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QUALIFIED IMMUNITY AFTER *HOPE v. PELZER*: IS "CLEARLY ESTABLISHED" ANY MORE CLEAR?

*Leah Chavis**

I. INTRODUCTION

In the last four decades, civil rights litigation has burgeoned.[1] "Litigants have discovered new 'federal rights,'"[2] and the growth in federal protection of civil rights has created docket pressure in the federal courts.[3] Our government increasingly assumes more duties that affect industry, occupations, and society in general. With this vast expansion of governmental activity, increasing abusive behavior and unethical conduct are inevitable. The tort liability of public officers who violate the constitutional rights of our citizens becomes of ever widening importance. Without civil liability for public officials, citizens' rights will become increasingly curtailed. Therefore, a private cause of action to vindicate constitutional rights is essential to ensure that government agents are held accountable to private citizens and to the law.

Recognizing the significance of accountability, Congress, in 42 U.S.C. § 1983 ("Section 1983"), created a civil cause of action for deprivation of rights providing the following:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[4]

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1. Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis,* 40 ARK. L. REV. 741, 741 (1987).

2. *Id.*

3. *Id.* at 742. In 1960, only 287 civil rights cases were filed in the federal system. *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, *Reports of the Judicial Conference, in* ANNUAL REPORT OF THE DIRECTOR 232 (1960). By 1977, 13,113 cases (not including 8,235 prisoner cases) were filed. ADMIN. OFFICE OF THE UNITED STATES COURTS, *Reports of the Judicial Conference, in* ANNUAL REPORT OF THE DIRECTOR 189 (1977). By 1984, 21,219 civil rights cases (not including 18,856 prisoner cases) were filed. ADMIN. OFFICE OF THE UNITED STATES COURTS, *Reports of the Judicial Conference, in* ANNUAL REPORT OF THE DIRECTOR 143, 145 (1984).

4. 42 U.S.C. § 1983 (2000).

Although the language of the statute does not suggest any type of immunity from liability for damages and specifically states that "every person . . . shall be liable" to the person wronged, the United States Supreme Court has declared that state officials are entitled to a defense of "qualified immunity."[5] As this article will later discuss in detail, the qualified immunity doctrine was created by the Supreme Court as a type of "social insurance scheme that protects civil rights violators from the consequences of uncertainty in the law,"[6] on the ground that public interest requires bold government decisions and actions,[7] and without some grant of immunity, those in public service would be inhibited in their decision making for fear of personal liability for damages and involvement in extended litigation. Essentially, qualified immunity excuses public officials from liability for some behavior that violates citizens' civil rights as long as the official's actions do not violate clearly established law and another reasonable official would have acted in the same manner under the circumstances.[8]

In spite of the Supreme Court's attempt to strike a balance between citizens' rights to be free from government abuse and the government's right to be free from frivolous lawsuits, the doctrine of qualified immunity has been misread, spun, twisted, and continues to be the subject of severe abuse by the judiciary and government officials. In light of accountability, the evolution of qualified immunity has produced such a liberal and favorable interpretation for officials and has produced such confusion in the lower courts that it has threatened to overcome the plaintiff before the complaint can even be drafted. Indeed, courts have been very verbal about their confusion as to the meaning of "clearly established law" and the manner in which it should be analyzed.[9] Does qualified immunity mean a case identical to yours has to have been previously adjudicated? Or does it mean the

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5. *See infra* Part II.A for a discussion on the historical events leading up to the birth of qualified immunity and the standards under which qualified immunity is applied.

6. Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J.L. & PUB. POL'Y 479, 479 (1994). The Supreme Court has also stated that qualified immunity works to temper the number of frivolous suits being filed against public officials in federal court. In *Smith v. Wade*, 461 U.S. 30, 91 (1983), Justice Rehnquist stated:

> The staggering effect of § 1983 claims upon the workload of the federal courts has been decried time and again. The torrent of frivolous claims under that section threatens to incapacitate the judicial system's resolution of claims where true injustice is involved . . . [t]here is a limit to what the federal judicial system can bear.

7. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 241 (1974).

8. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (explaining the purpose of qualified immunity as a protection against liability for public officials unless the official's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known").

9. *See infra* notes 58–64.

Supreme Court has to have previously considered your exact facts? With so many new and different circumstances having been pled, and with no clear guidance by the Supreme Court, the courts have been at a loss as to how to approach the defense. In light of the confusion, it is obvious that the courts would rather keep a lid on litigation than cause it to explode; thus, qualified immunity has slowly been molded into a steel shield for officials, instead of a sword for victims of civil rights abuse. In other words, since the introduction of qualified immunity, undue protection has been available to "all but the plainly incompetent or those who knowingly violate the law."[10]

But should the public not have reasonably high expectations? The public obviously has an interest in establishing a high standard of competence for public officials, yet the qualified immunity defense has always militated against this expectation of competency by forcing plaintiffs to prove that which is rarely provable.[11] Recently, however, in the case of *Hope v. Pelzer*,[12] it appears the Supreme Court finally recognized the injustice of the formidable standard imposed by qualified immunity by holding that established law no longer need be so clear before an official will be deemed to have violated it. Indeed, the Court held that established law need only give "fair warning" to officials that their conduct is unconstitutional, and fair warning can be supplied by cases without materially similar facts.[13]

Is the *Hope* decision a seeming victory for civil rights plaintiffs everywhere? Did *Hope* effectively eliminate the doctrine of qualified immunity, thus holding public officials liable for conduct that previously would have been excused under the "clearly established law" standard? Has "[q]ualified immunity jurisprudence . . . been turned on its head," as stated by Justice Thomas at the beginning of his dissent in *Hope*?[14] Or has *Hope* exacerbated the existing confusion in the lower courts as to when and how the doctrine of qualified immunity applies?

This article explores the history of qualified immunity and its requisite standards before and after *Hope v. Pelzer*. Part II will discuss the history, evolution and creation of qualified immunity, with emphasis on the confusion initially created by the doctrine in the lower courts. Part III will explore the Court's decision in *Hope* and its impact on the lower courts, with Part IV taking a brief look at cases in the Eighth Circuit in which *Hope* was applied.

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

11. *See infra* Part II.B for a discussion on the formidable hurdles plaintiffs face in demonstrating that the law allegedly violated was clearly established and that the defendant officer should have known of the violation.

12. 536 U.S. 730 (2002).

13. *Id.* at 740–41.

14. *Id.* at 748 (Thomas, J., dissenting).

II. THE CONCEPTION AND BIRTH OF QUALIFIED IMMUNITY: JUDICIAL CREATIONS

Just as the Constitution does not mention Section 1983 or provide a cause of action against government officials for civil rights violations, it does not mention the concept of qualified immunity. The defense is a judicial doctrine that evolved through a series of cases before the Supreme Court in response to the abundance of frivolous suits filed under Section 1983 during the 1960s and 1970s. History reveals, however, that the framers of the statute never intended for the statute to evolve into the immunity-riddled black hole it has become through years of misinterpretation.

A. The Birth of Qualified Immunity

Section 1983 stemmed from the Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act.[15] It was enacted and "specifically designed to halt a wave of lynchings of African-Americans that had occurred under guise of state and local law."[16] The Supreme Court noted that the purpose of "[S]ection 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[17] The Court then began to strip the immunities granted under common law by giving Section 1983 a broad meaning—by including the majority of public officials regardless of their status within the government. The expanding interpretation, however, began to produce a breeding ground for Section 1983 litigation.[18] By the late 1960s, the tides began to turn in favor of the government and the Court began to regain its grip on the reins of section 1983's interpretation. The door of redress, once again, began to close on civil rights plaintiffs everywhere.

