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QUALIFIED IMMUNITY FOR CIVIL RIGHTS VIOLATIONS: REFINING THE STANDARD

The qualified immunity doctrine protects public officials[1] from liability for civil rights violations committed during the exercise of their discretionary duties.[2] The doctrine originally was developed to protect law enforcement officials against civil suits stemming from either a *Bivens*[3] or a section 1983[4] civil rights claim.[5] The Supreme Court justified the qualified immunity doctrine as necessary for officials to perform their governmental functions effectively.[6]

As the doctrine developed, the Court broadened the category of public officials entitled to the doctrine's protection.[7] For many of these officials, particularly in the upper reaches of government, the Court perceived a need to provide protection from frivolous litigation and potential liability for damages.[8] To increase the scope of the doctrine's protection, the Court narrowed the qualifying test for immunity to a purely objective inquiry[9] in the hope that lower courts would be able to dismiss "insubstantial" suits at the complaint stage or on a motion for summary judgment.[10]

While expanding the scope and substance of the qualified immunity doctrine, the Court has nevertheless refused to tailor the

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1 Some officials, such as the President, legislators, judges and prosecutors, are granted absolute immunity for performance of their discretionary duties. *See infra* text accompanying notes 47-59.

2 *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). The doctrine currently bars suits against officials unless the right they violate is "clearly established." *See infra* text accompanying notes 127-37.

A discussion of the meaning of a "discretionary" as opposed to "ministerial" duty is beyond the scope of this Note. The majority opinion is that the distinction is basically a policy decision, based on considerations such as the type of injury, the availability of alternative remedies, and the importance of the right being protected. For a full investigation of the dichotomy, see RESTATEMENT (SECOND) OF TORTS § 895D, comment f (1969); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

3 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

4 42 U.S.C. § 1983 (1988) (section 1 of the Civil Rights Act of 1871).

5 Pierson v. Ray, 386 U.S. 547, 555 (1967).

6 Butz v. Economou, 438 U.S. 478, 481 (1978).

7 *See* Mitchell v. Forsyth, 472 U.S. 511 (1985) (United States Attorney General); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Presidential aides); *Butz*, 438 U.S. 478 (1978) (Secretary of the United States Department of Agriculture); Scheuer v. Rhodes, 416 U.S. 232 (1974) (Governor of Ohio).

8 *Harlow*, 457 U.S. at 814-15.

9 *Id.* at 817-18; Anderson v. Creighton, 483 U.S. 635, 641 (1987).

10 *Harlow*, 457 U.S. at 813.

standard to the disparate needs of different levels of government officials.[11] The Court's refusal to calibrate the qualified immunity standard, coupled with the greater range of officials to whom the standard applies, has led to the overprotection of lower-level government officials. A lower-level official, for the purposes of this Note, is an official who generally deals with the public directly, whose individual decisions tend to affect a relatively small number of people, and who is usually one of many individuals employed in the same capacity.[12] An upper-level official, on the other hand, is one who individually exercises great authority over a large group of lower-level officials or the public, and is usually solely responsible for the duties of their office.[13] The current standard provides too much protection for lower-level officials,[14] and gives little guidance to lower courts in suits where the official's state of mind is an element of the plaintiff's case.[15]

This Note argues that government-sponsored indemnity and insurance programs for civil rights violations would provide the most complete and appropriate solution to the problems of immunity for lower-level public officials. Adoption of these programs would allow complete abrogation of qualified immunity for these officials, benefiting victims of unconstitutional acts, government officials, and the legal system.

In the alternative, this Note argues for the bifurcation of the qualified immunity doctrine to better meet the needs of different categories of officials while simultaneously preserving as many of plaintiffs' constitutional remedies as sound public policy allows. As the Court has recoguized, qualified immunity sacrifices some individuals' constitutional rights in the interest of effective government.[16] Because the doctrine denies injured individuals a remedy

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11 *Creighton*, 483 U.S. at 643 ("[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties . . . .").

12 Typical examples of lower-level officials include police officers, FBI agents, school principals, and prison guards. For an analogous category, see Professor Schuck's conceptualization of "street-level" officials in Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 293-94. Schuck defines "street-level" officials as those who personally deliver basic governmental services to the public, and "exercise substantial discretion in doing so." *Id.* at 293.

13 This category should be narrowly defined, including only those officials to whom the special policy concerns voiced by the Court genuinely apply. *See infra* text accompanying notes 141-49. Examples of upper-level officials would include the United States Attorney General, *see* Mitchell v. Forsyth, 472 U.S. 511 (1985), or a state governor, *see* Scheuer v. Rhodes, 416 U.S. 232 (1974).

14 *See Creighton*, 483 U.S. 635; *see also infra* text accompanying notes 156-62.

15 *See infra* note 155.

16 *See Scheuer*, 416 U.S. at 242; *infra* text accompanying notes 64-73.

for violations of their constitutional rights, it should be narrowly tailored to effectuate only the purpose for which it was intended.

This Note argues that a closer fit between the competing interests of individual rights and effective government can be accomplished by dividing the category of "public officials" into two separate classes: upper-level and lower-level officials. Upper-level officials, due to the special policy concerns implicated,[17] should be granted immunity before trial if they can prove that the right violated was not "clearly established" at the time of their action.[18] Lower-level officials,[19] however, should only be granted immunity if they can prove both that the right was not clearly established *and* that they held a "good-faith" belief as to the constitutionality of their actions.[20]

I
BACKGROUND

A. Constitutional Remedies

The qualified immunity doctrine grew out of the use of section 1983 and the *Bivens* doctrine by individuals seeking redress for violations of their constitutional rights.[21] The Court's expansive reading of section 1983,[22] and its announcement of a new cause of action in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*,[23] created the potential for a vast increase in personal liability for federal and state officials. The Court reacted to this new potential for liability by carving out pockets of immunity for certain classes of officials.[24]

1. *Section 1983*

At its inception, section 1983[25] was specifically intended as a

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17 *See infra* text accompanying notes 141-44.

18 *See Harlow*, 457 U.S. at 818; *Creighton*, 483 U.S. at 643; *infra* notes 117, 126.

19 *See supra* note 12.

20 This two-prong standard was the rule until the Court's ruling in *Harlow*. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 321 (1975).

21 *See* Pierson v. Ray, 386 U.S. 547, 555 (1967); Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 456 F.2d 1339, 1344-45 (2d Cir. 1972).

22 *See, e.g.*, Owen v. City of Independence, Mo., 445 U.S. 622 (1980); Monell v. Department of Soc. Servs., 436 U.S. 658 (1977); Monroe v. Pape, 365 U.S. 167 (1961), *overruled by Monell*, 436 U.S. 658.

23 *Bivens*, 403 U.S. 388.

24 *See infra* text accompanying notes 47-73.

25 Section 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

response to the systematic violence and injustice against southern blacks in the wake of the Civil War.[26] The Act, written in broad terms, provides a remedy against "any person" who, under color of state law, deprives any person of "any rights, privileges, or immunities secured by the Constitution and laws . . . ."[27]

Since 1961, the Supreme Court has expanded the coverage of section 1983 to fit its sweeping language.[28] In *Monroe v. Pape*,[29] the Court held that section 1983 provides a remedy for any constitutional violation committed under color of state law.[30] Since this landmark decision, lower courts have permitted use of section 1983 to remedy a wide variety of constitutional violations far beyond the original, limited purpose of the Act.[31]

Prior to *Monroe*, the Court had been unclear about whether the phrase "under color of state law" included officials' actions not mandated by the law of their state.[32] *Monroe* resolved this issue by holding that "under color of state law" in the context of section 1983 includes actions that are illegal under state law, as long as the misuse of power was made possible only because the violator was "clothed with the authority of state law . . . ."[33]

Monroe vastly increased the scope of unconstitutional acts section 1983 covered. Together with the Court's later ruling in *Monell v. Department of Social Services of New York*,[34] *Monroe* imposed liability on individual officials rather than on municipalities themselves. The

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> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988) (Section 1983 is also known as section 1 of the Ku Klux Klan Act of 1871.).

26 *See generally* CONG. GLOBE, 42 Cong., 1st Sess., pt. 2, app. at 78 (1871) (comments of Representative Perry of Ohio, March 31, 1971); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47 (1983); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1982).

27 *See supra* note 25.

28 *See generally* ROBERT H. FREILICH & RICHARD G. CARLISLE, SECTION 1983: SWORD AND SHIELD (1983); Schuck, *supra* note 12; Eisenberg, *supra* note 26.

29 365 U.S. 167 (1961), *rev'd*, Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

30 *Id.* at 171.

31 *See, e.g.*, Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1145-46 (2d Cir. 1986), *rev'd*, 481 U.S. 107 (1987) (The Circuit Court of Appeals held that the automatic enforcement of a Texas lien bond of $12 billion deprived Texaco of its right to appeal by effectively destroying the company, and that this deprivation stated a section 1983 cause of action. Although later reversed on other grounds, this case illustrates how courts have stretched Section 1983 to cover injuries well beyond the civil rights violations it originally was intended to remedy).

32 *See* The Civil Rights Cases, 109 U.S. 3 (1883). *But see* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

33 *Monroe*, 365 U.S. at 184 (quoting *Classic*, 313 U.S. at 326).

34 436 U.S. 658 (1978); *see also infra* text accompanying notes 181-89.

Monell Court held that although local and municipal governments could be sued under section 1983 for violations if they were directly liable, they could not be held liable under the theory of *respondeat superior*.[35] This partial immunity for municipalities often left the offending official as the sole defendant.[36]

2. *Bivens v. Six Unknown Named Agents of Federal Bureau Of Narcotics*[37]

Bivens is the federal action analog to section 1983.[38] In *Bivens*, the Supreme Court implied a private right of action for violations of constitutional rights by federal officials—an area not covered by section 1983. In *Bivens*, the plaintiff's complaint arose from a warrantless search of his apartment by federal agents. After finding that the search violated Bivens' fourth amendment rights, the Court implied a private cause of action for damages to vindicate those rights.[39]

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35 *Id.* at 692. Direct liability, as contemplated in *Monell*, would arise if the unconstitutional action was the result of the execution of a policy statement, ordinance, regulation, or officially adopted decision of the municipality itself. *See id.* at 690.

36 At least one commentator believes that executive officials were granted only qualified immunity because, after *Monell* and *Monroe* had immunized cities and the Court had begun to immunize officials performing judicial, legislative, or prosecutorial functions, individual executive officials were the only ones left to hold liable. Immunizing executive officials as well would have drained section 1983 of all meaning. *See* Eisenberg, *supra* note 26, at 501-02.

37 403 U.S. 388 (1971).

38 *See* Eisenberg, *supra* note 26, at 468; *see also* Butz v. Economou, 438 U.S. 478, 504 (1978) (holding that the qualified immunity standard was identical for both section 1983 and *Bivens* claims.).

