted certiorari only as to the first basis of the court of appeal's decision, agreeing to review, "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under Section 1983."[96]

While the Court had granted certiorari to determine only whether Congress intended Section 1983 to provide redress for negligent infringements of constitutional rights, the Court did not reach that issue.[97] Instead, the Court ruled that the prison officials were entitled to summary judgment on the ground of qualified immunity.[98] The parties had not argued or briefed the immunity issue—and most certainly did not advocate for or against alteration of the

90. *Id.* at 557.

91. *Id.* at 557 n.3.

92. *Id.* at 570 (Stevens, J., dissenting).

93. *Id.*

94. *Id.* at 559.

95. *Id.* at 559.

96. *Id.* at 567 (Burger, C.J., dissenting).

97. The Court subsequently ruled that Section 1983 does not require a plaintiff to prove any culpability beyond the standard of fault imposed by the constitutional right at issue. *See generally* Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981).

98. *Procunier*, 424 U.S. at 565.

pre-existing doctrine.[99] Yet Justice White, author of the majority opinion in *Wood* now writing for the *Procunier* majority, blithely inverted the impact of the newly-minted concept of clearly established rights.[100] Contrary to the dissenter's construction in *Wood*, government officials would not be denied immunity whenever the right violated was clearly established. Rather,

> [u]nder the first [objective] part of the Wood v. Strickland rule, the immunity defense would be unavailing [to the public official] if the constitutional right allegedly infringed by them was clearly established at the time of the changed conduct, if they knew or should have known of that right, *and* if they knew or should have known that their conduct violated the constitutional norm.[101]

Under the standard newly promulgated in *Procunier*, even where the constitutional right violated *was* clearly established, the official had two additional means of satisfying the objective element of the immunity defense. The official could prevail if, under all the circumstances, they did not know and should not have known of the right. Even if the right was clearly established and the officials knew or should have known of the right, the official nonetheless would be immune if they did not know and should not have known that their conduct violated that right.

While the official is afforded two additional avenues to secure immunity where the right *was* clearly established, the citizen whose rights were invaded has no means to prevail on the objective element of immunity where the right violated *was not* clearly established. A plaintiff may not argue the official knew or should have known of the right, or that the official knew or should have known that their conduct violated the constitutional norm. The *Procunier* Court found that no clearly established First Amendment right protected prisoner correspondence at the time Navarette was incarcer-

99. The briefs of the parties referred to the immunity test only for analogous authority in support of their argument as to whether Section 1983 redresses negligent conduct. *See* Brief for Petitioners at 12–13, Procunier v. Navarette, 434 U.S. 555 (1978) (No. 76-446) (arguing that the qualified immunity test in *Pierson v. Ray* and *Wood v. Strickland* limited Section 1983 to intentional conduct); Brief for Respondent at 20–27, Procunier v. Navarette, 434 U.S. 555 (1978) (No. 76-446); Brief for the American Civil Liberties Union as Amicus Curiae Supporting Respondents at 10, 14–15, Procunier v. Navarette, 434 U.S. 555 (1978) (No. 76-446) (arguing that qualified immunity cases support liability for objectively unreasonable constitutional invasions). Chief Justice Burger dissented from the Court's choice to address immunity, finding the issue not fairly comprised within the issue on which the Court had granted certiorari. *Procunier*, 434 U.S. at 567 (Burger, C.J., dissenting).

100. *Procunier*, 434 U.S. at 565.

101. *Id.* at 562 (emphasis added).

ated.[102] Consequently, the Court ruled as a matter of law that the prison officials satisfied the objective prong of the qualified immunity test.[103] The Court did not allow consideration of whether the unambiguous state regulations the warden flaunted affected the objective reasonableness of the warden's belief that he had unfettered discretion to seize inmate's mailings.[104]

The *Procunier* Court never acknowledged that without benefit of the view of the lower courts or the argument of the parties, it was widening the swath of immunity it had set forth in *Wood v. Strickland* (which itself was an unacknowledged enlargement of the immunity prescribed in *Scheuer v. Rhodes*). The Court did not tether its expansion to the common law, the fount of qualified immunity under Section 1983.[105] As the Court later admitted, *Procunier* "simply set forth a policy prescription."[106] However, at no point did the *Procunier* Court explain why preserving the exercise of governmental discretion required exonerating officials whose belief that their conduct complied with constitutional norms was, under all the circumstances, unreasonable.

5. Immunizing Intentional Violations of the Constitution

After *Procunier*, where the right violated was not clearly established, the citizen could overcome immunity only if the official acted with the "malicious intent to cause a deprivation of constitutional rights or other injury."[107] The Court closed that small window of recovery when, in *Harlow v. Fitzgerald*,[108] it abrogated the subjective prong of the immunity test.

Harlow arose out of the suit by A. Ernest Fitzgerald, an analyst for the Department of the Air Force, alleging he had been dismissed in retaliation for his testimony before a congressional subcommittee, in violation of the First Amendment to the United

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102. *Id.* at 565.

103. *Id.*

104. *Id.* at 565 n.13 ("There is thus no occasion to . . . inquire whether petitioners knew or should have known that their conduct was in violation of that constitutional proscription.").

105. Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). Justice Scalia justified expanding immunity beyond the common law contours to correct what he viewed as the Court's incorrect holding in *Monroe v. Pape*, 365 U.S. 167 (1961) that officials act under color of law even when their actions violate state law. *Id.*

106. Richardson v. McKnight, 521 U.S. 399, 416 (1997).

107. Wood v. Strickland, 420 U.S. 308, 322 (1975).

108. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

States Constitution.[109] Fitzgerald had testified about technical problems and cost overruns likely to reach two billion dollars on the C-5A transport plane.[110] Fitzgerald sued senior White House aides Alexander Butterfield and Bryce Harlow, among others.[111]

The case reached the Supreme Court following the district court's denial of defendants' motion for summary judgment and the court of appeals dismissal, without opinion, of defendants' appeal of that judgment.[112] While rejecting defendants' claims to absolute immunity,[113] the Court held that government officials no longer would be required to act in subjective good faith to be excused from liability by qualified immunity.[114]

The Court found that eliminating the subjective tier of the immunity defense was necessary to avoid the costs that litigation imposes on government employees and society.[115] The Court reasoned that citizen suits seeking damages for deprivation of their constitutional rights not only subject the defendant-official to the expenses of lawsuits but cause "the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[116] Therefore, the Court concluded, the immunity standard must "permit the defeat of insubstantial claims without resort to trial."[117]

Ignoring available empirical evidence,[118] the Court presumed that to require the official to act in good faith in order to be im-

109. Fitzgerald's Complaint also alleged violations of two federal statutes: 5 U.S.C. § 7211 and 18 U.S.C. § 1505. *Id.* at 805.

110. *See* Nixon v. Fitzgerald, 457 U.S. 731, 733–34 (1982).

111. Fitzgerald also named President Richard Nixon as a defendant. In a separate opinion, the Court held that Nixon was entitled to absolute immunity for all official acts within the "outer perimeter" of his duties of office. *Id.* at 755–57.

112. *Harlow*, 457 U.S. at 805–06.

113. *Id.* at 807–13.

114. *Id.* at 817–18.

115. *Id.* at 816.

116. *Id.* at 814.

117. *Id.* at 813.

118. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 550–54 (1982) (demonstrating that out of 212 prisoner § 1983 claims filed in the Central District of California, depositions were conducted in 5 cases and 3 cases proceeded to trial); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 624 (1979) (studying prisoner suits over a 3-year period in 5 federal districts and finding that few prisoners attempted discovery and only 18 of 664 cases had either an evidentiary hearing or trial). *But see* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 675 (1987) (finding discovery, pretrial hearings, and trial "somewhat" more likely in constitutional tort cases, but cautioning that conclusions were limited to a single district and suggesting "decision makers demand evidence to support assertions about constitutional tort cases, and that they not act in the

mune thwarted the ability of courts to dispose of cases on motions for summary judgment.[119] While defendants had asked neither the lower courts nor the Supreme Court to do so,[120] the Court: a) abolished the subjective element of the legal test for qualified immunity; and b) further held that trial courts should not permit discovery until ruling on whether the constitutional right at issue was clearly established at the time of the alleged violation.[121]

After *Harlow*, public officials are immune from liability for harms caused by their unconstitutional conduct whenever the right violated was not clearly established, even if they intended to injure the citizen. Consequently, Congress' goals of compensating victims and deterring deprivations of the Constitution now turns on how generously or stingily courts determine that a right is clearly established. The Supreme Court's commandments on how lower courts are to ascertain when a constitutional right is clearly established, which will be examined next, elevate qualified immunity to a near-insurmountable obstacle to redress.

6. *Application of the Qualified Immunity Test: When Is a Right Clearly Established?*

Two principal questions have shaped the landscape regarding when a constitutional right is clearly established: 1) may courts con-

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empirical void that has dominated discussion to date"). The Court assumed its expansion of immunity would not undermine the goals of compensation of victims and deterrence of unconstitutional acts that Section 1983 and *Bivens* actions were designed to achieve. However, a study of all reported *Bivens* actions published 3 years before the *Harlow* decision revealed that plaintiffs had prevailed only in 5 of the 136 cases in which judgment or dismissal had been entered. W. Mark Smith, Note, *"Damages or Nothing"—The Efficacy of the* Bivens*-Type Remedy*, 64 CORNELL L. REV. 667, 694 (1979). A more recent, post-*Harlow* empirical inquiry found plaintiffs had succeeded in 16 percent of *Bivens* actions. Alexander Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837 (2010).

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

120. Defendants argued that the Court should require plaintiff to satisfy either a preponderance of the evidence or a clear and convincing evidence standard in order to survive a motion for summary judgment. Brief for the Petitioners at 79, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945). During oral argument, counsel reiterated that defendants were urging the Court to require plaintiffs to prove malice by a standard that was more demanding than a preponderance of the evidence. Transcript of Oral Argument at 14, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Nos. 79-1738, 80-945), 1981 U.S. Trans. LEXIS 17. Counsel submitted that the Court could "significantly reduce the number of cases that would have to go to trial and increase the number in which a motion for summary judgment was granted" if the Court were "to enjoin upon the lower courts close scrutiny of allegations of malice, applying the two standards of Wood *against* Strickland." Id. at 20 (emphasis added).