As early as 1967, in *Pierson v. Ray*,[19] the Supreme Court recognized what the Second Circuit had recognized in 1949, that the fear of being sued "would dampen the ardor of all but the most resolute, or the most irrespon-

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15. H.R. REP. NO. 105-323, pt. 1, at 23 (1997). Section 1983 was originally passed as section 1 of the Civil Rights Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

16. H.R. REP. NO. 105-323, pt. 1, at 23 (1997).

17. Matasar, *supra* note 1, at 741; *see also* Owen v. City of Independence, Mo., 445 U.S. 622, 622 (1980) (holding that there is no "good faith" defense for municipalities in Section 1983 actions); Maine v. Thiboutot, 448 U.S. 1, 1 (1980) (interpreting the words "and laws" broadly by stating that they are not limited to civil rights or equal protection laws); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 658–59 (1978) (holding that municipalities are "persons" within the meaning of Section 1983).

18. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

19. 386 U.S. 547 (1967).

sible, in the unflinching discharge of their duties."[20] It was here that the Court established a type of qualified immunity.[21] Although the Court did not express the standard in *terms* of qualified immunity, it held that the "defense of good faith and probable cause, . . . available to the officers [at] common law . . . for false arrest and imprisonment, [was] also available [to police officers] in [an] action under § 1983."[22] Although the officers in *Pierson* did not claim any type of immunity—only that they were not liable because they acted in good faith and with probable cause in making an arrest under a statute they believed to be valid—the Court, nonetheless, made an immunity determination.[23]

The Court held that the officers were entitled to qualified immunity if they had acted in good faith and with probable cause; however, the standard created confusion and was difficult to apply by other courts "because a determination that the officials had probable cause meant that the arrests would have been lawful and the officials would have no need to assert qualified immunity as an affirmative defense."[24] This opened the door for the Supreme Court to revise the standard that would eventually evolve into the doctrine of qualified immunity.

In two important cases following *Pierson*, the Court completed its revision of the qualified immunity standard. In *Scheuer v. Rhodes*,[25] the Court considered immunity from personal liability of officers of the executive branch of government for their role in the Kent State tragedy.[26] The Court

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20. *Gregoire*, 177 F.2d at 581.

21. In *Pierson*, police officers had arrested a group of black ministers for allegedly violating a state statute that prohibited congregating in a public place under circumstances that would cause a breach of the peace. 386 U.S. at 549–50. The ministers contended the statute was unconstitutional and that the officers had arrested them because they had used a waiting room designated for whites only, and not because of evidence that the ministers were planning to breach the peace. *Id.* at 557.

22. *Id.*

23. *Id.*

24. Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 70 (1989).

25. 416 U.S. 232 (1974).

26. The plaintiffs were personal representatives of the estates of students who were killed on the campus of Kent State, an Ohio state-controlled university. Plaintiffs brought suit for damages under Section 1983 against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various other Guard officers and enlisted members, and the university president, charging that the officials, acting under color of state law, "intentionally, recklessly, willfully and wantonly" caused an unnecessary Guard deployment on the campus and ordered the Guard members to perform illegal acts resulting in the students' deaths. *Id.* at 232. The only evidence regarding the Governor's role consisted of two proclamations issued by him describing the conditions at Kent State and calling the Guard to duty. *Id.* at 235–36. The court of appeals, on the basis of these proclamations, and the notion that since the Governor was being sued in his official capacity and that the actions were therefore in effect

attempted to dispel the confusion created by *Pierson* by implying that the term "probable cause" was commensurate to "reasonable" belief. Justice Burger wrote:

> [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 the action taken was appropriate], that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[27]

Justice Burger's explanation is essentially a two-pronged test. The first prong represents an objective element, which requires the defending officer to demonstrate that his belief in the appropriateness of his action was correct compared to what another *reasonable* officer would have believed under the same circumstances. The second prong represents a subjective element that requires the officer to demonstrate that he *personally* had a good-faith belief in the appropriateness of his action under the circumstances.[28] The separate objective and subjective nature of the two-pronged test enunciated in *Scheuer* was explicitly recognized one year later in *Wood v. Strickland.*[29]