39 *Bivens*, 403 U.S. at 392. In reaching its conclusion, the Court ruled that the fourth amendment guarantees citizens an "absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority." *Id.* Then, relying on Bell v. Hood, 327 U.S. 678 (1946), the Court recoguized that an invasion of this absolute right required the courts to "adjust their remedies so as to grant the necessary relief," and that, in this case, money damages were the proper remedy to "make good the wrong done." *Bivens*, 403 U.S. at 392 (quoting *Bell*, 327 U.S. at 684). Recovery under a *Bivens* action, as under section 1983, is limited to compensatory damages unless the defendant demonstrates "reckless or callous disregard for the plaintiff's rights" or "intentional violations of federal law." *See* Smith v. Wade, 461 U.S. 30, 51 (1983).

The *Bivens* holding represented a major change in the concept of liability for government officials. For a more complete discussion of the basis and implications of the *Bivens* case, see Michael P. Lehman, Bivens *and its Progeny: The Scope of A Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977); Schuck, *supra* note 12; Note, Bivens *Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action*, 101 HARV. L. REV. 1251 (1988); Note, *The Constitution as Positive Law:* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 5 LOY. L.A.L. REV. 126 (1972) (authored by Richard W. Wright); Note, *"Damages or Nothing"—The Efficacy of the* Bivens-*Type Remedy*, 64 CORNELL L. REV. 667 (1979) (authored by W. Mark Smith); Note, *Federal Agents Conducting Unreasonable Searches and Seizures are Liable for Damages Under the Fourth Amendment*, 50 TEX. L. REV. 798 (1972); Note, *The Truly Constitutional Tort*, 33 U. PITT. L. REV. 271 (1971) (authored by Gary V. Skiba); Comment, *Tort Liability of Law Enforcement Officers*—Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, *456 F.2d 1339 (2d Cir. 1972)*, 39 BROOKLYN L. REV. 943 (1973)

Since *Bivens*, both the Supreme Court and the lower courts have implied private causes of action to protect a broad category of constitutional rights.[40] The sweeping language of the case, and the expansive reading the Court has given it, suggest that *Bivens* may provide a remedy as broad as that of section 1983.[41]

B. Immunities

Section 1983 and the *Bivens* doctrine greatly enhanced an individual's opportunity to seek redress when public officials violated their constitutional rights. But by interpreting section 1983 as prohibiting vicarious liability for municipalities, and by holding the FBI agents in *Bivens* personally liable, the Court ensured that the burden of any damages arising from a *Bivens* or section 1983 claim would fall most often on the individual official, rather than the government entity.[42]

Confronted by the prospect of increased liability for public officials, the Court had to decide whether the traditional common-law immunities that protected public officials applied to this new class of civil rights claim.[43] The language of section 1983 makes no mention of immunities.[44] Nevertheless, drawing on what some commentators view as questionable precedent and public policy concerns,[45] the Court developed a scheme of immunities to protect public offi-

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(authored by J. Michael Fried); Comment, Bivens *and the Creation of a Cause of Action for Money Damages Arising Directly From the Due Process Clauses*, 29 EMORY L.J. 231 (1980) (authored by John Vian); Comment, *The Fourth Amendment: Is a Lawsuit the Answer?*, 23 SYRACUSE L. REV. 1227 (1972) (authored by Richard J. Sabat).

40 In addition to *Bivens*, which implied a right of action under the fourth amendment, see, *e.g.*, Carlson v. Green, 446 U.S. 140 (1980) (eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (individual had an implied damage remedy for violations of his fifth amendment rights); Briggs v. Goodwin, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (fourth amendment); Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (ninth amendment); Turpin v. Mailet, 579 F.2d 152 (2d. Cir. 1978) (fourteenth amendment); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (first amendment).

41 *See generally* P. SCHUCK, *supra* note 26; Eisenberg, *supra* note 26.

42 *Monell*, by holding that local municipalities and government agencies could not be held liable under *respondeat superior*, foreclosed a suit against the government entity unless it was directly liable. In all other cases, only the official himself would be held liable. *Monell*, 436 U.S. at 692. In *Bivens*, the Supreme Court mentioned only individual liability when finding the implied cause of action. *Bivens*, 403 U.S. at 397. Additionally, the Supreme Court more recently held in Quern v. Jordan, 440 U.S. 332, 338-45 (1979), that section 1983 did not abrogate the traditional immunity of states from suit provided by the eleventh amendment.

43 *See* Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951).

44 *See supra* note 25.

45 *See* Eisenberg, *supra* note 26, at 448; Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

cials from both *Bivens* and section 1983 liability.[46]

1. *Absolute Immunity*

The Court has granted judges,[47] legislators,[48] prosecutors,[49] and the President[50] absolute immunity in suits arising under section 1983 or the *Bivens* doctrine. To qualify for absolute immunity, these officials must have acted within the scope of their discretionary duties,[51] and (aside from the President) must be performing functions of either a judicial, legislative, or prosecutorial nature.[52] Members of the executive branch also may claim absolute immunity if they are performing judicial, legislative, or prosecutorial functions.[53]

The Supreme Court extended absolute immunity to *Bivens* and section 1983 claims on the grounds of general public policy and a combination of loosely analogous common-law immunities. For judges or officials performing judicial functions, the Court noted the long-standing common-law tradition of judicial immunity,[54] the public policy benefits of protecting judges, and the absence, in the face of this long-standing immunity, of language in section 1983 abolishing the common-law immunity.[55]

The Court reasoned similarly in extending absolute immunity

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46 *See infra* text accompanying notes 47-73.

47 *Stump*, 435 U.S. at 356-57; Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).

48 Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

49 Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

50 *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

51 *See, e.g.*, *Imbler*, 424 U.S. at 422; *see also* Schuck, *supra* note 12, at 319. Discretionary duties may be administrative in nature, and therefore not within the "scope" prong of the test. The key rationale for protecting the execution of duties within either the prosecutorial, judicial or legislative scope of the officials' actions was the need for officials to make these types of decisions without fear of personal liability.

52 *See Stump*, 435 U.S. at 356-57 (judges immune unless they acted in clear absence of jurisdiction); *Imbler*, 424 U.S. at 431 (prosecutor immune while performing prosecutorial, rather than investigative or administrative functions); *Tenney*, 341 U.S. at 377 (legislators immune while acting "as legislators"). *Compare* Forrester v. White, 484 U.S. 219 (1988) (judges not absolutely immune from liability and damages for administrative, legislative or executive functions). *See generally* Schuck, *supra* note 12, at 319 ("The Court has extended absolute immunity from damage actions to acts of a judicial, legislative, and prosecutorial nature . . . .").

53 *See* Mitchell v. Forsyth, 472 U.S. 511, 521 (1985) (Attorney General absolutely immune when performing prosecutorial, but not investigative, duties); Butz v. Economou, 438 U.S. 478, 512-13 (1978) (Department of Agriculture officials who performed prosecutorial or judicial functions absolutely immune).

54 *Stump*, 435 U.S. at 356 (noting the importance the Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872), placed on the freedom of judges to act without apprehension of personal consequences).

55 *Stump*, 435 U.S. at 356; *see also* Pierson v. Ray, 386 U.S. 547, 554-55 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . We presume that Congress would have specifically so provided had it wished to abolish the doctrine."); *Bradley*, 80 U.S. 335.

to prosecutors[56] and legislators.[57] Commentators have sharply criticized the reasoning of many of these opinions. The main focus of these criticisms has been the questionable applicability of common-law traditions to civil rights violations,[58] and the slippery-slope reasoning of the Court's public policy rationales—which seem to lead to the conclusion that all government officials should be granted absolute immunity.[59]

2. *Qualified Immunity*

Virtually all public officials who either cannot claim absolute immunity, or can claim absolute immunity for only some of their public functions,[60] may claim qualified immunity as an affirmative defense.[61] Under the current standard, qualified immunity protects officials acting within the scope of their discretionary duties unless their conduct violates clearly established constitutional rights of which a reasonable person would have known.[62] Additionally, even if the court finds that the right violated is clearly established, the official can still avoid liability if he can prove that he "neither knew nor should have known of the relevant legal standard."[63]

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

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

58 *See* Eisenberg, *supra* note 26, at 494.

59 P. SCHUCK, *supra* note 26, at 90-91. Schuck argues that the main policy concerns expressed by the Court in *Bradley* and *Stump* in granting judges absolute immunity are: the need for judges to be free from apprehension of personal consequences from their judicial decisions; the controversy and importance of the issues; the record keeping judges would resort to in the absence of immunity; the availability of the alternative remedies on appeal; and the ease with which bad-faith could be alleged apply equally to bureaucrats. *Id.*; *see also* Eisenberg, *supra* note 26, at 494-95 (arguing that the English parliamentary privilege, much relied upon by the Court in *Tenney*, has little application in deciding whether to grant immunity to members of a state legislature.).

60 *See* Mitchell v. Forsyth, 472 U.S. 511 (1985) (U.S. Attorney General, while absolutely immune for his prosecutorial actions, only entitled to qualified immunity for his investigative actions).

61 *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The Supreme Court has granted qualified immunity to a wide variety of officials. *See Mitchell*, 472 U.S. 511 (U.S. Attorney General in his investigative capacity); *Harlow*, 457 U.S. 800 (Presidential aides); Butz v. Economou, 438 U.S. 478 (1978) (Secretary of Agriculture); Wood v. Strickland, 421 U.S. 308 (1975) (local school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (Governor of Ohio); Pierson v. Ray, 386 U.S. 547 (1967) (police officers entitled to limited immunity).

62 *See Harlow*, 457 U.S. at 817-18; Anderson v. Creighton, 483 U.S. 635 (1987). The meaning of "clearly established" is discussed *infra* note 126.

63 *Harlow*, 457 U.S. at 819; *see infra* note 99.

II
PURPOSES OF THE QUALIFIED IMMUNITY DOCTRINE

Soon after it began expanding the scope of section 1983, the Supreme Court recognized that law enforcement and other officials needed a margin of error for actions they took in the course of their official duties.[64] The Court reasoned that, although any protection from a damage claim would leave some individuals without a remedy, some protection was necessary to allow officials to perform their work adequately.[65] Without this protection, officials would work in constant fear that their good faith actions might accidentally violate an individual's constitutional rights, thereby exposing them to liability.[66] Acting on this reasoning, the Court, in *Pierson v. Ray*,[67] held that law enforcement officials accused of constitutional violations under section 1983 were entitled to a good faith defense against claims for damages.[68]

Thus, the Court viewed the qualified immunity doctrine from its inception as a pragmatic compromise, necessary to accommodate the conflicting goals of protecting individual rights and facilitating the "effective operation of government."[69] In creating the doctrine of qualified immunity, the Court consciously decided to sacrifice some measure of constitutional protection to facilitate the effective operation of government.

Some sacrifice of individual rights for the sake of effective government is the inevitable price of living in a society organized and run by fallible human beings.[70] The early common law recognized that the threat of personal liability might prevent officials from executing their duties with the necessary decisiveness.[71] The framers embodied this recognition in the Constitution.[72] Indecisiveness

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64 *See Pierson*, 386 U.S. at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in [section 1983] damages if he does."); *see also* discussion of *Pierson*, *infra* text accompanying notes 74-82.