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

sider sources beyond judicial interpretations of the United States Constitution; and 2) with what degree of factual specificity must the right have been defined to be deemed clearly established?[122] The Supreme Court's answers to both questions have dramatically narrowed the circumstances under which a right may be clearly established, correspondingly quashing the ability of the victims of unconstitutional conduct to hold government officials accountable for their injures.

a. Sources Used in the Clearly Established Rights Calculus

In its first post-*Harlow* qualified immunity decision, *Davis v. Scherer*,[123] the Supreme Court held that courts may look only to judicial opinions interpreting the federal constitutional right allegedly violated to determine whether the right is clearly established.[124] Like many of the Court's immunity decisions, *Davis* did not arise out of a headline-grabbing invasion of the Constitution. Gregory Scherer worked for the Florida Highway Patrol as a radio-teletype operator.[125] As required by departmental conflict-of-interest policies, Scherer sought and received permission to take on additional part-time work as a reserve deputy with the Escambia County Sheriff's Office.[126] Because he had already purchased new uniforms, Scherer refused to quit his deputy sheriff job after his superiors at the Highway Patrol revoked their approval.[127] Florida Highway Patrol officials then fired Scherer.[128]

Scherer appealed his firing to the Florida Career Service Commission.[129] While the appeal was pending, Scherer reached a settlement with the Highway Patrol that reinstated Scherer with backpay.[130] Bad blood between Scherer and his Highway Patrol

122. In addition to these questions, the instances in which a right will be clearly established may be further diminished depending on how the Supreme Court answers the open question of whether only its own decisions can clearly establish a right. *See* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021); District of Columbia v. Westby, 138 S. Ct. 577, 591 (2018); Reichle v. Howards, 566 U.S. 658, 665–66 (2012); *cf.* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (stating that the application for writ of habeas corpus with respect to a claim adjudicated in a state court proceeding shall not be granted unless the decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States").

123. Davis v. Scherer, 468 U.S. 183 (1984).

124. *Id.* at 194.

125. *Id.* at 185.

126. *Id.*

127. *Id.* at 186.

128. *Id.*

129. *Id.*

130. *Id.*

superiors continued, and Scherer was suspended.[131] Scherer resigned and then filed a Section 1983 action alleging that he had been fired initially without a formal pretermination or prompt posttermination hearing in violation of the Due Process Clause of the Fourteenth Amendment.[132]

The district court found that Florida Highway Patrol officials had fired Scherer without affording constitutionally adequate procedures. Applying the totality of the circumstances test set forth in *Scheuer v. Rhodes*, the trial court further found the officials were not entitled to qualified immunity.[133] Two years before Scherer's dismissal, the Florida Attorney General had issued an official opinion providing that persons in Scherer's status "have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law."[134] Additionally, two months before Scherer's firing, the Florida Highway Patrol had issued a regulation that required a complete investigation of the facts surrounding the alleged offense, a written statement by the employee against whom the complaint was made, and, if a decision was made to dismiss the employee, a requirement that the department official present the employee a written statement of the reasons for the dismissal.[135] The district court found that in light of these authorities, the officials' beliefs in the legality of their conduct was unreasonable.[136] The court of appeals affirmed the opinion of the district court.[137]

While finding no dispute that the Highway Patrol officials had violated the Fourteenth Amendment,[138] the Supreme Court reversed the lower courts' denial of qualified immunity.[139] The Court held that the court of appeals erred in considered the officials' violations of unambiguous state regulations in assessing the objective reasonableness of their conduct.[140] The Court reasoned that immunity must be calibrated to allow officials to reasonably anticipate

131. *Id.*
132. *Id.* at 187.
133. *Davis*, 468 U.S. at 187.
134. *Id.* at 203 (Brennan, J., concurring in part and dissenting in part) (citing Off. of the Atty. Gen. of Fla., Opinion Letter 75-94 on Refusal to Take Polygraph (Apr. 14, 1975)).
135. *Davis*, 468 U.S. at 204 (Brennan, J., concurring in part and dissenting in part) (citations omitted).
136. *Id.* at 189 (majority opinion).
137. *Id.*
138. *Id.* at 190.
139. *Id.* at 197.
140. *Id.* at 193–96.

when their conduct may give rise to liability for damages and to facilitate expeditious dismissal of unjustified lawsuits.[141] Inclusion of state regulations in the immunity calculus would: a) risk subjecting officials to liability for otherwise unforeseeable violations of the Constitution "merely because their official conduct also violated some statute or regulation";[142] and b) require judges to interpret state administrative regulations, impeding their ability to grant summary judgment.[143] Furthermore, because a variety of rules and regulations govern officials' conduct, subjecting these actors to money damages for non-compliance would unduly induce them to err on the side of caution.[144] Hence, courts may look only to cases interpreting the United States Constitution in finding that the right was clearly established.[145]

b. The Degree of Factual Specificity with Which the Constitutional Right Must Be Clearly Established by Precedents

Because the Supreme Court has restricted courts to using cases interpreting the federal right at issue, a plaintiff's ability to overcome immunity and recover damages caused by an official's violation of the Constitution turns on the factual specificity with which a right is to be considered clearly established. In *Anderson v. Creigh-*

141. *Id.* at 195.

142. *Id.* While holding that violation of a state regulation cannot clarify law otherwise lacking in case precedents, the Court on occasion has invoked regulations and policies to support its determination that judicial opinions clearly established a right. *See* Groh v. Ramirez, 540 U.S. 551, 564 n.7 (2004) (referencing a Bureau of Alcohol, Tobacco, and Firearms directive requiring agents to verify that a search warrant issued by magistrate is sufficient on its face); Hope v. Pelzer, 53 U.S. 730, 743–44 (2002) (citing an Alabama Department of Corrections regulation constraining conditions that justify handcuffing a prisoner to a hitching post).

143. *Davis*, 468 U.S. at 195.

144. *Id.* at 196.

145. While a plaintiff may not utilize authorities outside judicial interpretations of the Constitution, the defendant official may offer extra-constitutional sources to support the objective reasonableness of their unconstitutional actions. The origin of the qualified immunity defense—*Pierson v. Ray*, 386 U.S. 547 (1967)—is the paradigm case of excusing a violation of the Constitution where the police officers were enforcing a then-valid state law. In *Wilson v. Layne*, 526 U.S. 603, 617 (1999), the Court invoked ride-along policies and practices of the United States Marshals' service and the Montgomery County Sheriff's Department to support the reasonableness of police officers' belief that it was constitutional to invite members of the media to accompany them in executing warrants on private homes. *See also* Roska v. Peterson, 328 F.3d 1230, 1251 (10th Cir. 2003) ("In considering the 'objective legal reasonableness' of the state officer's actions, one relevant factor is whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question.").

ton,[146] the Court issued the first in a series of opinions insisting, with ever-increasing rigor, that a court may find a right clearly established only where the facts of the precedent case(s) closely parallel the facts giving rise to the constitutional deprivation.[147]

The facts of *Anderson* were eerily reminiscent of the events giving rise to the seminal Section 1983 case, *Monroe v. Pape.*[148] Robert and Sarisse Creighton and their daughter, all of whom were Black, observed a spotlight shining into the front window of their home.[149] Mr. Creighton went to the front door where he was confronted by uniformed and plain clothes officers, all of whom were white and with several holding shotguns. One officer told Mr. Creighton to "keep his hands in sight" as the other officers ran into the house.[150] When Mr. Creighton asked whether the officers had a search warrant, an officer replied, "we don't have a search warrant and don't need [one]; you watch too much TV."[151] The officers then refused Mr. Creighton's request to put away their guns.[152] Mrs. Creighton, awakened by the shrieking of her children, was greeted by an officer pointing a shotgun at her.[153] She also witnessed other officers yelling at her daughters to "sit their damn asses down and stop screaming."[154] Mrs. Creighton asked an officer to explain "what the hell is going on," and the officer replied, "why don't you make your damn kids sit on the couch and make them shut up."[155]

The abuse of the Creightons continued. One officer punched Mr. Creighton in the face, and another hit Mr. Creighton's ten-year-old daughter when she screamed for her mother to come help.[156] When Mrs. Creighton began to phone her mother, an officer kicked her and grabbed the phone.[157] The children ran out of the house, and an officer chased one of the girls into the home of a neighbor.[158] Mrs. Creighton later took her daughter to the emer-

146. Anderson v. Creighton, 483 U.S. 635 (1987).

147. *Id.* at 640–41.

148. Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* expanded the availability of a federal civil action for redress of constitutional rights by holding that officials act "under color of law" for purposes of Section 1983 even where their conduct violated state law and the state courts afford a tort remedy for that wrongdoing.

149. Creighton v. City of St. Paul, 766 F.2d 1269, 1270 (8th Cir. 1985) *vacated sub nom.* Anderson v. Creighton, 483 U.S. 635 (1987).

150. *Id.* at 1270.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1271.