In *Wood*, several students brought a Section 1983 suit against school administrators for allegedly violating their constitutional rights during an expulsion proceeding.[30] The court of appeals and the district court disagreed over which immunity standard should be applied—the objective standard or the subjective standard.[31] The district court applied a subjective standard to the school officials' immunity claims, instructing the jury that a showing of malice, defined as ill will, was necessary for the students to prevail.[32] In other words, the students had to show that the officials *knew* their actions were inappropriate. The Court of Appeals disagreed, holding that specific intent to harm was not a requirement for the recovery of damages. Instead, it applied an objective test that inquired whether the defendants had acted in good faith in light of the circumstances.[33] The Supreme Court held the ap-

against the State and barred by the Eleventh Amendment, affirmed the district court's grant of summary judgment for the Governor. *Id.* at 232. The Supreme Court remanded the case after finding that the documents were inadequate to determine the appropriateness of immunity. *Id.* at 249–50.

27. *Id.* at 247–48.

28. *Id.*

29. 420 U.S. 308 (1975).

30. *Id.* at 309–10.

31. *Id.* at 310–11.

32. Strickland v. Inlow, 348 F. Supp. 244, 248 (W.D. Ark. 1972), *aff'd in part, remanded in part*, 485 F.2d 186 (8th Cir. 1973), *vacated and remanded*, 420 U.S. 308 (1975).

33. Strickland v. Inlow, 485 F.2d 186, 191 (8th Cir. 1973), *vacated and remanded*, 420 U.S. 308 (1975).

propriate standard to contain elements of both the objective and subjective tests. The Court noted that:

> [t]he official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.[34]

For seven years, the qualified immunity standard followed the *Wood v. Strickland* test. In 1982, however, the Supreme Court took a devastating turn when it decided to eliminate the subjective portion of the test and insisted that the lower courts apply the objective portion to all Section 1983 cases. This unfortunate decision occurred in *Harlow v. Fitzgerald.*[35]

B. In the Wrong Direction: The *Harlow* Standard of Qualified Immunity

In *Harlow*, the Supreme Court substantially changed the *Wood* standard by eliminating the subjective element of the good-faith defense. This change meant that the Court was willing to grant qualified immunity *even when the official knew his conduct was violative as long as a reasonable officer under the same circumstances would not have known that the actions were unlawful.* The Court noted that the subjective element of the defense had frequently proved incompatible with the admonition that "insubstantial claims should not proceed to trial . . . [since] an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury" and hence, could not be decided on motions for summary judgment.[36] The Court believed this to be an important reason to eliminate the subjective element of the defense because summary judgment would alleviate the "costs of trial" and the "burdens of broad-reaching discovery" facing officials who had been subject to suits based on "bare allegations of malice."[37]

Two decades of various interpretations, however, culminated in a qualified immunity standard that was not so clear after all. Holding that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,"[38] the Supreme Court left unresolved some very serious issues.

34. *Wood*, 420 U.S. at 321.
35. 457 U.S. 800 (1982).
36. *Id.* at 815–16.
37. *Id.* at 817–18.
38. *Id.* at 818.

First, although qualified immunity is an affirmative defense that must be pled,[39] once pled, it is the plaintiff's burden to show that the *clearly established* law is just that—*clearly established*.[40] This requirement means the plaintiff has two hurdles to jump in order to prevail: the judge has to find the law was clearly established at the time of the alleged violation and that a reasonable officer could not have believed the conduct at issue was lawful.[41] That standard, however, raises even more difficult questions. What is *clearly established law*? Who is the *reasonable* officer? Would any self-respecting officer in the same situation *really* defend the conduct as reasonable? What happens to malice or intent-based claims? Under the *Harlow* standard, how can Section 1983 encompass all types of claims and circumstances? Would the lower courts not reach seemingly contradictory and absurd results?