65 *See Scheuer*, 416 U.S. at 240.

66 *See id.* at 242 ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to that it is better to risk some error and possible injury from such error than not to decide or act at all.").

67 386 U.S. 547 (1967).

68 *See id.* The *Pierson* holding is discussed in greater detail *infra* at notes 74-82 and accompanying text.

69 *See Scheuer*, 416 U.S. at 242 ("The concept of immunity assumes . . . that it is better to risk some error and possible injury from such error than not to decide at all.").

70 *See id.*

71 *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872); Missouri *ex. rel.* Ward v. Fidelity & Deposit Co. of Md., 179 F.2d 327, 331 (8th Cir. 1950); Respublica v. Sparhawk, 1 U.S. 357, 361-63 (Pa. 1788).

72 U.S. CONST. art. I, § 6.

caused by fear of personal liability can lead to grave public harm. For example, a mayor may decide not to demolish a row of houses to provide a fire-break if he thinks he will subsequently be held liable for destroying the homes.[73]

This trade-off rationale implies that the protection that the qualified immunity doctrine supplies should be closely tailored to the needs of different levels of public officials. It should give no more protection than is necessary for the official to effectively fulfill his duties because each additional measure of protection divests victims of a greater range of remedies for violations of their constitutional rights. Providing more protection than is necessary to prevent officials from being *unduly* inhibited in the performance of their duties results in an unjustifiable sacrifice of individual constitutional rights.

A. Development of the Qualified Immunity Doctrine

1. *Early Development: 1967-82*

In *Pierson v. Ray*,[74] the Court first acknowledged the availability of a good faith defense for public officials. The *Pierson* Court held that police officers who arrested several black ministers in a "whites only" area of a train station were immune from damages from a section 1983 claim as long as they "reasonably believed in good faith that the arrest was constitutional."[75] This defense was valid even if it later turned out that the arrest was in fact unconstitutional.[76] Although the *Pierson* Court did not explicitly recognize it, the requirement that the officers' belief be both reasonable, and in good faith[77] contains both objective and subjective aspects. The Court's analogy to the common-law defense available to police officers accused of false arrest in creating the new immunity in *Pierson* strengthens this reading of the case.[78]

The *Pierson* Court engaged in a three-step analysis in deciding to apply the common-law false arrest defense to section 1983 actions. First, the Court cited its previous decisions holding that, by passing section 1983, Congress did not intend to abolish the common-law defenses of public officials.[79] Second, the Court noted

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73 *See Respublica*, 1 U.S. at 357, 363 (Pa. 1788).

74 386 U.S. 547 (1967).

75 *Id.* at 557.

76 *Id.*

77 *Id.*

78 *Id.* at 555. The common-law false arrest defense requires an actual (subjective) good faith belief that also is objectively reasonable. *See* RESTATEMENT (SECOND) TORTS § 121 (1965); 1 FOWLER V. HARPER, FLEMING JAMES & OSCAR J. GRAY, THE LAW OF TORTS § 3.18, at 277-78 (2d ed. 1986).

79 *Pierson*, 386 U.S. at 554-55. The Court previously had made this determination

that, as a general rule, a police officer who makes an arrest is not liable for the common law tort of false arrest if he can prove he acted in good faith and with probable cause.[80] Analogizing from this standard, the Court derived the qualified immunity standard for section 1983 actions, substituting "reasonable belief" for "probable cause."[81] The Court also based its grant of qualified immunity on fairness grounds, stating that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[82]

After introducing the qualified immunity doctrine in *Pierson v. Ray*, the Court waited seven years before reexamining its scope. In *Scheuer v. Rhodes*,[83] the Court clarified both the qualified immunity test and the policies supporting it. *Scheuer* also marked the beginning of a consistent practice of the Court in qualified immunity cases: narrowing the class of officials entitled to absolute immunity.[84] Limiting the availability of absolute immunity, however, had

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in *Tenney*, in deciding that Congress had not meant by section 1983 to implicitly abolish the traditional immunity of judges. *See* text accompanying notes 54-57. The Court also noted that, in *Monroe*, 365 U.S. at 187, it stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Pierson*, 386 U.S. at 556. The use of this language, which in *Monroe* justified the *imposition* of liability, to find a basis for extending *immunity* in *Pierson*, has been sharply criticized. *See* Newman, *supra* note 45, at 459.

80 *Pierson*, 386 U.S. at 555:

> The common law never has granted police officers an absolute and unqualified immunity, and the officers in this case did not claim that they were entitled to one. Their claim rather was that they should not have been held liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the subject is later proved.

Id.; see also RESTATEMENT (SECOND) TORTS § 121 (1965).

81 *See Pierson*, 386 U.S. at 557.

82 *Id.* at 555.

83 *Scheuer*, 416 U.S. 232 (Governor of Ohio entitled to qualified, not absolute, immunity). The *Scheuer* case arose out of the killing of several students by the National Guard on the campus of Kent State during an anti-Vietnam war demonstration.

Scheuer also held that the immunity applied to discretionary acts, and that the scope of the immunity would depend upon the scope of the official's discretion and responsibility. *Scheuer*, 416 U.S. at 247. The court has not yet clarified the difference between *discretionary* and *ministerial*, and several commentators and courts have concluded that policy considerations (i.e., whether the official should be granted immunity) rather than substantive distinctions are behind the different labels. *See* Smith v. Cooper, 256 Or. 485, 475 P.2d 78 (1970); RESTATEMENT (SECOND) TORTS § 895D comment f (1965); L. JAFFE, *supra* note 2, at 241.

84 *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 520 (1985) (Attorney General entitled to only qualified immunity); Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982) (Presidential aides entitled to only qualified immunity); Butz v. Economou, 438 U.S. 478, 507 (1978) (Cabinet officials only entitled to qualified immunity); *see also infra* text accompanying notes 138-47.

the reciprocal effect of enlarging the class of officials entitled to qualified immunity, because officials denied absolute immunity consistently were allowed to raise qualified immunity as a defense.[85]

The qualified immunity test enunciated in *Scheuer* clearly set out the two prongs implicitly suggested in *Pierson*. The *Scheuer* Court held that to pass the test for qualified immunity, a government official must meet two criteria: 1) an official must have had reasonable grounds to believe that his actions were constitutional, and 2) the official must have acted in good faith.[86]

Chief Justice Burger, writing for the majority, offered two rationales in support of the qualified immunity defense. First, he stated that it was unfair to hold a government official liable if he mistakenly, but in good faith, violated an individual's rights during the course of his duties.[87] Second, he noted that some protection was necessary to permit government officials to exercise their discretion without undue fear of liability for honest mistakes.[88] Chief Justice Burger explicitly recognized the pragmatic trade-off the qualified immunity defense represented:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[89]

The Court explicitly recognized the separate objective and subjective nature of its two-prong test one year later in *Wood v. Strickland*.[90] In *Wood*, a section 1983 suit brought against upper-level school administrators, the Court held that for qualified immunity to apply, the official must have acted sincerely and with "a belief that he is doing right" (the subjective prong), and also must not have violated "clearly established constitutional rights," whether out of ignorance or disregard (objective prong).[91] This "knew or should have known" test prevailed from 1975 to 1982,[92] when the Court

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85 *See Mitchell*, 472 U.S. 511; *Harlow*, 457 U.S. 800; *Butz*, 438 U.S. 478; *Wood*, 421 U.S. 308; *Scheuer*, 416 U.S. 232.

86 *Scheuer*, 416 U.S. at 247-48. Justice Burger wrote that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.*

87 *Id.* at 240.

88 *Id.*

89 *Id.* at 242.

90 *Wood*, 420 U.S. at 321-22. The action arose when several high schools students were expelled by the local school board for spiking punch at a school party. The plaintiffs alleged that the board deprived them of their rights to due process.

91 *Id.*

92 The Court also continued to expand the class of officials entitled to only quali-

decided *Harlow v. Fitzgerald*.[93]

2. Harlow *and its Progeny: Discarding the Subjective Prong to Protect Upper-Level Officials from Suit*

In *Harlow v. Fitzgerald*,[94] the Supreme Court modified the existing qualified immunity doctrine in two ways. First, it continued to narrow the class of government officials entitled to absolute immunity.[95] Second, it discarded the subjective prong of the *Scheuer* test, holding that the test for qualified immunity should turn solely on objective factors.[96]

a. *Discarding the Subjective Prong of the Test*

After finding that the defendants in *Harlow*, who included upper-level presidential aides, were not entitled to absolute immunity, the Court announced that it was discarding the subjective prong of the qualified immunity doctrine.[97] The new test focused exclusively on the objective conduct of the official. It shielded the official from liability so long as his conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[98] If the right he violated was not clearly established, this new test would shield the official from liability, even if the court determined that an actual violation had occurred, and

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fied immunity. In 1978, the Court held that the Secretary of Agriculture was entitled to only qualified immunity. *See* Butz v. Economou, 438 U.S. 478 (1978). In *Butz*, the plaintiff alleged that the Department of Agriculture had wrongfully initiated administrative proceedings against him in retaliation for his criticism of the operation of the Department.

93 457 U.S. 800 (1982).

94 *Id.* In *Harlow*, the plaintiff alleged that senior White House aides participated in a conspiracy to deprive the plaintiff of his due process rights by illegally forcing his dismissal from a government post.

95 *Id.* at 812-13. The Court held that Presidential aides generally are entitled only to qualified immunity. The Court stated that it would grant absolute immunity only in those exceptional cases where the aide could prove that his duties were of such a sensitive nature that absolute immunity was essential for him to adequately perform them. *Id.* "[I]n order to establish entitlement to absolute immunity a Presidential aide first must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability." *Id.* at 813-14. Thus, the Court placed the burden of proving that absolute immunity was justified on the official.

While the Court left open the possibility that a Presidential aide might be absolutely immune when exercising discretionary authority in the realm of national security, the *Harlow* decision basically shut the door on absolute immunity for all officials except the President, judges, prosecutors and legislators. In ruling against absolute immunity, the Court explicitly recognized the "functional" nature of immunity law, stating that the protection it provides should extend "no further than its justification would warrant." *Id.* at 810-11.

96 *Id.* at 817-18.

97 *Id.* at 817-19.

98 *Id.* at 819.

even if the official knew that his conduct violated the individual's rights. Thus, the Court eliminated the subjective prong of the *Wood* test.[99]

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[99] *Id.* at 818-19.

Although the *Harlow* Court discarded the subjective element from the qualified immunity test, it did leave an extraordinary circumstances defense open to the defendant official at trial. Even if the court found that the official had violated a clearly established right, he still was entitled to a second line of defense: "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Id.* at 819.