157. *Id.*

158. *Id.*

gency room to treat the arm that had been injured when the officer grabbed and shook her.[159]

Mrs. Creighton also asked FBI Agent Anderson for a search warrant.[160] He replied, "I don't need a damn warrant when I'm looking for a fugitive."[161] Unbeknownst to the Creightons, the officers were seeking Mrs. Creighton's brother, who was suspected of committing an armed robbery earlier that afternoon, and had conducted unsuccessful, warrantless searches at the homes of Mrs. Creighton's mother and grandmother.[162] Despite finding no fugitive, no evidence that a fugitive had been present, and no evidence that the Creighton's were involved in criminal activity of any sort, the officers arrested Mr. Creighton for obstruction of justice, handcuffed him, and placed him in the jail at the police station.[163] The police released Mr. Creighton the next day without pressing any charges.[164]

The Creightons filed an action against the officers involved in the search, partially seeking damages for violation of their rights under the Fourth Amendment.[165] The district court granted FBI Agent Anderson's motion for summary judgment on the ground of qualified immunity.[166] The court of appeals reversed.[167] The court ruled that there were material issues of fact as to whether the officers had probable cause to believe that Mrs. Creighton's brother was present at the Creighton home the night of the search and whether exigent circumstances excused the need for a search warrant.[168]

The court of appeals then turned to the issue of immunity.[169] Referencing its detailed analysis and application of prior cases (in which the court found officers did not satisfy the requisites excusing a warrant when in hot pursuit of a suspect or when concerned about destruction of evidence), the court of appeals ruled that both the Creighton's Fourth Amendment rights and the exigent circumstances doctrine were clearly established at the time of the search.[170] Furthermore, the court found that Anderson had offered

159. *Creighton v. City of St. Paul*, 766 F.2d at 1271.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. Anderson v. Creighton, 483 U.S. 635, 637 (8th Cir. 1985).
166. *Id.*
167. *Id.* at 637–38.
168. *Id.*; *Creighton v. City of St. Paul*, 766 F.2d at 1273–75.
169. *Creighton v. City of St. Paul*, 766 F.2d at 1276.
170. *Id.*

no evidence that he reasonably could have been unaware of that clearly established law.[171]

The Supreme Court held that the court of appeals improperly found that Creighton's Fourth Amendment rights were clearly established by assessing the right at too high a level of generality:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, 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 the light of pre-existing law the unlawfulness must be apparent.[172]

While recognizing it was clearly established that an officer must possess both probable cause to search and exigent circumstances to excuse procuring a warrant, the Court reasoned that the court of appeals erred by failing to consider whether it was clearly established *that the facts confronting Agent Anderson* did not meet these constitutional mandates.[173] The Court then offered the following standard for assessing when a right is deemed clearly established:

> 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 officers possessed.[174]

In subsequent cases, the Court progressively reframed the test to require ever-closer factual resemblance between the precedents establishing the constitutional right and the facts of the case in which plaintiff is seeking recovery for violation of that right. In *Hope v. Pelzer*,[175] the Court proclaimed that the facts of the precedents must afford the officer "fair warning" that their conduct would violate constitutional norms:

> Officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier, we expressly rejected a requirement that previous cases be "fun-

171. *Id.* at 1277.
172. *Anderson v. Creighton*, 483 U.S. at 640.
173. *Id.* at 640–41.
174. *Id.*
175. Hope v. Pelzer, 536 U.S. 730 (2002).

> damentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to Lanier, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.[176]

In later decisions, however, the Court increasingly mandated that the facts of precedent cases must more strictly mirror the facts of the case at bar before the right violated can be considered clearly established. In *Brosseau v. Haugen*,[177] the Court reversed the lower court's denial of immunity, finding that none of the cases relied on by the court of appeals "squarely governs the case here."[178] The Court admonished that an analysis of whether precedents clearly established the right "must be undertaken in light of the specific context of the case, not as a broad general proposition."[179] In *Reichle v. Howards*,[180] the Court declared: "[a] clearly established right is one that is "sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right."[181] In *Ashcroft v. Iqbal*,[182] the Court pronounced that for a right to be clearly established, "[w]e do not require a case directly on point, but existing precedent must have placed the constitutional question *beyond debate*."[183] In *Saucier v. Katz*,[184] the Court admonished that in suits by victims of police misconduct, it is especially important to require a near factual match to precedents because "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the office confronts."[185] Finally, in *Messerschmidt v. Millender*,[186] the Court signaled that immunity was to be presumed, with "the threshold for establishing [an] exception a high one," met only on "rare" occasions.[187]

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176. *Id.* at 741.
177. Brosseau v. Haugen, 543 U.S. 194 (2004) (per curiam).
178. *Id*. at 201.
179. *Id.* at 198 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2011)).
180. Reichle v. Howards, 566 U.S. 658 (2012).
181. *Id.* at 664 (emphasis added).
182. Ashcroft v. Iqbal, 563 U.S. 731 (2011).
183. *Id.* at 741 (emphasis added).
184. Saucier v. Katz, 533 U.S. 194 (2001).
185. *Id.* at 205.
186. Messerschmidt v. Millender, 565 U.S. 535 (2012).
187. *Id.* at 546. Independent of its application of the test for when a right is clearly established, the Court's decision in *Pearson v. Callahan*, 555 U.S. 223

In a series of *per curiam* opinions, the Supreme Court made unmistakable its insistence on tight factual correspondence between precedent cases and the constitutional violation sought to be redressed before a right could be seen as clearly established.[188] An autopsy of one of these cases, *Mullenix v. Luna*,[189] reveals the tools employed by the Court to find factual distinctions that—in all but rare cases with "particularly egregious facts"[190]—will preempt a finding that a constitutional right is clearly established.[191]

Mullenix arose out of the suit by the Estate of Israel Leija, Jr., who had been shot to death by Texas Department of Public Safety Trooper Chadrin Mullenix.[192] Leija led police officers on a high speed chase after they unsuccessfully tried to arrest Leija to revoke

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(2009) decreased the likelihood that precedents will factually place the constitutional question beyond debate. In *Saucier v. Katz*, 532 U.S. 194 (2001), the Court had mandated that a judge ruling on a qualified immunity claim must first determine whether there was sufficient evidence that the official had contravened the Constitution before turning to the issue of whether the right was clearly established. In *Pearson*, the Court overruled the mandatory order of decision, holding that courts have discretion to immediately address the immunity question and, if finding the right not clearly established, decline to address the constitutionality of the officer's conduct. After *Pearson*, there will be fewer instances in which courts reach the substantive question of whether the right was violated, and there will be consequently decreased instances in which facts will clearly establish a right for future cases.

188. *See, e.g.*, City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam) (reversing a denial of immunity to officers who shot and killed Dominic Rollins in the garage of his ex-wife's house after Rollins raised a hammer behind his head and took a stance suggesting he was about to throw the hammer or charge at the officers); Rivas-Villejas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam) (reversing a denial of immunity to a police officer who was sued for excessive force for placing a knee on the back of a suspect who was lying face-down on the ground); Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); White v. Pauly, 137 S. Ct. 548 (2017) (per curiam); Taylor v. Barkes, 575 U.S. 822 (2015) (per curiam); Carroll v. Carman, 574 U.S. 13 (2014) (per curiam); Stanton v. Sims, 571 U.S. 3 (2013) (per curiam) (reversing a denial of qualified immunity for a warrantless entry to arrest a fleeing suspect for a misdemeanor); Brosseau v. Haugen, 542 U.S. 194 (2004) (per curiam). More generally, defendants have prevailed in nearly 80 percent of cases presenting an issue of qualified immunity to the Supreme Court. *See* Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment* 47 (Yeshiva Univ. Benjamin N. Cardozo Sch. of L., Faculty Rsch. Paper No. 634, 2021), https://bit.ly/3vrSKTR [https://perma.cc/9CT7-3PUG].

189. Mullenix v. Luna, 577 U.S. 7 (2015).

190. *See* Taylor v. Riojas, 141 S. Ct. 52, 54 (2020) (reversing a court of appeals decision that granted immunity where Taylor was confined for four days in a cell covered with massive amounts of feces, causing him to refrain from eating or drinking for fear of contamination, and then was moved to a second, frigidly cold cell where he was required to sleep naked on the floor in sewage that spilled over from a clogged drain in the floor, which was the only place in the cell to dispose of bodily waste).

191. *Mullenix*, 577 U.S. at 12–19.

192. *Id.* at 8–9.

his probation for a misdemeanor offense on the ground that Leija had failed to perform all hours of his community service and an intervening domestic violence petition had been lodged.[193] The 18-minute pursuit was at speeds between 85 and 110 miles per hour, during which Leija had called the dispatcher and threatened to shoot the police if they did not abandon the chase.[194] Leija was driving on an interstate highway, divided by a wide median, and at all times remained on the paved part of the roadway with his headlights on.[195] Because the events occurred around 10:30 in the evening in a rural area where there were no businesses or residences, traffic was light and Leija did not drive past any pedestrians or vehicles stopped on the roadway, run any other car off the road, or collide with any vehicle.[196]

While the chase was underway, police officers set up spike strips, designed to flatten the tires of Leija's car, across the interstate and underneath an overpass at Cemetery Road as well as in two locations further up the roadway.[197] The officers had been trained both on how to deploy the spikes as well as how to assume a position that would protect themselves from the driver and car as it approached and passed over the spikes.[198]

Mullenix, who was on patrol 30 miles north of the pursuit, went to the Cemetery Road overpass intending to set up tire spikes.[199] Instead, he drove to a bridge 20 feet above the highway, planning to disable Leija's car by shooting his .223 caliber M-4 rifle at its engine block.[200] Mullenix had been trained only in shooting upwards at moving clay pigeons; had no training on shooting to disable a moving vehicle; and had never attempted to or seen anyone do so.[201]

In the three minutes between arriving at the scene and firing his rifle, Mullenix asked the dispatcher to contact Sergeant Byrd, Mullenix's supervisor, to ask whether Byrd thought shooting the car was "worth doing."[202] Without waiting for a response, Mullenix left his patrol car and took up a shooting position.[203] While there was a dispute of fact as to whether Mullenix heard the transmission, the

193. Luna v. Mullenix, 773 F.3d 712, 715 (5th Cir. 2014) *rev'd* 577 U.S. 7 (2015).
194. *Mullenix*, 577 U.S. at 8.
195. *Luna*, 773 F.3d at 716.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 716–17.
203. *Id.*

dispatcher relayed Sergeant Byrd's instruction to "stand by" and "see if the spikes work first."[204]

Leija's car approached the overpass at a speed of 85 miles per hour (approximately 127 feet per second). When Leija was between 75 and 90 feet from the spike strips (less than 3 quarters of a second before he would have driven over the strips), Mullenix fired 6 shots.[205] At the time Mullenix fired his rifle, it was dark outside, there were no streetlights or ambient lighting, and Mullenix could not determine whether there were any passengers in Leija's car or what Leija was doing while driving.[206]