C. Clearly Established Law Under *Harlow*

The initial problem and ultimate issue in deciding whether a government official is entitled to qualified immunity is whether he reasonably should have known that his actions would violate someone's specifically established federal rights. In other words, the problem is determining whether the constitutional right at issue was clearly established at the time of the alleged violation. Of all the constitutional standards and interpretations existing today, there is at least one constitutional prohibition that is so well known and so frequently defended that the law is always considered clearly established—discrimination on the basis of race.[42] The remaining constitutional standards remain to be clearly established.

Neither the Supreme Court nor any other federal court has provided bright-line rules that may be used to determine whether a specific federal right has been clearly established. The federal courts have criticized the objective standard for being vague and have noted that "there are no bright lines for deciding whether the law's treatment of particular conduct at any given time" is clearly established.[43]

Of course, the Supreme Court, being the final authority on constitutional interpretation, can determine what is clearly established law. The

39. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

40. *Id.* at 641.

41. *Id.*

42. Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980) (stating that the general right to be free from such invidious discrimination is well established and "that all public officials must be charged with knowledge of it"). In *Flores*, two Mexican-Americans showed that they were discriminated against based on their race and national origin because of a delay in receiving requested liquor licenses. *Id.*

43. Barker v. Norman, 651 F.2d 1107, 1126 (5th Cir. 1981).

problem, however, arises when specific rights are alleged in light of the particular constitutional amendment. The availability of the qualified immunity defense depends on an analysis of whether the courts have decided that a particular right is included within the protection of a general constitutional provision. An official's knowledge of a general constitutional provision does not always tell him whether a proposed action will violate that general provision, and therefore, he will not be required to pay damages unless the particular federal right allegedly violated was clearly established at the time he acted. The plaintiff must make an almost impossible showing that *his* facts have been previously adjudicated and are clearly established. In other words, the plaintiff would have to show clearly established precedent that is absolutely fact-specific.[44] What is the likelihood of someone else's clearly decided case being identical to yours? The chances are slim that this kind of fact-dependent precedent would be found. Because the law, therefore, would rarely be considered "clearly established," the official would almost always be entitled to qualified immunity.

One appalling case that illustrates this problem is *Todd v. United States.*[45] In *Todd*, a Bivens action[46] was filed "against IRS agents for damages arising out of a penalty imposed under 26 U.S.C. § 6702."[47] The plaintiff, Donna Todd, filed a federal income tax return and an amended return for 1982.[48] Below the [portion of the return that provides for the taxpayer's signature and declaration of oath], she typed "signed involuntarily under penalty of statutory punishment."[49] The IRS assessed a penalty against her under the premise that the additional statement invalidated the tax return.[50]

44. The Seventh Circuit, in discussing the meaning of clearly established rights, has suggested that the right can rarely be considered "clearly established," at least in the absence of closely corresponding factual and legal precedent. Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986).

45. 849 F.2d 365 (9th Cir. 1988).

46. This was named for the case of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court held that a victim of a constitutional violation by a *federal* agent, acting under the color of his authority, has the right to recover damages. *Id.* at 397. After Bivens, thousands of Bivens-type cases flooded the courts, prompting Congress to amend the Federal Tort Claim Act "to provide a statutory damages remedy against the United States government in all Bivens-type FTCA actions provided that the employee acted within the scope of his employment." Mark Drooks, *Statutory Comment, H.R. 2659: Amending the FTCA*, 17 Harv. J.L. 357, 359 (1980). As an aside, however, many legal scholars, including Mr. Drooks, feel the FTCA is riddled with holes and protects the government rather than compensating victims of misconduct. *Id.*

47. *Todd*, 849 F.2d at 366. The code cited provides for penalties against anyone who basically conducts himself in an unreasonable manner in order to delay or impede the administration of federal income tax laws by including information that, on its face, indicates that the self-assessment is substantially incorrect. *See Id.* at 367 n.3.

48. *Id.* at 367.