The Court has not articulated the exact scope or meaning of this ambiguous passage. A close reading of the opinion shows that the concurring justices themselves misunderstood this second line of defense. Justice Powell, writing for the Court, stated that the extraordinary circumstances defense should "turn primarily on objective factors." *Id.* Justice Brennan, writing in concurrence and apparently also referring to the "extraordinary circumstances" defense, wrote that the standard announced by the Court in *Harlow* "would not allow the official who *actually knows* that he is violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." *Id.* at 821 (Brennan, J., concurring). On its face, the language of the defense, that a defendant prove he "neither knew nor should have known" of the relevant legal standard, suggests that the test for this defense would include an inquiry into the subjective beliefs of the defendant. A reasonable reading seems to be that the official can claim immunity—even for a violation of a clearly established right—if he can prove both that he did not know he was committing that violation, and that due to some unique circumstance he should not reasonably have been expected to know he was committing it. A full analysis of this exception is beyond the scope of this Note, but some of the problems and ambiguities are discussed briefly below:

Some lower courts have read the extraordinary circumstances defense as pertaining to instances in which a defendant relied on legal advice, a statute, or a government regulation. Unfortunately, these courts have not been clear whether the above situations constitute extraordinary circumstances, or whether they are factors in determining whether the defendant violated clearly established rights. *See, e.g.*, Arnsberg v. United States, 757 F.2d 971, 981-82 (D.C. Cir. 1982) (defendant's conduct did not violate clearly established rights *because* they reasonably relied on the assessment of an assistant attorney general as to the validity of the arrest warrants), *cert. denied*, 475 U.S. 1010 (1986); King v. City of Fort Wayne, 590 F. Supp. 414, 424-26 (N.D. Ind. 1984) (existence of a state statute that seemed to authorize the officers' actions led the court to conclude that the officers did not violate a clearly established right of which a reasonable person should have known); Keefe v. Library of Congress, 588 F. Supp. 778, 792 (D.C. Dist. 1984) (defendant did not violate clearly established right by enforcing unconstitutionally vague federal regulation, because it was not clear at the time that the defendant should have known its actions were unconstitutional, and further because the defendant was entitled to rely on the advice of the Library of Congress General Counsel.), *aff'd on other grounds*, 777 F.2d 1573 (D.C. Cir. 1985); Dehorty v. New Castle County Council, 560 F. Supp. 889, 894 (D. Del. 1983) (fact that attorney for defendant County employers did not advise does not mean defendants did not know their conduct violated plaintiff's constitutional rights.); Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543, 1555 (1985) (authored by Edmund L. Carey). Compare these with cases where courts have interpreted the "extraordinary circumstances" defense as making this inquiry necessary. *See, e.g.*, Skevofilax v. Quigley, 586 F. Supp. 532, 538 (D.N.J. 1984); Heslip v. Lobbs, 554 F.Supp. 694, 701-02 (E.D. Ark. 1982). *See generally* Sheldon H. Namod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 7 (1982).

As used by the courts that read *Harlow* literally (the second line of cases) the extraordinary circumstances exception shields an official from liability if he can prove at trial that he *both* did not subjectively know that he was committing a violation, and that

b. *Rationale for Restructuring the Test*

In support of this new test, the *Harlow* Court focused on the goal of encouraging dismissal of insubstantial claims before trial or extended discovery to protect government officials from the nuisance of defending against them.[100] Under the *Harlow* test, if the plaintiff's complaint does not allege a violation of a clearly established constitutional right, the trial court can dismiss the case on summary judgment before discovery.[101] In the Court's view, the costs of a subjective good faith inquiry,[102] and the excessive disruption of government that could result from requiring government officials to defend every suit through the trial process,[103] required a change in the qualified immunity standard to strike a better balance between the needs of government and individual rights.[104]

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possibly due to reasonable reliance on a statute, legal advisor, or government regulation, he should not reasonably be expected to have known he was committing the violation. As long as the Court continues to place liability for violations on the official himself, this second line of defense seems reasonable.

Courts that use the extraordinary circumstances exception to determine whether the law was clearly established, however, allow the defendant to use a statute, legal opinion or government regulation to set up a conclusive presumption that he did not subjectively know he was violating a clearly established right. This not only contradicts the clear language of *Harlow*, 457 U.S. at 819, it also allows the defendant to move for summary judgment on the immunity issue without being required to prove either actual reliance, or that this reliance was reasonable under the circumstances. In the case of a state statute, the combination of the absolute immunity of states, coupled with the irrebuttable presumption of reasonable reliance, could combine to leave the plaintiff without a cause of action, even if the court finds that the right violated was clearly established.

If the Court provided this exception to allow immunity based on reasonable reliance on the constitutionality of a statute, the opinion of general counsel, or government regulations, then the defense should be allowed. As long as the burden of liability is placed on the individual official, he should be granted immunity if he can prove that he reasonably relied on a higher authority. The Supreme Court, however, should clarify the meaning of the extraordinary circumstances exception to forestall its use as an irrebuttable presumption on summary judgment. An official should not be able to defeat a valid constitutional claim simply on the grounds that he blindly followed higher authority. *See* Malley v. Briggs, 475 U.S. 335 (1986) (holding that a police officer was not shielded from liability in a section 1983 suit simply because a judge authorized the arrest warrants, and that the officer was required to exercise his own reasonable judgment as to whether probable cause existed for requesting the arrest warrants.).

100 *Harlow*, 457 U.S. at 817. Some of the Court's concerns on this point can be attributed to the facts of *Harlow*. Discovery in this case lasted for more than eight years. Another factor may have been the general perception that, due to the broad interpretation the Court had given to Section 1983, civil rights suits were threatening to overwhelm the federal system. This perception has been called into question by recent empirical studies. *See* Eisenberg, *supra* note 26, at 522-56.

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

102 *Id.* at 816.

103 *Id.* at 818.

104 *Id.* at 816 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial.").

3. *Post-*Harlow *Developments:* Mitchell v. Forsyth[105]

Three years after deciding *Harlow*, the Court in *Mitchell v. Forsyth*[106] recharacterized qualified immunity as immunity from suit, rather than as a shield from liability. The Court also refined its understanding of what constitutes a clearly established constitutional right. *Mitchell* arose out of the use of warrantless wiretaps by former Attorney General John Mitchell—ostensibly for national security purposes.[107] The plaintiff brought suit alleging that these wiretaps were illegal and violative of his fourth amendment rights.[108]

The Court first examined the character of Mitchell's qualified immunity. Recognizing the implications of *Harlow*, the Court explicitly recharacterized the qualified immunity doctrine as providing protection from *suit*, rather than from damages,[109] because immunity is effectively lost if the case erroneously goes to trial.[110] *Mitchell*'s recharacterization followed logically from the *Harlow* Court's focus on the desirability of dismissing insubstantial claims before trial.[111] To protect the immunity, which amounted to an entitlement not to stand trial, the court held that a denial of qualified immunity was immediately appealable.[112]

The *Mitchell* Court also refined the clearly established language from *Harlow*.[113] Under *Mitchell*, for the qualified immunity defense to fail, the officials' actions must have violated rights that were clearly established *at the time the act was performed*.[114] The Court had ruled that warrantless wiretaps conducted to protect domestic security were unconstitutional six months after Mitchell had discontinued the tap on the plaintiff.[115] The Court stated that, given the timing of its decision, the right not to be subjected to warrantless wiretaps was not clearly established at the time that the violation took place.[116] The Court left open the question of just how "clearly established" the right had to be, stating in *Mitchell* only that there was an "open question" as to whether the wiretap was illegal at the

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105 472 U.S. 511 (1985).

106 *Id.*

107 *Id.* at 514.

108 *Id.* at 515.

109 *Id.* at 526 (The Court noted the explicit aim of the objective standard announced in *Harlow*: "to 'permit the resolution of many insubstantial claims on summary judgment . . . .' " (quoting *Harlow*, 457 U.S. at 818)).

110 *Id.*

111 *See Harlow*, 457 U.S. at 813.

112 *Mitchell*, 472 U.S. at 526; *see* Note, *supra* note 99, at 1570.

113 *Mitchell*, 472 U.S. at 531; *see also Harlow*, 457 U.S. at 817-18.

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

115 *See* United States v. United States Dist. Court, 407 U.S. 297, 320-21 (1972).

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

time it was used.[117]

B. *Anderson v. Creighton:* The Current Scope of the Qualified Immunity Doctrine

The process of enlarging the class of officials entitled to qualified immunity, and the use of a one-standard test for immunity, converged in *Anderson v. Creighton*.[118] In *Creighton*, the Court used a standard developed for upper-level officials to grant immunity to lower-level officials,[119] a result that is inconsistent with the policy interests implicit in the development of the qualified immunity doctrine.[120]

Creighton arose out of a warrantless search by FBI agents of the Creightons' home. The agents were looking for Mrs. Creighton's brother, who was a suspect in an armed robbery.[121] According to the complaint, the agents and several uniformed police officers carrying shotguns appeared at the Creightons' home.[122] They told Mr. Creighton to "keep his hands in sight" and rushed through the door, pointing weapons at his wife and yelling at his children. One of the officers injured Mr. Creighton during the search. Afterwards, the agents arrested Mr. Creighton, later releasing him without filing charges.[123] The police found no evidence of the suspected fugitive.

The District Court granted the defendant's motion for summary judgment on the ground that the agents had probable cause to conduct the search.[124] The Court of Appeals reversed, holding that there was a factual dispute as to whether probable cause existed.[125] The Court of Appeals also ruled that the defendants were not entitled to qualified immunity because freedom from warrantless searches, conducted without probable cause, is a clearly established constitutional right.[126]

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117 *Id.* The Court noted that such wiretaps had been used by six successive administrations. *See also* Note, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 923-33 (1984). The author sets out three possible interpretations of the clearly established test from *Harlow*: 1) requiring "strict factual correspondence" to a prior case; 2) requiring the defendant to be aware of general legal principles applied to analogous cases; and 3) requiring the defendant to anticipate new legal developments. The Note author favors the middle approach.

118 483 U.S. 635 (1987).

119 *See id.* at 638-39.

120 *See supra* text accompanying notes 60-74.

121 *Creighton*, 483 U.S. at 637.

122 *Id.* at 664 n.21 (Steven, J., dissenting).

123 *Id.*

124 *Id.* at 637.

125 Creighton v. City of St. Paul, 766 F.2d 1269, 1275 (8th Cir. 1985), *cert. granted sub nom.* Anderson v. Creighton, 478 U.S. 1003 (1986), *vacated*, 483 U.S. 635 (1987).

126 *Id.* at 1272-77. The Court subsequently clarified the clearly established test in

The Supreme Court reversed the Court of Appeals on the qualified immunity issue. Justice Scalia, writing for the majority, applied the objective standard test, which had been developed in cases involving upper-level government officials,[127] to decide that the defendant was entitled to immunity from the action. The majority declared that the officer's subjective state of mind was irrelevant to the qualified immunity inquiry under the rules established in *Harlow*.[128] In applying this test, however, the Court failed to consider that the objective standard test was developed in cases involving upper-level government officials, such as state governors and cabinet members, whereas this case involved a lower-level official—a field-level FBI agent.