None of Mullenix's shots hit the radiator hood or engine block of Leija's car.[207] Four of the shots hit Leija in the upper body; Leija was killed by the shot that struck him in the neck.[208] Leija's car engaged the spike strips, hit the median, and rolled over two-and-one-half times.[209]

In a counselling session earlier that day, Sergeant Byrd had advised Mullenix that he was not being sufficiently proactive.[210] Speaking to Byrd after the shooting, Mullenix stated: "How's that for proactive?"[211]

Reviewing the district court's denial of Mullenix's motion for summary judgment asserting immunity, the court of appeals first addressed whether Leija's estate had produced facts sufficient to prove objectively unreasonable force.[212] The court preliminarily noted both that: a) Mullenix's subjective intent or motivation was not relevant; and b) the court was to evaluate the objective reasonableness of Mullenix's actions in light of the specific facts and circumstances he encountered.[213] The court then reiterated three times the highly fact-specific nature of the reasonableness inquiry—what it termed "the factbound morass of reasonableness."[214]

The court first examined the facts concerning the severity and immediacy of the threat of harm Leija posed to police officers and others, referencing 3 cases from the United States Supreme Court, 3 cases from the 5th Circuit, and a case from the 11th Circuit assess-

204. *Id.*
205. Mullenix v. Luna, 577 U.S. 7, 23 (2015) (SOTOMAYOR, J., dissenting).
206. *Luna*, 773 F.3d at 717.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 718–19.
213. *Id.*
214. *Id.*

ing that factor.[215] The court reasoned that the facts, viewed in the light most favorable to Leija, did not support a finding that Mullenix had acted reasonably to protect officers located beneath the underpass or officers and motorists located further north of the initial set of spike strips.[216] To the contrary, the particular facts of Leija's flight from the police—viewed in concert with the video of the encounter as required by *Scott v. Harris*[217]—refuted each of the risk factors that had supported a finding of reasonableness in high-speed chase decisions issued by the Supreme Court and Fifth Circuit.[218] In those cases:

> [M]ultiple other methods of stopping the suspect through alternate means had failed, the suspects were traveling on busy roads, had forced multiple other drivers off the road, had caused collisions with officers or innocent bystanders, and at the time of the shooting were indisputably posing an immediate threat to bystanders or other officers in the vicinity.[219]

The court did not disregard the threat to shoot officers Leija had relayed to the dispatcher.[220] Comparing Leija's threats to the facts of precedent cases, the court concluded, "[t]he factual scenario here is substantially different, in terms of imminence and immediacy of the risk of harm, from situations where we have granted qualified immunity to officers who shot an armed suspect believed to be armed."[221]

Finally, the court of appeals distinguished Mullenix's actions from the split-second judgments that the precedent cases relied on to justify the use of deadly force.[222] The court noted that Mullenix

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215. *Id.* at 719–21.

216. *Luna*, 773 F.3d at 723.

217. Scott v. Harris, 550 U.S. 372 (2007).

218. *Luna*, 773 F.3d at 721.

219. *Id.* The court noted that while Leija was driving well in excess of the speed limit, traffic in that rural area was light, there were no pedestrians, businesses, or residences near the highway, and Leija had not run any cars or police vehicles off the road. *Id.* at 716.

220. *Id.* at 723.

221. *Id.* at 722. The court reasoned that Leija was not escaping from the scene of a crime of violence; no officer or other witness had seen a weapon; at the time Mullenix fired his rifle, most officers and bystanders were miles away; Leija could not have encountered any officers until after the spike strips had the opportunity to stop the chase; Mullenix was not aware of the officers' positions below the overpass; officers were trained to set up the spikes in a location where they could find a position for their protection and as trained, the officer who set up the spike strips was behind a pillar; and in replying to a deputy, Mullenix did not indicate that he perceived Leija to pose any threat to an officer standing beneath the overpass. *Id.* at 723.

222. *Id.* at 724.

had heard the warning that Leija had a weapon six minutes before he shot his rifle and had time to ask for his supervisor's opinion, to inform another officer of his intention to shoot, and to discuss the feasibility of shooting with a third officer.[223] None of the other officers involved in the pursuit, similarly aware of Leija's threats, concluded that deadly force was necessary or justified.[224] To the contrary, Mullenix's supervisor advised Mullenix to stand by until Leija's car crossed the spike strips.[225]

The court of appeals next turned to the issue of qualified immunity. The court acknowledged that in assessing immunity, it was required to be attentive to the particular facts giving rise to Mullenix's decision to shoot.[226] The court noted that to be clearly established the "reasonable official would understand that what he is doing violates that right";[227] "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights";[228] and that the court was to define the right "in the specific context of the case."[229] While accepting the mandate to apply the immunity test through a fact-specific lens, the court of appeals noted that it could be clearly established that Mullenix's use of force was constitutionally unreasonable "despite notable factual distinctions between the precedents relied on and [Mullenix's shooting], so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."[230]

The court of appeals found that at the time Mullenix killed Leija, precedents clearly established that it was unreasonable to use deadly force to apprehend a fleeing felon absent a risk of harm to the officer or others—not only as a general proposition—but "in the more specific context of shooting a suspect fleeing in a motor vehicle."[231] The court distinguished Supreme Court and courts of appeal cases that had immunized officials sued for using deadly force to stop a vehicle. In those cases, the court observed, the high-speed chase endangered officers and nearby bystanders.[232] In arriving at its conclusion that Mullenix's decision to shoot at Lejia's car

223. *Id.*

224. *Id.*

225. *Id.* The court further observed that there was no evidence it was feasible to immediately disable Lejia's car by shooting at the engine.

226. *Luna*, 773 F.3d at 724–25.

227. *Id.* at 724 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

228. *Id.* at 724 (quoting Kinney v. Weaver, 367 F.3d 337, 350 (5th Cir. 2014)).

229. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

230. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 740 (2002)).

231. *Id.* at 725.

232. *Id.*

was unreasonable, the court had already detailed why Leija posed no substantial or immediate threat to officers or others when Mullenix chose to fire his rifle.[233] Accordingly, the court concluded, Mullenix violated Leija's clearly established Fourth Amendment rights.[234]

The Supreme Court summarily reversed.[235] Its *per curiam* decision is a playbook for defense counsel asserting qualified immunity and a warning to courts entertaining the thought of denying immunity. First, while the court of appeals had referenced the "fair notice" standard the Court had proffered in *Hope v. Pelzer*,[236] the *Mullenix* Court reiterated the more demanding tests of factual proximity.[237] Ignoring the fact-intensive inquiry that the Fifth Circuit had acknowledged and utilized, the Court concluded that the court of appeals conducted its assessment of whether Leija posed an actionable threat of harm to officers or bystanders at too high a level of generality.[238]

In comparing the *Mullenix* facts to the facts of the precedents, the Court sanctioned a second strategy for finding that prior cases did not clearly establish the right at stake. Even though the evidence was required to be viewed in the light most favorable to Leija, the Court did not attempt to grapple with all the ways in which the court of appeals expressly found Leija posed a significantly less (or non-existent) threat to officers or bystanders compared to the fleeing suspects in the precedent cases. Instead, the Court extricated individual aspects of Leija's flight that—viewed in isolation—theoretically posed a greater risk of harm than in the precedent cases.[239]

In *Brosseau v. Haugen*,[240] the Court had reversed the denial of immunity to Officer Brosseau, who, after responding to a report of a fight in the yard of Haugen's mother's house, ran after a fleeing Haugen.[241] Haugen jumped into his Jeep that was parked in his mother's driveway.[242] Brosseau believed Haugen was trying to get a weapon.[243] Haugen ignored repeated instructions at gunpoint to get

233. *Id.* at 719–21.
234. *Id.* at 725.
235. Mullenix v. Luna, 577 U.S. 7 (2015).
236. Hope v. Pelzer, 536 U.S 730, 740 (2002).
237. *See supra* notes 177–86 and accompanying text.
238. *Mullenix*, 577 U.S. at 12–13.
239. *Id.* at 14–15.
240. Brosseau v. Haugen, 543 U.S. 194 (2004) (per curiam).
241. *Id.* at 195–96.
242. *Id.* at 196.
243. *Id.*

out of the car.[244] Brosseau struck and shattered the driver's side window with her handgun, unsuccessfully tried to grab the keys to the truck, and struck Haugen on the head with her gun.[245] After Haugen started the Jeep—or just after it began to move—Brosseau jumped back and fired one shot at Haugen.[246] She feared for the safety of: 1) other officers who she believed were on foot in the immediate area, including officers who were on the scene when Brosseau arrived as well as officers who responded to her request for assistance; 2) vehicles in Haugen's path, including the car occupied by Haugen's girlfriend and her three-year-old daughter that was parked four feet in front of the Jeep; and 3) other citizens who may be in the area of Hagen's mother's house.[247]

The Supreme Court found *Brosseau* supported reversal of the court of appeals' denial of summary judgment to Mullenix.[248] The *Mullenix* Court could have pointed to the countless ways in which Haugen presented a significantly greater risk of harm than Leija.[249] Instead, the Court construed the single fact that Haugen had just begun driving off when shot to be less risky than the fact that Leija had been leading police on a high-speed chase for 24 miles, was reportedly intoxicated, and had threatened to shoot officers.[250] Yet the court of appeals had considered these same facts—not in isolation but in the context of the actual encounter (including Mullenix's superior officer's instruction not to shoot before giving the spike strips a chance to work)—to justifiably conclude that at the time of the shooting, Leija posed no risk of harm to anyone.[251] If *Mullenix* is representative of the prescriptive immunity analysis,[252] then any time a court dissects a constitutional violation and abstracts one or