49. *Id.*

50. *Id.*

Because Todd did not pursue the judicial remedies set out in the tax code, the IRS attached her property and her bank account and filed a tax lien against her.[51]

Todd filed suit in district court alleging violation of various constitutional rights, claiming that her return was complete and accurate and that the IRS improperly assessed the penalty.[52] She provided all information necessary to process her return and claimed no frivolous deductions.[53] Thus, Todd did not satisfy either of the prerequisites contained in the penalty statute.[54] Although Todd prevailed at the district court level and the government conceded her point, the IRS still fought her in court by claiming that its conduct in assessing the penalty did not contravene clearly established constitutional rights because no court had held that the conduct at issue violated a taxpayer's First and Fifth Amendment rights.[55] The United States Court of Appeals for the Ninth Circuit held that "[t]he IRS agents entrusted with section 6702's enforcement were not experienced in or familiar with the parameters of that provision" because it had been in effect for less than a year and that the agents, therefore, did not violate Todd's clearly established rights and were entitled to immunity.[56]

The court overlooked the fact that the First and Fifth Amendments *had been established* for over 200 years. Further, the IRS agents should be well versed in that which they are hired to manage, whether the provision is a day old or has been in effect since the agency began. Of all the whimsical things people do to express their dissatisfaction with politics, no two will ever be exactly alike so that those who file constitutional violation suits will never get past the pleading stage. Fact-specific pleading creates a very serious problem.

There are two further problems surrounding the "clearly established" standard. First, government officials may become guarded in their actions for fear of liability on those matters that have been clearly established. Thus, officials will tend to be overly cautious with the clearly established standard because they will act as if some principles of law are clearly established which, in fact, are not. In other words, with such a mutating standard, an officer might not know what is clearly established from day to day. So, in order to avoid liability, he will over-comply, i.e., be overly cautious, and avoid actions that he thinks are clearly established, when, in fact, he could have, and possibly should have, acted.[57]

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51. *Id.*
52. *Id.* at 367–68.
53. *Todd*, 849 F.2d at 368.
54. *Id.* at 367–68.
55. *Id.* at 368.
56. *Id.* at 371.
57. For an in-depth discussion on overcompliance see Mandery, *supra* note 6.

More seriously, a standard that permits so much variation will also permit officials trying to abide by that standard to exercise a low level of care. Without bright-line rules, the official cannot be charged with knowledge of what is clearly established from day to day, and this leaves the official with virtually absolute immunity. There is no incentive for the official to study the law because what he would study is disputed. Further, if the Supreme Court is the final authority on what is clearly established, an officer who has been sued can claim that the law he acted under was not clearly established, *even if it was established in the circuit in which he is employed.* This situation lowers the standard too far and prevents lower courts from reaching even remotely congruous results.

Because the exact definition of "clearly established" has not been established, courts have been known to reach seemingly contradictory results. Some circuits have concluded that courts should look to all available decisional law to determine whether the right was clearly established.[58] Some give deference to the Supreme Court, although other courts may play a role in what is clearly established.[59] Some courts, such as the D.C. Circuit, appear to be at a total loss as to the manner in which to approach the meaning of "clearly established."[60] This type of uncertainty and self-regulation[61] leads to inequitable administration of laws. A plaintiff in one circuit may prevail, whereas a plaintiff in a neighboring circuit may not.[62]

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58. *See, e.g.*, Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989) ("Absent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established.").

59. *See, e.g.*, Hughes v. City of N. Olmsted, 93 F.3d 238, 241 (6th Cir. 1996) ("In determining whether a constitutional right was clearly established we look first to the decisions of the Supreme court, then to decisions of this Court and other courts within our Circuit, and finally to the decisions of other Circuits.").

60. *See, e.g.*, Hobson v. Wilson, 737 F.2d 1, 25–26 (D.C. Cir. 1984) ("It is not clear, for example, how a court should determine well-established rights: should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?"); *see also*, Zweibon v. Mitchell, 720 F.2d 162, 168–69 (D.C. Cir. 1983) (noting that "clearly established law" is difficult to define).