The Court expressly refused to bifurcate the immunity test between upper- and lower-level officials, citing the goals of simplicity and certainty.[129] An immunity standard that varied among different categories of officials, according to the Court, would lead to precisely the same type of uncertainty that the qualified immunity doctrine sought to avoid.[130] Although not stating so explicitly, the majority was apparently concerned that officials, uncertain of the type of immunity to which they were entitled, would hesitate to perform their discretionary duties with appropriate vigor.[131]

Justice Stevens, in a dissent in which Justices Brennan and Marshall joined, asserted that the Court, by applying the objective test to a law enforcement official, had made a major change in existing law.[132] Justice Stevens argued that the *Harlow* standard did not ap-

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Creighton, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). In *Creighton*, this test meant that the plaintiff not only must show that he had a clearly established fourth amendment right to be free from unreasonable search and seizure, but also that the actions taken by the agent were such that a reasonable officer would know that the search was unreasonable. The plaintiff argued that because the search was found to be unreasonable for fourth amendment purposes, it could not have been reasonable for the purpose of the clearly established test. The Court dismissed this contention as based on a "mere semantic fortuity." *Id.* at 643-45; *see* Kathryn R. Urbanya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61 (1989); *see also* Note, *The Supreme Court—Leading Cases*, 101 HARV. L. REV. 119, 220 (1987).

127 *See Mitchell*, 472 U.S. 511 (United States Attorney General); *Harlow*, 457 U.S. 800 (Presidential aides).

128 *Creighton*, 483 U.S. at 641.

129 *Id.* at 643.

130 *Id.* Although not articulated clearly in the opinion, Justice Scalia apparently is referring to the pre-immunity situation in which officials could be held liable, even if acting in good faith, if it later turned out that their actions violated the plaintiff's rights.

131 *See* Scheuer v. Rhodes, 416 U.S 232, 240 (1974) (without immunity, a danger would exist that the threat of liability would render an official less willing to execute his office with the decisiveness necessary to serve the public good).

132 *Creighton*, 483 U.S. at 647 (Stevens, J., dissenting).

ply to the case of a police officer accused of violating an individual's fourth amendment rights.[133] He noted that the policy concerns behind the *Harlow* Court's restructuring of the qualified immunity doctrine were attenuated in suits against law enforcement agents.[134] In contrast with upper-level officials, law enforcement agents are frequently called upon to testify in court. Consequently, participation in litigation would not greatly disrupt their everyday duties.[135] Stevens also noted that the political restraints, such as scrutiny by the press and Congress, that deter upper-level officials from engaging in unconstitutional conduct generally are missing from the day-to-day lives of lower-level law enforcement officials.[136] According to Justice Stevens, by mechanically applying a level of protection designed for a different group of government officials to lower-level officials, the Court announced "a new rule of law."[137]

III
Creighton: LOGICAL RESULT OF AN ILLOGICALLY-DEVELOPED DOCTRINE

Justice Stevens correctly recognized that the *Harlow* standard was inappropriate to determine the outcome in *Creighton*.[138] The majority, however, also was correct when it insisted that it did not make a major change in the law.[139] Instead, the Court applied a doctrine that had developed haphazardly in response to conflicting, ill-defined policy goals.

The Court developed the concept of qualified immunity in the context of unreasonable searches and seizures by law enforcement officials.[140] The two-prong test, requiring a subjective good faith belief that also was objectively reasonable, adequately protected law enforcement officials from the hardship of strict liability for civil rights violations. As the Court added upper-level government officials to the qualified immunity pool,[141] however, new policy considerations arose.[142] These new considerations produced a tension in the doctrine. If courts force upper-level officials to prove subjective good-faith, which often requires a full trial, the costs to effective

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133 *Id.* at 648 (Stevens, J., dissenting).
134 *Id.* at 649 (Stevens, J., dissenting).
135 *Id.* at 662 (Stevens, J., dissenting).
136 *Id.* at 662 n.18 (Stevens, J., dissenting).
137 *Id.* at 647 (Stevens, J., dissenting).
138 *Id.* at 648 (Stevens, J., dissenting).
139 *Id.* at 641 n.3.
140 *See* Pierson v. Ray, 386 U.S. 547 (1967).
141 *See Mitchell*, 472 U.S. 511 (United States Attorney General); *Harlow*, 457 U.S. 800 (high-level aides to President Nixon); *Butz*, 438 U.S. 478 (Secretary and Assistant Secretary of Agriculture); *Scheuer*, 416 U.S. 232 (Governor of Ohio).
142 *See Harlow*, 457 U.S. at 813-15.

government are greater than if lower-level officials are required to make this showing.[143] This tension led to *Harlow*'s recharacterization of the test.[144] But the Court's refusal to bifurcate the standard extended too much protection to lower-level officials.

A logical consequence of the Court's contraction of absolute immunity was a corresponding broadening of the class of officials entitled to qualified immunity.[145] As this immunity covered more upper-level government officials,[146] the Court had to change the character and strength of the protection provided by the qualified immunity doctrine to fit the new policy considerations that came into play.[147]

The Court's greatest concern was protecting government officials from the burden of defending against insubstantial claims.[148] This concern is justified for two reasons. First, the actions of upper-level officials often affect a much larger class of individuals than do those of lower-level officials. The larger plaintiff pool increases the likelihood that the upper-level official's decision would cause someone to feel injured enough to bring suit. Second, upper-level officials' positions involve a much greater degree of responsibility than do those of lower-level officials. Thus, the cost—in terms of effective governmental efficiency—of requiring upper-level officials to take time away from their official duties to prove subjective good-faith is too high a price to pay for the added increment of accountability. In response to these concerns, the *Harlow* Court discarded the subjective element of the qualified immunity test.[149]

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143 *See infra* text accompanying notes 156-59.

144 *Harlow*, 457 U.S. at 813-15.

145 *See supra* text accompanying notes 83-117.

146 *See Mitchell*, 472 U.S. 511; *Harlow*, 457 U.S. 800.

147 *See Harlow*, 457 U.S. at 813-15.

148 *Id.* at 814.

149 *Id.* at 814, 817-18.

By limiting the immunity test to objective criteria, the Court hoped to encourage the dismissal of claims at an early stage of litigation. *Id.* at 818. Under the law, unless the complaint demonstrates on its face that the right violated was clearly established, the lower court should dismiss the claim prior to discovery. *Id.* at 817. By discarding the subjective element, the Court pragmatically shifted the balance further in favor of the government official by protecting those officials who did, in fact, violate an individual's rights, even though subjectively believing that they were committing such a violation. By announcing that the qualified immunity doctrine was an immunity from suit rather than damages, the *Mitchell* Court simply recognized the effect of the *Harlow* decision and the policy concerns it addressed. *Mitchell*, 472 U.S. at 526. When the immunity test contained a subjective prong, a trial virtually always was necessary, once the plaintiff passed the threshold requirement of having stated a claim of an actual violation. The *Harlow* Court wanted to limit the number of suits against officials that went to trial; the additional protection for defendants was only a byproduct. By discarding the subjective element, the Court hoped that a larger number of insubstantial claims would be dismissed, on the basis of the official's immunity, before discovery or trial. What the *Mitchell* Court recognized was that it was immunity from trial—before discovery even began—

Although the Court strengthened the qualified immunity standard to fit the needs of the new entries into the qualified immunity pool, it chose not to distinguish between the particular needs of each group of officials by breaking the qualified immunity doctrine into different levels.[150] Throughout the development of the qualified immunity doctrine, the Court has framed the test for immunity as a uniform standard. The *Wood*[151] standard never distinguished among classes of officials; it merely applied a two-pronged test to all officials entitled to qualified immunity.[152] *Harlow* expressly discarded the subjective prong of the *Wood* standard,[153] and at no point since overruling *Wood* has the Court distinguished between upper- and lower-level officials. However, the Court's own rationale for reducing the scope of absolute immunity—that immunity should be granted only to the extent necessary for the effective functioning of government[154]—mandates distinguishing between upper- and lower-level officials.

Viewed in the light of its development, the Court's application of the *Harlow* qualified immunity standard in *Creighton* was not a departure from past precedent. Rather, it represented the straightforward application of a one-standard doctrine that had simply grown too unwieldy to be applied to the case before it. By refusing to subdivide the qualified immunity standard, while at the same time applying the doctrine to increasingly diverse categories of officials, the Court created a standard that causes needless and unfair dismissal of many civil rights actions.[155]

From a societal point of view, lower-level officials do not require protection from suit[156] because of the limited number of indi-

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that was the main focus of the new test. This recognition led the *Mitchell* Court to hold that the denial of a qualified immunity claim was immediately appealable.

150 *See Creighton*, 483 U.S. at 641.

151 *Wood*, 420 U.S. 308 (1975).

152 *See id.* at 321.

153 *See Harlow*, 457 U.S. at 815-16.

154 *See Mitchell*, 472 U.S. at 520; *Harlow*, 457 U.S. at 812.

155 Justice Stevens's assertion that the Court made a new law by applying the *Harlow* standard to law enforcement officials is correct in the sense that *the Supreme Court* never did so. The lower courts, however, have consistently applied *Harlow* in cases involving civil rights violations by police officers. *See* Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987); Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984); Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982); Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982).

156 Two additional problems with the current *Harlow* standard are beyond the scope of this Note, but should be mentioned briefly: 1) the ambiguity of the extraordinary circumstances exception, and 2) the lack of gnidance provided by *Harlow* in cases where unconstitutional motive is an issue in the plaintiff's case. For a discussion of the extraordinary circumstances exception, see *supra* note 99.

In cases involving unconstitutional motive as an element of the plaintiff's claim, *Harlow*'s purely objective test does not provide any guidance—and indeed has no appli-

viduals who would be likely to bring suit against them, and the

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cation. Such cases can include equal protection claims, in which the plaintiff is required to show purposeful discrimination, *see* Mobile v. Bolden, 446 U.S. 55, 66 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256, 274 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976); eighth amendment violations, in which the plaintiff is required to show "deliberate indifference," *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); and claims that facially valid conduct was unconstitutional due to impermissible motive, which includes first amendment violations (a governmental official fires an employee due to his or her political affiliation), or the warrantless search of a prisoner's cell (permissible if conducted for the purpose of prison security, but not to further prosecution of the prisoner). *See* United States v. Vallez, 653 F.2d 403, 406 (9th Cir.), *cert. denied*, 454 U.S. 904 (1981).