244. *Id.*
245. *Id.*
246. *Id.* at 196–97.
247. *Id.* at 197.
248. *Mullenix*, 577 U.S. at 14.
249. The Court, ignoring the articulated reasoning in *Brosseau*, inexplicably considered Haugen to have been "headed only in the general direction of officers and bystanders." *Id.*
250. *Id.*
251. Luna v. Mullenix, 773 F.3d 712, 719–23 (2014).
252. The *Mullenix* Court employed the same *modus operandi* in finding that its decisions in *Scott v. Harris*, 550 U.S. 372 (2007) and *Plumhoff v. Rickard*, 472 U.S. 765 (2014) did not clearly establish that Mullenix's use of deadly force was unconstitutional. While acknowledging that Leija posed a lesser (or more accurately, non-existent) danger to other cars than the fleeing suspects in those cases, the Court reasoned that the fugitives in those cases (1) had not verbally threatened to kill officers (as the court of appeals had noted, none of the other officers involved in the pursuit—including Mullenix's superior—who were aware of Leija's threats determined that deadly force was necessary or justified) and (2) were not about to come upon other officers (officers who the court of appeals found, consis-

more out-of-context facts out of the government-citizen encounter that are more ominous than analogous facts in the precedent cases, the right will not be clearly established.[253]

The Supreme Court endorsed a third means of arguing/finding that prior decisions fail to clearly establish a right. The Court discredited the court of appeals' reliance on the fact that when Mullenix made the unilateral, unauthorized, untrained, and untried decision to shoot, protocols were already in place to stop Leija's car.[254] The Canyon Police Department, its officers deployed to the scene, and Mullenix's superior all concluded that the spike strips were the appropriate means of stopping Leija's fleeing car.[255] The officers from the Texas Department of Public Safety who were leading the pursuit of Leija on I-27 saw no need to intervene before Leija drove over the spike strips. Nonetheless, the Supreme Court drew upon the amicus brief filed by the National Association of Police Organizations (NAPO) on the fallibility of and dangers posed by spike strips.[256] There was no evidence that Mullenix was privy to or relied upon that association's view of spike strips. Yet, the Court invoked NAPO's opinion that spike strips are dangerous and then reasoned that no case had denied immunity because the officer selected one dangerous alternative to stopping a chase over another.[257] Accordingly, the Court held that the court of appeals erred in denying immunity because the precedents did not "place

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tent with their training, had taken a protective position after setting the spike strips, and Mullenix had no information to the contrary).

253. The *Mullenix* Court utilized the same technique in concluding that lower court cases decided after *Brosseau* did not clearly establish the unconstitutionality of Mullenix's shooting. *Mullenix*, 577 U.S. at 16–17. In her dissent, JUSTICE SOTOMAYOR observed that the majority's parsing of individual facts was a "red herring," disguising the inarguable reality that Mullenix could articulate no interest in shooting at Lejia's car before it ran over the spike strips. *Id.* at 24–25 (SOTOMAYOR, J., dissenting). JUSTICE SOTOMAYOR concluded that the Court's opinion supported a culture of "shoot first, think later" that "renders the protections of the Fourth Amendment hollow." *Id.* at 26.

254. *Id.* at 20–21 (SOTOMAYOR, J., dissenting).

255. *Id.*

256. The Court also cited a) a Fifth Circuit case conferring immunity on an officer who shot a fleeing driver *after* the driver had avoided road spikes, Thompson v. Mercer, 762 F.3d 433 (5th Cir. 2014); and b) a Tenth Circuit case affirming the immunity of an officer who shot at the driver of a stolen truck after it had twice driven off the road to avoid spike strips, and the officer had set a third set of strips assuming the driver, to again avoid the strips, would cease driving the wrong way on the highway, Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009). In neither case did the court of appeals conclude the spike strips posed a danger or rely upon such a danger to justify the shooting.

257. *Mullenix*, 577 U.S. at 15.

the conclusion that [Mullenix] acted unreasonably 'beyond debate.'"[258]

In light of *Mullenix*, defense counsel is well-advised to research, solicit, and present to the court extrinsic evidence from sources outside the officer's department or chain of command that justify one or more aspects of the officials' unconstitutional behavior. Though it may not have been relied upon by the official—and even if contrary to the departmental policies, training, and instruction that were in place to guide the officer's actions—such evidence can introduce facts that will be used to distinguish otherwise-analogous precedents.[259]

The Supreme Court's repeated *per curiam* reversals of denials of immunity have sent a clarion call to lower courts: deny immunity at your peril. As Judge Reeves, the keynote speaker at this Symposium, offered:

> No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting. If you've been a Circuit Judge since 1979—sitting on the bench longer than any current Justice—you might expect a more forgiving reversal. Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established constitutional violation . . . .[260]

Professor Alexander Reinert's review of over 4,000 appellate decisions issued from 2004 to 2015 supports Judge Reeves' reading of the likely effect of the Supreme Court's message.[261] In what Prof. Reinert terms "asymmetric review," the data shows that: a) courts of appeals are far more likely to uphold lower court rulings granting immunity than rulings denying immunity; and b) courts of appeals reversed district court decisions that denied immunity far more frequently than reversing district court grants of immunity, resulting in defendants succeeding on their immunity claim in 61 percent of appeals while plaintiffs succeeded in fending off immunity in only 30 percent of appeals.[262]

By its own admission, the Court's rulings on when a right is clearly established protect "all but the plainly incompetent or those

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258. *Id.* at 16.

259. By contrast, the Court has precluded the victim from offering evidence extrinsic to cases interpreting the federal constitutional right to defeat immunity. *See supra* notes 138–45 and accompanying text.

260. Jamison v. McClendon, 476 F. Supp. 3d 386, 408 (S.D. Miss. 2020).

261. *See generally* Reinert, supra note 188.

262. *Id.* at 26.

who knowingly violate the law."[263] The Court's reckoning of the generous shield its decisions confer understates the behaviors immunity protects. As demonstrated by *Mullenix*, immunity shelters a plainly incompetent police officer from liability for killing a citizen. And even when the official knows they are violating the Constitution, their lawyer can rescue them from accountability by unearthing fact distinctions from prior cases and soliciting and presenting evidence that was unknown to, much less relied upon, by the official.

The current qualified immunity standard is founded exclusively in the Court's policy prescription that preserving socially desirable decision-making requires freeing government officials from bearing the costs of their unconstitutional acts. Thus, in evaluating the current legal test for immunity it is appropriate to: a) identify the Court's assumptions as to the mental process by which officials make the decisions that the Court has declared to merit immunity; and b) test those hypotheses against the current scientific consensus as to the working of the brain.

III. TESTING THE SUPREME COURT'S ASSUMPTIONS AS TO HOW THE HUMAN BRAIN MAKES DECISIONS AGAINST CONTEMPORARY NEUROSCIENCE

The Supreme Court never explicitly articulated the thought process precipitating the actions of officials that the Court's immunity test is designed to encourage and insulate from accountability. Yet, the Court has implicitly relied on a theory of how the human brain works when it repeatedly reformulated the common law test for qualified immunity. This Article will now unpack the unstated assumptions, analyze whether the Court's view of how the brain operates is supported by contemporary understandings of neuroscience and neurobiology, and propose how the present conditions for immunity should be modified to be congruent with the workings of the brain.

A. Assumptions Underlying the Court's Abrogation of the Subjective Prong of Immunity

The Court's rescission of the requirement that the government actor must subjectively act in good faith to be immune rests upon the expectation that the rational processes of the brain will override

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

the emotional impulses of the official.[264] In *Harlow v. Fitzgerald*, the Court accepted that "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, *and emotions*."[265] Nonetheless, the *Harlow* Court theorized that, even when harboring ill-will towards the citizen, the official would "be made to hesitate" where they "could be expected to know that [the] conduct would violate . . . constitutional rights."[266] The Court had faith that even when *emotionally* intent on causing harm, the official would refrain from exercising discretion if the *rational* processes of the brain concluded that to do so would transgress a clearly established right.

B. Testing the Assumptions Underlying Abrogation of the Subjective Prong of Immunity Against Neuroscientific Findings as to the Role of Emotion in the Working of the Brain

The *Harlow* Court's parsing of decision-making into separate emotional and rational spheres is consonant with the conception of the Triune Brain propounded in the 1960s by neuroscientist Paul MacLean.[267] MacLean posited that through evolution, the brain developed three structures, each with separate and increasingly more sophisticated abilities.[268] The earliest, primitive brain—the reptilian or lizard brain—acts by reflex to control survival functions such as breathing and heart rate.[269] The next portion of the brain to evolve, the limbic system, processes and uses emotion to guide the body's reaction.[270] The neocortex—the most recent and most highly developed part of the brain—has the capacity to perform the executive functions we associate with rationality.[271]

Anatomically, the Triune Brain buttresses the notion that emotion and reason are wholly separate functions of the brain, engaged in a battle to dictate the body's actions. Emanating from the less-

264. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (rescinding the requirement of subjective good faith in qualified immunity cases).

265. *Id.* at 816 (emphasis added).

266. *Id.* at 819.

267. *See generally* PAUL D. MACLEAN, THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS (1990). Leonard Mlodinow attributes the roots of this theory to Charles Darwin's *The Expression of Emotions in Man and Animal*, and the popularization of the triune model to Carl Sagan's *The Dragon of Eden* and Daniel Goleman's *Emotional Intelligence*. MLODINOW, *supra* note 6, at 17.

268. MACLEAN, *supra* note 267, at 15–18.

269. *Id.* at 15–16.

270. *Id.* at 16–17.

271. *Id.* at 17–18.

evolved portion of the brain, the theory posits, "emotions are part of an inherent animal nature and cause us to perform foolish and even violent acts unless we control them through our rational thoughts."[272] The baseline of the American legal system—*stare decisis*—is premised on this traditional, longstanding view of emotion and reason.[273] It is unsurprising, then, that the Supreme Court believed that the rational operation of the government agent's neocortex would overcome the emotional impulses that, unrestrained, would set in motion the official's intention to deprive the citizen of their constitutionally guaranteed liberties.

The technological revolution in witnessing the workings of the brain has spawned an accompanying "revolution in our understanding of human feelings."[274] Three questions are critical to assessing the validity of the assumption underlying the Court's abrogation of the subjective good faith prerequisite to immunity: 1) What constitutes emotions; 2) How do emotions interact with the cognitive processes of the brain; and 3) What degree of influence do emotions exert on the brain's communication to the body to act.