Harlow's inapplicability to suits involving unconstitutional motive has left the lower courts to fend for themselves in trying to form a standard that adequately balances the needs of the government with those of the individual. In practice, the lower courts have dealt with the problem in three ways. Some courts have read *Harlow* literally as foreclosing *any* inquiry into the defendant's subjective state of mind. As a result, a defendant who claims that his motive *was* permissible, and can provide *any* evidence tending to prove that motivation, is automatically granted qualified immunity on summary judgment. Other courts have gone in the opposite direction, holding that *Harlow* does not apply in cases where unconstitutional motive is an issue. These courts require a trial on the merits when a factual conflict exists over the defendant's motives. They allow the jury to determine the defendant's actual motivation. *See* Acoff v. Abston, 762 F.2d 1543, 1550 (11th Cir. 1985); Kenyatta v. Moore, 744 F.2d 1179, 1184 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

Most recently, several lower courts, *see* Gutierrez v. Municipal Ct. of S.E. Judicial Dist., 838 F.2d 1031, 1050 (9th Cir. 1988), *cert. granted and vacated*, 109 S. Ct. 1736 (1989), and Elliot v. Perez, 751 F.2d 1472, 1479-81 (5th Cir. 1985), have followed the approach developed by the D.C. Circuit in Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), and Martin v. D.C. Metro. Police Dep't, 812 F.2d 1425 (D.C. Cir.), *reh'g granted, vacated in part*, 817 F.2d 144 (D.C. Cir.), *reinstated on reconsideration*, 824 F.2d 1240 (D.C. Cir. 1987). In *Hobson*, the district court held that for a plaintiff to avoid dismissal of his claim, he must provide more than nonconclusory allegations of an unconstitutional motive. *See Hobson*, 737 F.2d at 29. In *Martin*, the court clarified *Hobson*, holding that a plaintiff must allege "some direct evidence that the officials' actions were improperly motivated." *Martin*, 812 F.2d at 1435. *Martin* also stated that if the trial court found that the complaint did not meet this standard, the trial judge should, at his discretion, allow narrow discovery into the issue of the defendant's motivation. *Id.* at 1437-38.

Despite the confusion in the lower courts, the Supreme Court has been unwilling to address the applicability of *Harlow* to cases in which unconstitutional motive is an element of the substantive violation. Instead of ignoring the problem, the Court should follow the lead of the lower courts by establishing pleading requirements and some guidelines as to the permissible scope of discovery. The method developed by the D.C. Circuit in *Martin*, 812 F.2d 1425, and *Hobson*, 737 F.2d 1—requiring some specificity of pleading and allowing for narrow discovery—is a good model upon which to build. A statement by the Court on these issues is necessary, however, to end the confusion among the circuits, and to lead to a more uniform application of the qualified immunity standard to these types of cases. *Compare* Gutierrez v. Municipal Ct. of S.E. Judicial Dist., 838 F.2d 1031 (9th Cir. 1988) (holding that summary judgment can be avoided if pleading is specific), *cert. granted and vacated*, 109 S. Ct. 1736 (1989); *Martin*, 812 F.2d 1425; *Hobson*, 737 F.2d 1 (same); *with* Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985) (requiring an extremely detailed complaint.); Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) (granting summary judgment on grounds of immunity even though complaint stated

limited scope of these officials' responsibilities.[157] In addition, in the case of law enforcement officials, testifying at trial is often a normal part of their job.[158] In short, it is unlikely that lower-level officials would be unable to perform their duties because of a deluge of civil rights suits or that their involvement in a suit would seriously impede the effective operation of government.[159]

Thus, by failing to distinguish between different categories of public officials, the current standard provides too much protection to many lower-level officials. The Court has failed to balance individual rights and governmental efficiency in a precisely tailored way.[160] Lower-level officials, who do not require the level of protection granted by *Harlow*,[161] receive a windfall of unnecessary protec-

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that dismissal from employment was due to plaintiff's political affiliations); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983).

Beyond eliminating insubstantial claims during discovery, it is impossible to shield government officials at any level from the necessity of defending against suits alleging unconstitutional motives. The particularly offensive nature of these violations, however, plus the lack of any alternative short of leaving the plaintiff without a remedy, justifies the added cost to the system. In unconstitutional motive cases, the official is accused of intentionally using his grant of state power to violate an individual's civil rights. This type of violation is so odious that it overbalances *Harlow*'s concern with protecting the official from the inconveniences of the trial process. If a specific pleading of nonconclusory allegations and narrow discovery make out a prima facie case, the official should be required to prove that he did not act on unconstitutional motives. The *Harlow* standard for high level officials should leave open a small niche in which an individual can force a public official to go through the inconvenience of qualified discovery. Also, because literal application of *Harlow* will lead to summary judgment before discovery, the standard must be modified for unconstitutional motive cases if the plaintiff is to retain any right to a remedy.

For a more comprehensive exploration of the problem, see Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126 (1985).

157 Officials are granted qualified immunity from suit for the benefit of society (*i.e.*, effective government), not for the individual official. *See Scheuer*, 416 U.S. at 242. Since lower-level officials, depending on the classification, deal directly with the public, only those individuals with whom they had direct contact would be likely to bring suit for a civil rights violation resulting from the exercise of the official's discretionary duties. And, since lower-level officials are by definition one of many, the time taken to defend against the suit will not greatly inhibit the smooth functioning of government.

158 *Creighton*, 483 U.S. at 661-62 (Stevens, J., dissenting). In Stevens's view, the necessity of defending a civil rights action will not seriously impede law enforcement officers from performing their duties, because testifying in court is a routine part of a police officer's job.

159 For a contrary view, see Schuck, *supra* note 12, at 295-315. Schuck argues that the nature of discretionary duties usually exercised by "street level" officials—which are generally not closely supervised, involve extensive public contact, and a high risk of harm—not only carry a greater opportunity for civil rights violations (and thus the threat of liability), but also a greater opportunity for officials to fail to act for fear of that liability.

160 For a fuller discussion of this problem, and the suggestion that another possible remedy would be bifurcation of the qualified immunity doctrine into two separate standards, see *infra* text accompanying notes 200-15.

161 *See Harlow*, 457 U.S. at 817-18.

tion. As a consequence, many victims are needlessly left without a remedy.[162]

IV
REFORMING THE CURRENT STANDARD

Remedying the problem of the overprotection of lower-level officials requires broad reform of the qualified immunity doctrine. Two avenues of reform would provide good solutions: 1) complete abrogation of qualified immunity for lower-level officials in favor of insurance and indemnification; and 2) creation of a bifurcated standard to track more closely the needs of both the government and individual plaintiffs. Under either alternative, the Court should continue to grant qualified immunity to upper-level officials under the current *Harlow* standard.[163]

A. Complete Abrogation of Qualified Immunity for Lower-Level Officials in Favor of Insurance and Indemnification

The most sweeping, and ultimately most satisfying, long-term reform of the qualified immunity doctrine would be its eventual abrogation for lower level officials in view of the increasing availability of insurance and government indemnification programs for damages stemming from section 1983 and *Bivens* claims.

In *Creighton*, the plaintiff argued that the growing availability of insurance for damage claims arising from civil rights suits undercuts the rationale for the qualified immunity doctrine.[164] Justice Scalia, however, dismissed this argument, implying in part that the risk of governmental liability would produce the same hesitation to act as would holding the official individually liable.[165] He also noted that existing state and federal reimbursement programs are not sufficiently certain or available to justify a change in the *Harlow* standard.[166]

1. *The Current Availability of Insurance and Indemnification*

Few states indemnify or insure their officials specifically for

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162 This "windfall," however, is granted at public expense—in the form of a needless denial of remedy for constitutional violations.

163 The need to protect high-level officials from defending every suit at trial stems from the greater number of possible plaintiffs who may bring suit as the result of a single decision, and the greater cost—in societal terms—of requiring these officials to take time away from their official duties to prove their subjective good-faith. *See supra* text accompanying notes 139-49.

164 *Creighton*, 483 U.S. at 641-42 n.3.

165 *Id.*

166 *Id.*

damages assessed in section 1983 actions.[167] Similarly, there is no general provision for either insurance or indemnification of federal officials.[168] A majority of states, however, have passed more general statutes either allowing or mandating insurance[169] or indemnification[170] of different classes of public officials. Moreover, although most of the indemnification statutes and insurance policies issued pursuant to statute have various limitations as to the types and

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167 Only two states currently have indemnification statutes that explicitly cover civil rights damages. *See* LA. REV. STAT. § 13:5108.1 & 2 (West Supp. 1985) (state officials and employees indemnified for damages under section 1983 provided the act was not intentional or the product of gross negligence); N.H. REV. STAT. ANN. 31:105 & 106 (Equity Pamph. 1983) (indemnification permissible for civil rights violations as long as not committed with malice).

168 The Federal Tort Claims Act of 1946 (current version at 28 U.S.C.A. § 2672) (West Supp. 1989)), provides a form of *de facto* indemnification by authorizing federal liability for actions of its officials that would be torts under state law. Because of its numerous exceptions, including acts which fall within the official's "discretionary functions or duties," it is not very helpful in the *Bivens* context.

169 *See* ARIZ. REV. STAT. ANN. §§ 9-497 (1977), 41-621(A)(3) (West Supp. Pamph. 1984); COLO. REV. STAT. § 24-10-115, Rule 3.4(b)-10-116 (1982); O.C.G.A. § 45-9-1 (1982); ILL. ANN. STAT. ch. 85, para. 9-103 (Smith-Hurd Supp. Pamph. 1985); KAN. STAT. ANN. § 75-611 (1984); ME. REV. STAT. ANN. tit. 14, § 8103(3) (1980); MISS. CODE ANN. § 21-15-6 (Harrison Supp. 1983); N.H. REV. STAT. ANN. § 31:107 (Equity Supp. Pamph. 1983); N.D. CENT. CODE § 32-12.1-15 (Allen Smith Supp. 1983); OHIO REV. CODE ANN. § 307.441 (Anderson Supp. 1984); OR. REV. STAT. § 278.100 (1981); S.C. CODE ANN. § 1-11-140 (Law. Co-op. Supp. 1985); TENN. CODE ANN. § 29-20-406 (1980); UTAH CODE ANN. § 63-30-33 (Allen Smith Supp. 1985); VT. STAT. ANN. tit. 24, § 1092, tit. 29, § 1406 (Equity Supp. 1985); VA. CODE ANN. § 46.1-39(b) (1980); W. VA. CODE § 8-12-7 (1984).

170 *See* ALA. CODE § 41-9-74 (1982); ARIZ. REV. STAT. ANN. § 41-621 (West Supp. 1989); ARK. STAT. ANN. § 12-3401 (Michie supp. Pamph. 1985); CAL. GOV'T CODE §§ 824, 825 (1980); COLO. REV. STAT. § 24-10-110(1)(b)(I) (1982); CONN. GEN. STAT. ANN. §§ 4-16a & 7-465 (West Supp. Pamph. 1985); DEL. CODE ANN. tit. 10, §§ 4001 to 4002 (Michie Supp. 1984); FLA. STAT. § 111.071 (1982); GA. CODE ANN. § 45-9-60 (1982); IDAHO CODE §§ 6-903(b) & (c) (1975); ILL. ANN. STAT. ch. 24 para. 1-4-5, ch. 85 para. 9-102 (Smith-Hurd Supp. 1980); IND. CODE ANN. § 34-4-16.5-5 (Burns Supp. 1985); IOWA CODE ANN. §§ 25A.21, 25A.22 (West Supp. 1985); KAN. STAT. ANN. §§ 75-6101 to 6116 (1984); LA. REV. STAT. ANN. §§ 13:5108.1, 13:5108.2 (West Supp. 1985); ME. REV. STAT. ANN. tit. 14, § 8112 (1980); MD. STATE GOV'T CODE ANN. §§ 12-404, 12-405 (1984); MICH. COMP. LAWS ANN. § 691.1408 (West Supp. 1985); MISS. CODE ANN. § 25-1-47(2) (1972); MO. ANN. STAT. §§ 105-710-711 (Vernon Supp. 1985); MONT. CODE ANN. § 2-9-305 (1985); NEV. REV. STAT. ANN. §§ 41.0349, 41.035 (Michie 1983); N.H. REV. STAT. ANN. §§ 31:105, 31:106, 99D:2 (Equity Pamph. 1983); N.J. STAT. ANN. §§ 59:10-1-4 (1982); N.M. STAT. ANN. §§ 41-4-4, 22, 23, 25 (1982 and 1985 Supp.); N.Y. GEN. MUN. LAW § 50-j. & N.Y. PUB. OFF. LAW § 17(3)(a) (McKinney Supp. 1984); N.C. GEN. STAT. § 160A-167; OR. REV. STAT. § 30.285 (1983); R.I. GEN. LAWS § 9-31-12 (Michie Supp. 1984); S.C. CODE ANN. § 15-77-230(d) (Lawyer's Co-op. 1984); S.D. CODIFIED LAWS ANN. § 3-19-1-2 (1980); TEX. CIV. PRAC. & REM. CODE ANN. § 104.002(2) (Vernon 1986); UTAH CODE ANN. §§ 63-30-36-37 (Allen Smith Supp. 1985); VT. STAT. ANN. tit. 3, § 1103 (Equity Cum. Supp. 1984); W. VA. CODE § 8-12-7(b) (1976); WIS. STAT. ANN. § 895.46 (1983 & West Supp. 1985); WYO. STAT. § 1-39-104 (Michie Supp. 1985). *See also* 5 F. HARPER, F. JAMES & O. GRAY, *supra* note 78, § 29.9; Schuck, *supra* note 12, at 335-37.

amounts of damages they cover,[171] on their face they apply to section 1983 damages.[172] At present, these programs are insufficient to replace qualified immunity,[173] but they do show a willingness on the part of state and local entities to protect their public officials.

The slow growth of the government reimbursement programs actually may be attributable to the Court's strengthening of the qualified immunity doctrine. As long as the doctrine provides such a broad scope of protection, there is little incentive for public officials to push for more widespread insurance and indemnification programs. Further, regardless of the direct causal link between the two, if the Court were to announce the imminent abrogation of qualified immunity for lower-level officials, then states surely would develop these programs.

The reaction by municipalities to state court abrogation of municipal immunity for tort claims—the passage of measures to conform to the change—supports this argument.[174] By signalling the demise of sovereign immunity for state and local governments, the state courts, in effect, compelled city and state legislatures to act. By

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171 Virtually all of the indemnification statutes, and most personal injury policies purchased by government entities, exclude indemnification or coverage for "bad-faith" or "willful" violations. In addition, most cover only compensatory, not punitive, damages. *See* Donald J. Farley, *Insurance Coverage in Civil Rights Cases*, 20 IDAHO L. REV. 617 (1984); Schuck, *supra* note 12, at 335-337.

172 Courts have interpreted personal injury policies as covering civil rights claims. *See, e.g.*, Town of Goshen v. Grange Mut. Ins. Co., 120 N.H. 915, 424 A.2d 822 (N.H. 1980); City of Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 342 A.2d 513 (1975); *see also* Farley, *supra* note 171, at 626-29 (Courts have found personal liability policies cover civil rights claims when they do not explicitly exclude those claims).

173 *Creighton*, 483 U.S. at 641-42 n.3. The statute's insufficiency stems from the various limitations and conditions that often are attached to indemnification or insurance coverage. Some of the statutes contain dollar limitations, condition indemnification on good-faith cooperation with the defense, or exclude indemnification for officials acting in bad-faith. In addition, many of these statutes cover only specific types of actions against a narrow class of officials, and many do not specifically address liability under federal civil rights laws, rendering their application to Section 1983 actions uncertain. In sum, the existing insurance and indemnification statutes are neither widespread enough nor comprehensive enough to immediately and fully replace qualified immunity. States and the federal government will have to enact more complete coverage to replace qualified immunity. *See* Schuck, *supra* note 12.

174 A good example of this is the process by which the Minnesota Supreme Court signalled the impending end of sovereign immunity to the city of St. Paul. In Nissen v. Redelack, 246 Minn. 63, 74 N.W.2d 300 (1955), the court reluctantly denied recovery to the parents of an 8-year-old boy who drowned in a municipally operated swimming pool. Agreeing with the trial court that there was ample evidence to warrant a jury in finding that the city of St. Paul was negligent in its operation of the pool, the court nevertheless held that since "it has long been the settled law in this state that municipalities are not liable for negligence in the performance of governmental functions," the plaintiff's claim was barred. *Id.* at 89, 74 N.W.2d at 304.

The court noted the injustice of allowing the municipality to avoid responsibility for its own negligence under the cloak of sovereign immunity, but noted that "it is not the function of the courts to pass laws in this respect, and any change in this policy must

signalling a determination to abrogate the qualified immunity doctrine for lower-level public officials, the Court could accomplish the same result—in effect forcing the federal and state governments to provide for comprehensive insurance or indemnification programs for these officials.

Although abrogating qualified immunity for lower-level officials might force the hand of state and federal legislatures, it does not amount to judicial usurpation of the legislative function. The qualified immunity doctrine from its inception was a creation of the Court.[175] Faced with the broad language of section 1983, which on its face does not provide for *any* official immunity,[176] the Court attempted to develop a system of protection that would provide the best balance between individual rights and the smooth operation of government.[177] However, the confusion in the lower courts,[178] the inapplicability of the doctrine to a broad category of cases,[179] and the current overprotection of lower-level officials,[180] make it apparent that the Court's attempt to achieve the desired balance has failed. By announcing the pending abrogation of qualified immunity for lower-level officials, the Court would be discarding the product of twenty-two years of judicial legislation. This abrogation would force the state and federal governments to confront an issue that should not have been delegated to the Court in the first place.

2. *The Vicarious Liability Limitation Does Not Prevent Abrogation of Qualified Immunity for Lower-Level Officials*

The Court's position that municipalities cannot be held vicariously liable for section 1983 violations should not limit its ability to abrogate qualified immunity for lower-level officials—although this

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come from the legislature." The Minnesota Court thus left the door open for the legislature to act. *Id.* at 90, 74 N.W.2d at 304.

The Minnesota Court waited seven years for the legislature to modify the statutory sovereign immunity doctrine. Then, in Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962), the court abrogated the doctrine prospectively—to commence after the adjournment of the 1963 Minnesota Legislature. The *Spanel* opinion demonstrated the court's frustration caused by the legislature's failure to act: "Since we have repeatedly proclaimed that this defense is based on neither justice or reason, the time is now at hand when corrective measures should be taken by either legislative or judicial fiat." *Id.* at 285, 118 N.W.2d at 799. Before the time limit expired, the St. Paul City Council adopted a statute providing for limited municipal liability for tort claims.

175 *See* Pierson v. Ray, 386 U.S. 544, 566-67 (1967); *see also supra* text accompanying notes 74-82.

176 *See supra* note 25.

177 *See supra* text accompanying notes 60-73.

178 *See supra* note 156.

179 *See supra* note 156.

180 *See supra* text accompanying notes 156-62.

action would indirectly compel the development of widespread indemnification and insurance programs. In *Monell v. Department of Social Services of the City of New York*,[181] the Supreme Court held that a local government, while included in the definition of the word "person" in section 1983, could not be held vicariously liable solely because it employed the individual tortfeasor.[182] The Court's conclusion rested upon the language of section 1983,[183] and Congress' rejection of the Sherman Amendment,[184] which would have imposed liability on any "county, city, or parish" for any injury caused by the citizens of that municipal entity.[185]

Neither the language of section 1983, nor Congress' rejection of the Sherman Amendment, however, should be construed to prohibit the Court from abrogating a doctrine it developed, even if such action would force governmental entities to provide indemnification for their officials. The *Monell* decision rested on the conclusion that Congress had not intended to *impose* vicarious liability upon governmental entities.[186] *Monell* did not proscribe the voluntary assumption of such liability.[187] By announcing the prospective abrogation of qualified immunity, the Court would simply be removing an ill-conceived cushion that enabled governmental entities to avoid paying the costs imposed by both section 1983 and *Bivens* for constitutional violations committed by their officials.[188] In the absence of qualified immunity, society will pay these costs, either by increasing the salaries of lower-level officials to compensate them for the risk of liability, or by providing insurance or indemnification. Insurance and indemnification programs are the most attractive alternative, as

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181 436 U.S. 658 (1978).

182 *Id.* at 691-92. The Court recently refined this point, holding that a local school district could be held liable in a Section 1983 claim only if the officials who committed the violation had been delegated policy-making authority or acted pursuant to a well-settled custom that represented official policy. Jett v. Dallas Independent School District, 109 S. Ct. 2702 (1989).

183 *See Monell*, 436 U.S. at 691 ("Any person who, under color of any law . . . . *shall subject or cause to be subjected* . . .") (empbasis added). The Court took this language to mean that section 1983 was intended to impose liability only on the "person" directly responsible for the violation.

184 *See Monell*, 476 U.S. at 691-94 (Appendix), 702-08 (Powell, J., concurring).

185 *Id.* at 702 (Powell, J., concurring) (citing Sherman Amendment).

186 *See id.* at 692.

187 *See supra* notes 169-70 (pertaining to insurance indemnification statutes in which state and local governments have, in essence, assumed vicarious liability for the acts of their officials).

188 In the absence of qualified immunity, governmental entities would have been forced to either insure/indemnify their employees, or pay them enough that they could bear the risk of liability. With the advent of qualified immunity, governmental entities were allowed to avoid the "price" of civil rights violations—at the expense of the plaintiff left without a remedy.

they would be less costly to implement.[189]

3. *Insurance and Indemnity Programs Spread the Cost of Civil Rights Violations*

The requirement[190] that state and federal governments provide insurance or indemnification for certain categories of officials would add a significant extra cost to the system. However, if the rationale for protecting public officials from civil rights damages is that it is the necessary price of effective government,[191] it would be more equitable to spread this cost throughout society by requiring state and federal governments to insure or indemnify their officials. Someone must pay the "price" of efficient government. Currently, that price is borne by the individual plaintiff, who is often left without a remedy in the face of a qualified immunity defense. Widespread and comprehensive insurance or indemnification programs would shift this burden to society as a whole. Lower-level government officials would be protected against personal liability (perhaps with an exception for "malicious intent"); victims would retain a remedy for violations; and the cost of providing insurance would be borne more equitably by taxes collected from the society at large.[192]

This cost-spreading approach is distinct from the growing trend in common-law tort doctrine to assign liability to the party who can most clearly *prevent* the loss.[193] If the rationale for protecting public

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189 This follows from the natural tendency of most individuals to be risk averse. The individual government official will tend to overestimate the risk of being sued and thus insist on overcompensation for that risk. Of course, government officials could insure themselves individually against the risk of suit. However, assuming that the officials would demand compensation to cover the cost of this insurance, it would still be cheaper to require the government to provide the coverage. The government, by pooling the risk of its employees liability, would be better able to predict the year-to-year "cost" of liability. It would therefore be able to more closely tailor its insurance coverage to its needs. For an analysis in the context of the purchase of insurance, see WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 205-19 (3d. ed. 1985).