1. What Constitutes Emotions

Emotions are what we experience and perceive in response to the body's internal signals to the brain. In a constant process known as interoception, the brain receives a steady stream of transmissions from our "internal organs and tissues, the hormones in [our] blood, and [our] immune system."[275] The brain remains continuously alert to disruptions to homeostasis, the heathy state of the body's internal condition. Unsurprisingly, that interior condition is affected by stimuli external to the body, including our reactions to the persons with whom we are interacting.[276]

Emotion is the concept or label we have assigned to the feeling we perceive from "affect:" the brain's response to the body's internal signals.[277] That feeling is a combination of two variables: 1) valence—pleasantness or unpleasantness; and 2) arousal—the magnitude or intensity of the response, such as the degree of calm or agitation.[278]

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272. BARRETT, *supra* note 7, at xii.
273. *Id.*
274. MLODINOW, *supra* note 6, at xii.
275. BARRETT, *supra* note 7, at 56.
276. *Id.* at 71.
277. MLODINOW *supra* note 6, at 45–46.
278. *Id.* at 43; BARRETT, *supra* note 7, at 74.

2. *How Emotions Interact with the Cognitive Processes of the Brain*

As noted earlier, the Triune Brain divides the mind into three autonomous layers, with the neocortex recognized as the most evolved and dominant driver of rational decision-making. The view that there are three independently operating segments of the brain "remains one of the most successful misconceptions in human biology."[279] For the neurons in each of the three parts of the Triune Brain do not merely function in isolation, but are intertwined and communicate reciprocally with one another.[280] "We now know that emotion is profoundly integrated into the neural circuits of our brains, inseparable from our circuits for 'rational' thought."[281] Accordingly, the decision to act is never determined solely by the rational output of the neocortex. Rather, the brain invariably considers the constant current of internal signals concerning the body's needs—disruptions in the beating of the heart, changes in blood pressure, demands for oxygen by the lungs, and requests for added glucose.[282] Affect—the response to these signals—is "irrevocably woven into the fabric of every decision."[283]

3. *What Degree of Influence Do Emotions Exert on the Brain's Communication to the Body to Act*

Not only is emotion a constituent part of every choice, but contrary to the view that we are rational actors, emotion exerts the greatest sway over decision-making. The continuous process of interoception is the brain's "most important mission," reacting to disruptions in the body's internal state "so you can stay alive and well."[284] Affect—the response to cues as to that internal state—"reflects whether the homeostatic state of the body and its current external circumstance is conducive to survival."[285] Emotion is "the body's way of saying, 'Hey, something really important is going on,'" generating a response before the brain has fully processed the situation.[286] Accordingly, our higher order thinking skills do not suppress the desires generated by emotion; rather, "[a]ffect is in the driver's seat and rationality is a passenger."[287]

279. BARRETT, *supra* note 7, at 81.
280. *Id.* at 22; SAPOLSKY, *supra* note 9, at 23, 25.
281. MLODINOW, *supra* note 6, at 23.
282. BARRETT, *supra* note 7, at 66, 73.
283. BARRETT, *supra* note 7, at 80.
284. *Id.* at 66.
285. MLODINOW, *supra* note 6, at 46.
286. TALI SHAROT, THE INFLUENTIAL MIND 40–41 (2017).
287. BARRETT, *supra* note 7, at 80.

The modern discoveries on the role that emotion plays in the brain's decision-making are squarely opposite to the Court's supposition when it eliminated subjective good-faith as a prerequisite to qualified immunity. The Court presumed the public official's rational assessment of whether a contemplated action will violate the Constitution would override their emotional investment in harming the citizen.[288] Instead, those emotions will play a signature role in how the government agent chooses to exercise their discretion, and likely will be the most significant driver of the decision that deprives the citizen of their constitutional rights. Any anger the Florida Highway Patrol officials harbored over Scherer's refusal to follow their orders to quit his part-time deputy position necessarily played an animating role in their election to fire Scherer without affording him the protections required by the Procedural Due Process Clause of the Fourteenth Amendment.[289] Mullenix's motivation to disprove his supervisor's critique that Mullenix was insufficiently proactive inescapably played a leading role in his decision to fire the six shots that killed Leija.[290] By excising good-faith as a necessary condition for immunity, the Court detached its test from the reality of governmental decision-making that the doctrine is designed to protect.

C. Reforming the Court's Abrogation of the Subjective Prong of Immunity to be Congruent with the Neuroscience of Governmental Decision-Making

Because emotion unavoidably plays a significant role in how government agents exercise their discretion, subjective good faith should be restored as a prerequisite to qualified immunity. Divesting the official of immunity when they intend to harm the citizen will not disrupt the policy goal of protecting blameless action from liability. To the contrary, immunizing the official whose brain's signal to act was principally influenced by their motivation to harm the citizen would insulate the official from accountability for the most opprobrious conduct.

Demanding that the officer act in good faith to be immune would not undermine the policy goal of carving added space for the appropriate exercise of discretion that the doctrine of immunity is designed to preserve. But the Court's retraction of the subjective good-faith requirement was animated by an added policy concern—

288. *See supra* notes 264–66 and accompanying text.
289. *See supra* notes 127–28 and accompanying text.
290. *See supra* note 211 and accompanying text.

the Court's perception that public officials and society needed to be freed from the costs attendant to litigation.[291] The Court believed that the issue of the official's intent, as a classic issue of fact, prevented defendants from succeeding on motions for summary judgment asserting qualified immunity. As Justice Kennedy recognized, developments after *Harlow* facilitated grants of summary judgment where intent was an element:

> Harlow was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in Harlow we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a non-moving party "who fails to make a showing sufficient to establish the existence of an element necessary to that party's case, and on which that party will bear the burden of proof at trial." Under the principles set forth in Celotex and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.[292]

As the issue of the official's intent no longer precludes dismissal of cases on summary judgment, the lone social cost of litigation that would be incurred by restoration of subjective good faith as an element of immunity is the discovery that occurs before filing the motion for summary judgment. The available empirical evidence did not support the Harlow Court's surmise that discovery in constitutional tort actions was widespread and disruptive.[293] Equally importantly, rectifying the Court's error in assuming that reason would overcome the emotion underlying the official's intent to harm the citizen alters the outcome of what the Harlow Court deemed the "balance between the evils in any available alternative" when it crafted a new test for qualified immunity.[294] On one side of the balance, as the Harlow Court recognized, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."[295] The neuroscientific discovery as to the preeminent sway of emotion makes it

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291. *See supra* notes 115–17 and accompanying text.

292. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (citing Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

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

294. Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982).

295. *Id.*

more probable that invasions of constitutional rights will occur where the official harbors ill-will towards the citizen. Subsequent decisions of the Court have removed from the government's side of the scale the concern that Rule 56 of the Federal Rules of Civil Procedure precludes disposition of the issue of good faith on motions for summary judgment.[296] Consequently, the balance of the "evils available in any alternative" now plainly tips in favor of requiring the official to have acted in good faith in order to be exempted from accountability for damages when they deprive a citizen of their constitutional rights.[297]

D. Assumptions Underlying the Court's Reformulation of the Objective Test for Immunity

The current objective test of qualified immunity exonerates public officials on the ground that although their *actions* violated the Constitution, the officials' *belief* that they acted in accordance with constitutional norms nonetheless was reasonable.[298] The Court has supposed that the officer can harbor a reasonable belief that exercising their discretion is appropriate even where acting on that belief is objectively negligent,[299] reckless,[300] deliberately indiffer-

296. *See, e.g.*, *Wyatt*, 504 U.S. at 169–76 (Kennedy, J., concurring).

297. Justice Blackmun responded to proposals to relieve another social cost of litigation in civil liberties actions—the rising number of Section 1983 actions on the dockets of the federal courts—as follows:

> If critics are concerned by the sheer burden placed on the federal judiciary by § 1983 actions, they might do well to turn their attention, too, to other sources of federal litigation. My point is simply that if we want to nominate a particular group of cases for exclusion from the federal courts, we should look first at groups in which federal law is not sensitively at issue rather than at one in which fundamental constitutional rights are at stake.

Hon. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L. REV. 1, 21 (1985). To parrot Justice Blackmun's words, if we want to nominate a particular group of cases for exclusion from discovery in federal courts, we should look first at claims against government officials where fundamental constitutional rights are not at stake.

298. Saucier v. Katz, 533 U.S. 194, 206 (2001).

299. Graham v. O'Connor, 490 U.S. 386, 397 (1989) (explaining that the test for when use of force violates Fourth Amendment is "whether the officers' actions are 'objectively unreasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation"); Brinegar v. United States, 338 U.S. 160, 175-76 (1949) ("Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.") (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

300. Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986) (holding that negligent conduct does not constitute a "deprivation" of procedural due process within the

ent,[301] and even conscience shocking.[302] Under the Court's reworked immunity standard, the official will reasonably believe their intended action is constitutional unless and until the right imperiled was so clearly established under the facts presented that "every reasonable official would have understood that what he is [proposing to do] violates that right."[303]

Under the test for immunity it set forth, the Court assumes the brain of the public official will arrive at the belief that their contemplated conduct will not trammel the constitutionally guaranteed rights of the citizen through the following cognitive process.

First, the official will consider relevant case precedents interpreting the federal constitutional right at stake in assessing whether their proposed course of action will violate the Constitution.[304]

Second, the official will conclude that their intended action satisfies the Constitution unless those precedents establish "beyond debate" that, under the specific facts, the proposed course of conduct is unconstitutional.[305]

Third, the official *will not* consider whether state constitutional provisions, state statutes, state administrative regulations, departmental policy, the officer's training, and orders from their superiors—viewed in concert with precedents interpreting the federal right—should lead them to believe the proposed action is unconstitutional.[306]

Fourth, if under the precedent-only based assessment it is not clearly established that their contemplated actions are unconstitu-

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meaning of the Fourteenth Amendment, reserving resolution of whether recklessness or gross negligence amounts to a "deprivation"); Davidson v. Cannon, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting) (opining that reckless or deliberate indifference would establish "deprivation" under the Due Process Clause).

301. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994) (finding that the failure of prison authorities to protect a transgender inmate from sexual assault violates Eighth Amendment where inaction was reckless as defined by criminal law). *See also* Estelle v. Gamble, 429 U.S. 97, 106 (requiring a prisoner to prove "deliberate indifference to serious medical needs" to establish a violation of Eight Amendment).

302. County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998) (rejecting the deliberate indifference standard and holding that only governmental actions that shock the conscience invade the substantive guarantees of the Due Process Clause); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 128–29 (1992) (finding that the substantive Due Process guarantees of Fourteenth Amendment are violated only where the conduct is arbitrary or shocks the conscience).

303. Reichle v. Howard, 566 U.S. 658, 664 (2012).

304. *See supra* Part II(B)(6)(a).

305. *See supra* Part II(B)(6)(b); Ashcroft v. Iqbal, 563 U.S. 731, 741 (2011).

306. *See supra* Part II(B)(6)(a).

tional, the brain of the official will signal the official to proceed with the intended action.[307]

Fifth, the brain will instruct the official to take the considered action even if the brain does not believe it to be the approved, correct, or desirable course of action in light of all the authorities (case precedents about the federal right, the state constitution, state statutes, state administrative regulations, departmental policy, the officer's training, and orders from their superiors) bearing upon its lawfulness.[308] The official's brain will reason that the official should proceed with the contemplated course of conduct because they will not risk liability for depriving the citizen of their constitutional rights—even though the official may be liable for damages caused by their violation of state law and may be subjected to internal discipline for acting contrary to applicable policy, training, or orders. Put another way, if the constitutional right endangered is not clearly established, the brain will order the official to act even where other guardrails on their authority—accounted for in concert with or independent of the Constitution—signal the intended action is wrong.

E. Testing the Assumptions Underlying the Court's Reformulation of the Objective Test for Immunity Against Neuroscientific Findings as to the Rational Working of the Brain

The Court's adoption and application of the clearly established right standard presumes that the neo-cortex of the official will engage executive functions akin to those used by judges and lawyers.[309] Government agents will estimate the foreseeability that their contemplated action will violate the federal constitution separate from an evaluation of whether the action is proscribed by other authorities and directives. In determining whether the intended exercise of discretion risks depriving the citizen of a clearly established right, the official will engage in the granular process of analogizing and distinguishing the facts of their current situation against those presented in the relevant precedent cases.[310] If the official concludes that acting will not impinge upon a right that is clearly established under the particular facts they confront, the offi-

307. *See supra* Part II(B)(6)(b).

308. *See supra* Part II(B)(6)(a)–(b).

309. *See* SAPOLSKY, *supra* note 9, at 48. ("The frontal cortex also mediates 'executive functions'—considering bits of information, looking for patterns, and then choosing a strategic action.").

310. *See supra* Part II(B)(6)(b).

cial will proceed with the intended course of action, concluding that to do so does not foreseeably risk personal liability—at least as to violations of the United States Constitution.

Unlike the erroneous presumption of the Court that reason can and will conquer the insidious influence of emotion emanating from a separate part of the brain, the neo-cortex does have the ability to conduct the analytical steps the Court presumes the official will undertake. While the brain is capable of that analysis, the Court's hypothesis nonetheless contravenes the way in which the mind of the official actually will reach a decision to act. To understand why the official will not reason as the Court inferred, it is necessary to understand four central features of the construct of the brain.

First the brain consists of billions of neurons, encased in the opaque box of the skull. These neurons cannot see, hear, taste, or feel. Rather they receive and interpret signals from what the senses of sight, sound, smell, and touch detect outside the body and, as previously discussed, communications emanating from inside the body.[311]

Second, the neurons of the brain are not prewired.[312] There is no cohort of neurons genetically assigned to receive, store, and access information from case precedents interpreting provisions of the United States Constitution. Rather, our experiences create the neural architecture of our brain.[313]

The individual neurons in the brain create networks that are formed as a result of the events in our life. Inputs that, based on past encounters, are found to be relevant and valuable are transmitted more readily from the ears to the mouth of a single neuron, and more quickly across the synapse between neurons.[314] As the brain identifies multiple signals that co-occur in an event, the various neurons transmitting those signals form a network, communicating with one another.[315] The more frequent the instances in which those inputs recur together, the stronger and faster the communication is between the neurons in that network. Hebb's law, summarizing the finding of a Canadian neurobiologist Donald Hebb, states that "neurons that fire together wire together."[316]

311. *See* BARRETT, *supra* note 7, at 58–59.
312. *See* SAPOLSKY, *supra* note 9, at 689–90.
313. *See* BARRETT, *supra* note 7, at 28, 34.
314. *See* SAPOLSKY, *supra* note 9, at 687, 694.
315. *Id.* at 700–01.
316. *Id.* at 138.

Third, to make sense of the signals it receives from outside the body, the brain conducts a Google search of its database, looking for the highest ranked match to these inputs.[317] The brain's database is not a law library, Lexis, Westlaw, or compendium of cases interpreting the United States Constitution. Rather, the database is the past life experience of the perceiver, embodied in the neural networks that were formed by the coinciding of inputs. Based upon its search of the experiential database, the brain will predict what the incoming signals mean and dictate the body's appropriate response. In arriving at its prediction, the brain's algorithm assigns the highest rank to the pattern of experience that most resembles the present situation.[318] Because the neural networks are strengthened as an experience is repeated, events that have recurred with greater frequency are assigned greater weight in ordering the results of the search.

Fourth, this process of pattern matching takes place, constantly, automatically, invisibly, and subconsciously.[319] Once the brain finds that what is presently occurring sufficiently resembles past experience, it will instantaneously signal the body to act on that prediction.[320] The brain will immediately issue its instruction to act even though there is a possibility of error that could be minimized if the mind paused and took time to consider contradictory data and alternate explanations.

The brain homed its capacity to make instantaneous decisions both to ensure our survival and to efficiently allocate its finite supply of energy. Every second, the brain receives as much data from the retina of the eye alone as in a complete computer network.[321] Therefore, it must constantly sift for what is, and is not, relevant.

Utilizing the higher analytical powers of the brain draws heavily on the body's glucose supply.[322] When the brain has found a sufficient resemblance to past experience to predict what it is perceiving and how to respond, to engage in further thought would be time-consuming and a wasteful expenditure of energy that could be better allocated to address the body's true needs.

The cognitive psychologist Daniel Kahneman captured this operation of the mind in his seminal *Thinking Fast and Slow*.[323] Bor-

317. *See* BARRETT, *supra* note 7, at 59.
318. *Id.* at 117.
319. *Id.* at 26, 125.
320. *Id.* at 60.
321. *Id.*
322. DANIEL KAHNEMAN, THINKING FAST AND SLOW 43 (2011).
323. *See id.* at 44.

rowing the terms first coined by psychologists Keith Stanovick and Richard West,[324] Kahneman depicted the fast operation of the brain as System 1 and the slower operation of brain as System 2.

The processes of System 2 will be familiar to those trained in legal analysis. System 2 "follow[s] rules, compare[s] objects on several attributes, and make[s] deliberate choices between options."[325] It "can construct thoughts in an orderly series of steps"[326] and "[c]heck the validity of a complex logical argument."[327]

While System 2 engages in conscious reasoning,[328] System 1 operates quickly, automatically, and constantly, without voluntary control or effort.[329] System 1 instantaneously seeks to associate incoming signals of perception with a pattern from past experience. When System 1 finds what it is perceiving sufficiently resembles something that has occurred in the past, it concludes that it has accurately detected what is happening, shuts out any contradictory input, and notifies the body to respond.[330]

While not anatomically separate parts of the brain, System 1 and System 2 function both independently and interdependently. System 2 will not unnecessarily exert the expensive effort required to engage its mental activity. Therefore, where the cognitively efficient operation of System 1 discovers that what is taking place is sufficiently similar to the user's past experience, System 2 will uncritically accept that interpretation and the proffered solution.[331] System 2 remains dormant, activated only where System 1 cannot find a past pattern that adequately matches the present situation.[332]

None of the five attributes of official decision-making that underpin the Court's reimagination of the objective immunity standard square with the operation of the brain. When called upon to decide whether to exercise discretion, the government agent's brain will not conduct a discrete, System 2 assessment of constitutionality by comparing and contrasting the facts presented to the facts of applicable precedents interpreting the federal right in issue. Rather, System 1 of the official's mind will automatically search the neural networks created from the government agent's experience for resemblance to the instant situation. All inputs relevant to those past

324. *Id.* at 20.
325. *Id.* at 36.
326. *Id.* at 21.
327. *Id.* at 22.
328. *Id.* at 21.
329. *Id.* at 20–21, 24.
330. *Id.* at 58, 73, 80, 81.
331. *Id.* at 24, 64.
332. KAHNEMAN, *supra* note 322, at 24.

instances will form an integrated part of the neural networks associated with the event—not only court cases alone but also guidance from state constitutional and statutory law, state administrative regulations, policies, training manuals and programs, orders from superiors, and the official's on-the-job history. Where the fast, subconscious, invisible operation of the brain finds that the present situation sufficiently resembles past experience, the official will act or refrain from acting accordingly. If the integrated neural network of precedents, state law, internal policies, training, and/or instructions from their superior formed from the officer's past experiences collectively cause System 1 to predict that taking action is inappropriate, System 2 will not waste energy analyzing whether acting nonetheless might not violate a clearly established federal constitutional right.[333]

Even were we to wrongly assume that the official's brain will conduct an isolated and independent review of precedents, the Court was mistaken in concluding that the official will believe their proposed action is constitutional unless there is a prior case that is so close factually that every official would recognize that the Constitution prohibited the act. The Court presumes that, upon finding no pattern of unconstitutionality in the caselaw, the brain will cease searching for other resemblances to the current situation. To the contrary, the mind is constantly, invisibly, and automatically looking for the "winning instance"[334] emerging from its comparison of current inputs to the database of experience. If cases interpreting the Constitution do not supply a pattern that determines how to act, the brain will continue to search for other experiential matches that will best predict what is happening outside the brain and determine how to respond. Contrary to the Court's assumption, the mind will not leap from "I see no experience from cases interpreting the Constitution" to "I believe it is appropriate to act." Rather, the brain searches for a pattern from the entirety of its database of past occurrences, with all authorities and instructions that have a bearing on the proper way to act under the circumstances contributing to the neural network.