190 *See supra* text accompanying notes 164-66. State and federal governments would be "required" to provide insurance or indemnification simply because it would be less costly than paying each individual official to bear the risk of liability without immunity.

191 *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

192 This method of spreading the costs of safeguarding individual rights may not be the most *efficient* in economic terms. Generally, only compensatory damages are available in section 1983 actions, see Smith v. Wade, 461 U.S. 30 (1983), and often these damages—particularly in unreasonable search and seizure cases—are minimal. Nonetheless, if these constitutional guarantees are to be taken seriously, then we should be willing to incur such slight additional costs to provide a remedy for an individual whose rights have been violated.

193 *See generally* Lester W. Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805 (1930); Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Clarence Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

officials from civil rights liability is to promote effective government,[194] providing insurance and indemnification programs imposes the costs on the beneficiaries—society as a whole. Since each individual within society reaps some of the benefit that flows from an effectively run government, it follows that the price should be parceled out among these individuals, rather than placed on the unlucky individual who is left without a remedy. Shifting the burden of protecting public officials is not a call for government largesse, but rather a recognition that the costs of that protection should be commensurate with the benefits.[195]

4. *Insurance Indemnity Programs Will Not Unduly Inhibit Public Officials*

The *Creighton* Court rejected the insurance alternative on the ground that, in addition to existing programs being inadequate, the risk of *government liability* would inhibit officials in the performance of their duties.[196] To the extent that any degree of liability will cause hesitation, the majority is probably correct. Indeed, while the possibility of governmental liability for the official's violation would not provide the same level of deterrence as would the threat of personal liability, the potential adverse effects on the official's career of frequent and costly constitutional violations would, no doubt, lead to a certain level of hesitancy.

This objection, however, begs the question. Taking the Court's reasoning to its logical conclusion, all officials should be *absolutely* immune because anything short of absolute immunity would, to some extent, inhibit public officials in the performance of their duties. The real question is how much the Court should sacrifice individual rights for the sake of effective government. In making this determination, the Court should consider the importance that both the Constitution and our democratic society place on individual rights. The *Bivens* Court recognized the primacy of these rights when it declared that " '[t]he 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.' "[197]

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194 *See, e.g.*, *Scheuer*, 416 U.S. at 240. Economically, providing for insurance and indemnification programs also puts the costs of violations on the least cost avoider and internationalizes the insurance pool.

195 Another argument for shifting liability away from the individual official is that the governmental entity is better suited to take action to avoid recurrence of the violation. *See* Newman, *supra* note 45 at 457; Schuck, *supra* note 12, at 349.

196 *Creighton*, 483 U.S. at 641 n.3. Justice Scalia's rejection of insurance on this ground is an implicit antecedent to his point concerning the lack of comprehensive insurance coverage: "[E]ven assuming that conscientious officials care only about their personal liability and not the liability of the government they serve . . . ." *Id.*

197 *Bivens*, 403 U.S. at 397 (quoting Marbury v. Madison, 1 Cranch 137, 163 (1803)).

The Court often has recognized that the qualified immunity doctrine represents an unfortunate but necessary compromise.[198] In this regard, the increased hesitation which may accompany an official's pondering about the adverse effects of an insurance claim would be justified by the vindication of an individual's constitutional rights. Comprehensive insurance and indemnification programs for lower-level officials would enable individuals to maintain their right to a remedy and, at the same time, protect society from the ill effects of holding individual officials personally liable. The Supreme Court should therefore encourage these programs as an alternative to qualified immunity for lower-level government officials.

Subjecting upper-level government officials to civil rights claims implicates a special set of policy considerations.[199] The possibility that an official could be inundated by a great number of suits stemming from a single action, and the cost to effective government of forcing such officials to defend each suit at trial, indicate that insurance and indemnification programs are not an adequate solution in this context. For these officials, the Court should retain the *Harlow* standard of qualified immunity.

B. An Alternative Solution: Creating a Bifurcated Standard

Short of the complete abrogation of qualified immunity for lower-level government officials, the Court should at a minimum recognize that different policy considerations apply to different categories of government officials. Because the purpose of the qualified immunity doctrine is to promote effective government at some cost to the rights of individuals,[200] the protection afforded officials should be closely tailored to their needs. The Court consistently has relied on this pragmatic rationale to deny government officials absolute immunity.[201] The Court should recognize that the same rationale mandates the bifurcation of the qualified immunity standard to ensure that it protects individuals "no further than its justification would warrant."[202]

1. *Lower-Level Officials: The* Wood *Standard*

Law enforcement and many other lower-level officials do not require the protection from suit that the current standard pro-

198 *Scheuer*, 416 U.S. at 247; Butz v. Economou, 438 U.S. 478, 506-12 (1978); *Harlow*, 457 U.S. at 807.

199 *See supra* text accompanying notes 141-47.

200 *See supra* text accompanying notes 64-73.

201 *Harlow*, 457 U.S. at 807-12.

202 *Id.* at 811.

vides.[203] Because the decisions of lower-level officials tend to affect only those with whom they have direct contact, the number of potential plaintiffs is much smaller.[204] Moreover, because a lower-level official is generally one of many, the time he spends defending each suit will not impose an excessive burden on the government.[205] For these reasons, requiring lower-level officials to defend against civil suits would not unduly disrupt the operation of the government.

Thus, the doctrine's rationale and the needs of the government dictate that lower-level officials should be granted immunity only if they satisfy both the objective and subjective prongs of the *Wood* standard. To claim immunity, a lower-level official should be required to establish both that he did not violate a clearly established constitutional right, and that he sincerely believed his action did not violate that right.[206] Because the plaintiff must demonstrate an *actual* violation of his constitutional rights to satisfy his initial burden of proof, this standard will not attach liability if the official erroneously believed he was violating an individual's rights, but no violation actually occurred.[207] However, the application of this standard would deny immunity in cases where the right actually violated was not sufficiently clear to pass the objective test if the official believed that, in fact, he was violating the individual's constitutional rights. This reduced level of protection for lower-level officials more closely meets both the needs of the government, and the policy objectives inherent in holding officials liable for constitutional violations. Because their need for protection is not as great as that of upper-level officials, lower-level officials should be afforded a degree of immunity which infringes less on the individual's right to a remedy. A return to the *Wood* standard would immunize lower-level officials against damages so long as they exercised due care in the performance of their duties and did not knowingly violate an individual's rights. This standard is not so demanding as to *unduly* inhibit an official in exercising his discretion. It is important for officials to be *duly* restrained, as the court has made clear in cutting back on absolute immunity.[208] A recognition that public officials do err[209] should not be turned into an encouragement that they do so.

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203 *Id.* at 818. This view is in contrast to the dual rationale of effective government and individual fairness upon which the original standard was developed. *Compare Scheuer*, 416 U.S. at 240.

204 *See supra* note 12.

205 Regarding law enforcement officials, Justice Stevens noted that testifying at trial is a routine part of their duties. *See Creighton*, 483 U.S. at 662 (Stevens, J., dissenting).

206 *See* Wood v. Strickland, 420 U.S. 308, 321 (1975).

207 In other words, there will be no liability for "bad intent" alone.

208 *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 520 (1985); *Harlow*, 457 U.S. at 807.

209 *See Scheuer*, 416 U.S. at 242.

For upper-level government officials, the qualified immunity standard should remain substantially the same as that articulated in *Harlow*. As *Harlow* and *Mitchell* noted, certain government officials require protection from both suit and damages, to enable them adequately to execute their duties.[210] These considerations make it necessary to provide upper-level officials with a greater degree of immunity.

2. *Uncertainty Is Not Fatal to the Bifurcated Standard*

In *Creighton*, the Court refused to bifurcate the qualified immunity test, arguing that the uncertainty of a multi-level standard would defeat the purpose of qualified immunity.[211] This Note has assumed the existence of clear distinctions between upper-level and lower-level officials but, under a bifurcated system, an official near the border between the two categories (mid-level official) might be unsure which standard he would be held to. This uncertainty, however, should not affect his decision whether to take a particular action.[212] If an official subjectively believes that his actions will violate another's constitutional rights, he should abstain from so acting regardless of the applicable immunity standard. The *Harlow* standard does not remove the requirement that an official act in good faith; it simply establishes a conditional presumption that he did so as long as the right involved was not clearly established.[213]

Seen in this light, the uncertainty of a bifurcated standard should not inhibit mid-level officials from the *good faith* performance of their duties.[214] If an official acts in good faith and with a reasonable belief that his actions do not violate another's constitutional rights, he will be protected under either standard.

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210 *Mitchell*, 472 U.S. at 525; *Harlow*, 457 U.S. at 807.

211 *See Creighton*, 487 U.S. at 642.

212 Uncertainty at the fringes already exists under the current standard. An official will be denied immunity if the trial court finds, as a matter of law, that his action violated a clearly established right. Requiring subjective belief does not in any way add to *that* uncertainty.

213 The decision in *Harlow* to discard the subjective prong of the qualified immunity test was not based on a desire to provide immunity for officials who, acting in bad faith, violated an individual's civil rights. *Harlow* simply established presumption that if the official's action did not violate a clearly established right, the law would assume that the violation was committed in good faith. The Court's decision was based on the need to promote effective government. It does not confer upon officials a license to act with complete disregard of their subjective beliefs.

214 There are several responses to Justice Scalia's concern over lower courts' uncertainty regarding applicable standards. First, such uncertainty follows almost any refinement in a developing body of law. Second, the extent of any uncertainty largely depends on the clarity with which the Court articulates the factors it considers in deciding which standard to apply. Finally, temporary uncertainty among the lower courts is not a sufficient reason to resist reforming a doctrine which denies individuals the opportunity to pursue a remedy for violations of their constitutional rights.

CONCLUSION

The qualified immunity doctrine was developed as a pragmatic sacrifice of individual rights for the sake of an effectively-run government. As a result, the protection provided by the doctrine should be closely tailored to the particular needs of different categories of government officials.

The best and most comprehensive solution to the problems posed by the qualified immunity doctrine would be the complete abrogation of the qualified immunity doctrine for lower-level officials, which would compel state and federal governments to insure or indemnify these officials against damages. This solution would more effectively spread the cost of protecting individual rights while providing sufficient protection to ensure that lower-level officials are not unduly inhibited in the performance of their duties.

At the very least, the Court should bifurcate the doctrine and, in so doing, provide immunity from suit only for those officials who require that protection to adequately perform their duties. Thus, immunity for lower-level officials should be granted under the two-prong standard articulated in *Wood*.

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