The Court's current immunity test was not proven in a neuroscience lab but was concocted in its chambers. Interestingly, the

333. The Court has been particularly deferential to police officers' use of force when making "split-second judgments." Graham v. O'Connor, 490 U.S. 386, 397 (1989). In such instances, it is even less likely that the brain of the official will be scanning for factually identical precedents. To the contrary, where there is a call for immediate action, System 1 thinking must and will animate action without activation of System 2 processes.

334. BARRETT, *supra* note 7, at 112–13.

prior iterations of the Court's test contradict the assumptions as to the workings of the mind that undergird the present standard. The Court's initial recognition of qualified immunity rested upon a very different understanding of the mental process preceding governmental action. The *Pierson* Court found it unacceptable to hold police officers strictly accountable because it assumed that in forming the belief that it was constitutionally appropriate to arrest the Freedom Riders, they would consider and did consider state law, which in that case was a Mississippi statute that authorized the arrest of the Freedom Riders if they caused a breach of the peace.[335] The Court's expansion of the test for immunity in *Scheuer v. Rhodes* likewise presumed the brain of the public official would consider all inputs bearing on the lawfulness of their proposed conduct—not solely caselaw about the federal right—in formulating a belief as to the propriety of their contemplated act. The Court proffered that the officials' belief that acting was lawful would be formed after considering state laws defining their duties and discretion and, for subordinate officials, the orders of their superiors.[336]

Only after *sua sponte* interjecting the concept of "clearly established rights" into the immunity test[337] did the Court pivot to a different hypothesis as to the workings of the official brain. In *Davis v. Scherer*, the Court assumed that in arriving at the belief that firing Scherer without affording additional notice and an opportunity to be heard would be constitutional, the Florida Highway Patrol officials would not have considered procedures unambiguously mandated by state regulations issued two months before the firing as well as the Attorney General's opinion issued two years earlier.[338] The Court's *per curiam* opinion in *Mullenix v. Luna* similarly assumed that Officer Mullenix's belief that it was appropriate to shoot at Leija's car was solely the product of comparing his situation to the facts of prior federal court cases on the constitutionality of use of deadly force. The Court further accepted that once believing that it was not clearly established that firing six shots from his rifle violated constitutional limits, Mullenix would pull the trigger even though to do so contradicted his training, departmental policies, orders from his superior, and contemporaneous actions of the other officers on the scene.[339]

335. *See supra* text accompanying note 42.
336. *See supra* text accompanying note 61.
337. *See supra* text accompanying notes 84–86.
338. *See supra* text accompanying notes 134–35.
339. *See supra* text accompanying notes 199–205.

The Court's view of the workings of the mind are not only betrayed by its earlier formulation of the test for qualified immunity but are refuted by its allowing government actors to successfully invoke immunity even where the right *is* found to be clearly established. Although the right violated was clearly established, the official remains immune if either: a) they did not know and should not have known of the right; *or* b) they did not know and should not have known that their conduct violated the right.[340] Consistent with current neuroscience, the Court implicitly recognized that the official's brain could and would arrive at a belief that the proposed exercise of discretion was lawful by comparing the current situation to patterns formed by *all* variables presented in similar experiences that created the neural pathways of the brain. In deciding whether the action is appropriate, the brain will not solely search for resemblance to cases about the constitutional right but also will consider similarities from state constitutions, state statutes, state administrative regulations, policies, training, orders from superiors, and the official's previous encounters with the citizenry.

F. Reforming the Court's Objective Immunity Standard to Be Congruent with the Neuroscience of Governmental Decision-Making

Beyond restoring the requirement that an official act in good faith to be immune,[341] there are at least three alternative modifications to the objective standard that would make the test for immunity congruent with how the brain of the government agent arrives at the belief that they should act on the proposed exercise of discretion.

First, those empowered to change the current test—the United States Supreme Court, Congress, and state legislators and state court judges enforcing rights guaranteed by the state constitution or a state statute[342]—could return to the standard the Supreme Court adopted in *Scheuer v. Rhodes*.[343] That test acknowledged that the official should and would draw upon all the experiences and inputs that have shaped the neural architecture of their brain to reach a single prediction that signaled the body to respond. Immunity would be appropriate only if "in light of all the circumstances"

340. *See supra* text accompanying note 101–02.

341. *See supra* text accompanying note 81.

342. Local governments also may have occasion to define qualified immunity for causes of action to enforce rights they legislate. *See supra* note 4.

343. Scheuer v. Rhodes, 416 U.S. 232 (1974).

there were "reasonable grounds for the belief formed at the time" that the intended action would be appropriate and lawful.[344]

The *Scheuer* test, however, does not satisfactorily account for the true interaction between the official's belief and conduct for all constitutional guarantees. While some constitutional rights are defined by a purely legal test,[345] other rights are violated only when the official acts with a degree of culpability lying somewhere on the tort spectrum—negligently,[346] recklessly,[347] with deliberate indifference,[348] or in a manner that shocks the conscience.[349] For these latter rights, the *Scheuer* test envisions that a state of affairs could exist where, considering all the circumstances, it would be reasonable for the official to believe that their intended action was constitutional but unreasonable (or objectively worse) to act on that same belief.

When applied to rights defined by tort-like culpability, the *Scheuer* test recognizes the possibility that the brain would rely on a different set of inputs in deciding to act than in forming a belief. Allowing immunity for conduct that is objectively unreasonable envisages the brain issuing competing commands—the first, based on inputs predictive of legality ordering "go," and a second signal, after considering all the circumstances, including legality, shouting "stop." We now know, however, that this is not how the brain works. If System 1 finds a sufficient resemblance to experience to reach the prediction that the official should not act, System 2 will not override that conclusion by conducting a deliberative assessment of data interpreting the federal constitution. Rather, to avoid useless expenditure of glucose better allocated to necessary functions, System 2 will remain dormant, endorsing the prediction that satisfied System 1. Therefore, a second option for reforming immu-

344. *Id.* at 247.

345. For example, most First Amendment doctrine erects legal tests defining the degree of justification the government must meet to sustain a burden on speech, *see, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (permitting content-based restrictions on speech only where the government can prove a compelling interest and that the regulation is narrowly tailored to achieve that interest); religion, *see, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (subjecting neutral laws of general applicability that burden religion to rational basis review rather than strict scrutiny); and association, *see, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (justifying a limitation on right to associate for expressive purposes only where the restriction serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms").

346. *See supra* note 299 and accompanying text.

347. *Supra* note 300 and accompanying text.

348. *Supra* note 301 and accompanying text.

349. *See supra* note 302 and accompanying text.

nity would be to import the *Scheuer* test for constitutional rights governed by a legal standard but to deny immunity whenever plaintiff must prove objective negligence, recklessness, deliberate indifference, or conscience shocking conduct to establish a constitutional violation.[350]

A third option is to eliminate qualified immunity as a defense that exonerates an official from paying damages caused by their unconstitutional actions. After every input into belief-formation is considered—unless they all point to the same conclusion—it will be difficult for a judge or jury to reliably determine whether it was reasonable for the official to believe it was lawful to act. The lower courts' continued struggle over the narrower inquiry of when a particular federal constitutional right is clearly established offers a canary-in-a-coal-mine warning as to how daunting and unpredictable it will be if courts or jurors undertake to adjudge reasonableness of belief under the multiple legal and experiential variables bearing on that question.

Nor is rejection of the qualified immunity defense necessarily problematic as a matter of policy. Immunity was designed to provide leeway for the official to act in the interests of the community. But, in defining the contours of a constitutional right, courts have struck a balance between the interest in individual autonomy free from governmental incursion and the need and desirability of governmental action to protect the interests of that collective. In arriving at that balance, the courts have already baked in leeway for the inevitable fact that officials will make mistakes.[351] Thus one could rightfully conclude that the Constitution itself has addressed the very concerns that animated the doctrine of qualified immunity.

CONCLUSION

The Supreme Court's qualified immunity jurisprudence is the product of the inner workings of the Justices' own brains, wired by

350. In the interest of full disclosure, I offered this same proposal over 40 years ago, before the findings of neuroscience on which this article is premised. Gary S. Gildin, *The Standard of Culpability in Section 1983 and* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983).

351. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949) ("Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men . . . ."). *But see* Saucier v. Katz, 533 U.S. 194 (2001) (reasoning that qualified immunity affords additional leeway for mistakes in use of force beyond the room for error afforded by Fourth Amendment's objective reasonableness standard).

their unique experiences. One can only speculate how—both before and after becoming judges—the Justices' personal experiences have created neural patterns that subconsciously predict government agents are unduly inhibited in the performance of their duties by the specter of civil liability.[352] The policy reformulation they legislated is an offshoot of the operation of their minds, projecting the Court's expertise in System 2 slow thinking as the default mode of how all government actors think and decide. Whatever the ultimate resolution, those charged with shaping qualified immunity must take into account the findings of neuroscience as to how the brain works if they opt to shield governments from accountability for depriving citizens of their constitutional rights.[353]

352. Two prime candidates are a) the perception that Section 1983 actions constitute an unwarranted percentage of cases on federal court dockets, and b) the view that an expansive interpretation of Section 1983 results in federal courts unduly impinging on the province of the states to regulate their officials. *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). The repeated willingness of the Court to suspend normal doctrines of judicial self-limitation to limit the scope of Section 1983 is suggestive of a subconscious or conscious agenda. *See generally* Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN STATE L. REV. 1333 (2010).

353. It should go without saying that any reform also should consider adjusting current doctrine on entity liability that leaves the victim without a remedy where the individual official is immunized. *See supra* text accompanying notes 28–29.