61. It is important to note that in 1994, in *Elder v. Holloway*, the Supreme Court unanimously held that, in determining whether a government official's conduct violated clearly established law, an appellate court should consider all relevant precedents and not just those presented in plaintiff's brief. 510 U.S. 510, 512 (1994). This, however, seems to be just a suggestion because courts are not bound by what another circuit or federal district is doing with respect to a provision of law. The Supreme Court obviously is asserting that it would be best to look at the entire picture in order to make a judicious decision regarding qualified immunity.

62. For example, in Rich v. City of Mayfield Heights, 955 F.2d 1092 (6th Cir. 1992), the plaintiff, a pre-trial detainee who attempted suicide by hanging, claimed that the city officials were at fault for physical damage resulting from a lack of oxygen. Upon discovering the detainee hanging in his cell, the officials called the local fire department for assistance instead of cutting down the detainee themselves. *Id.* at 1093–94. The Sixth Circuit noted the

As illustrated, courts follow different guidelines in determining clearly established law. By allowing Section 1983 and Bivens defendants to interpose such distinctions, courts defy common sense in order to distinguish which laws are clearly established.[63] As noted by one observer,

> A [government] attorney's option in any case is to argue that there is no decision by *any* court that addresses the specific constitutional rights allegedly violated. If *some* federal court has decided a case that deals with the specific right, the best option is to argue that the case was decided by a court that is not binding on the sued [government] official. In either event, the federal right allegedly violated [will not have been] clearly established at the time of the alleged violation, and the [government] official [will be] immune from liability for damages.[64]

The Eleventh Circuit allowed this approach in *Hope v. Pelzer* [65] when it affirmed summary judgment for the individual defendants in a shocking case of prison brutality.[66] *Hope* opened the door for the Supreme Court to take a much needed look at the *Harlow* standard of qualified immunity.

III. *HOPE V. PELZER*: A NEW STANDARD AND A NEW BALANCE? REVISITATION OF THE QUALIFIED IMMUNITY DEFENSE

In 1995, Larry Hope, then an inmate in Alabama's Limestone Prison, was twice handcuffed to a hitching post for disruptive conduct. The first occurrence was for a two-hour period in May, during which time he "was offered drinking water and a bathroom break every fifteen minutes."[67] Hope was handcuffed above shoulder height, and when "he tried moving his arms to improve circulation, the handcuffs cut into his wrists, causing him pain and discomfort."[68]

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general right of a pre-trial detainee to adequate medical care, but the court refused to recognize as clearly established the more particularized right of a detainee "to be cut down by police officers when discovered hanging in a jail cell." *Id.* at 1097. Yet, two years later in *Hare v. City of Corinth*, the court stated, "pretrial detainees are often entitled to greater protection than convicted persons . . . [and] jail officials were under a clearly established constitutional duty to respond to [the] pretrial detainee's serious medical needs . . . [which included] respond[ing] immediately when [the detainee] was discovered hanging." 22 F.3d 612, 615 (5th Cir. 1994).

63. *See* Wood v. Ostrander, 851 F.2d 1212, 1218 (9th Cir. 1988).

64. Michael R. Smith, *Qualified Immunity from Liability for Violation for Federal Rights— a Modification.* 14 SCH. L. BULL. 8, 8–9 (Jan. 1983).

65. 240 F.3d 975 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

66. *Id.* at 981.

67. Hope v. Pelzer, 536 U.S. 730, 733–34 (2002).

68. *Id.* at 734.

In June of the same year, Hope was again handcuffed to the hitching post after an altercation with a guard at his chain gang's worksite.[69] Before being handcuffed to the post, however, Hope was ordered to remove his shirt, thus exposing himself to the sun.[70] Unlike the previous occurrence, however, Hope remained on the post for seven hours, was given only one or two water breaks, no bathroom breaks, and was taunted by a guard who gave water to dogs in Hope's presence and "spill[ed] the water on the ground" instead of giving it to him.[71]

Hope initially filed a 42 U.S.C. § 1983 suit against eight prison guards in the Northern District of Alabama, alleging that the use of the hitching post was cruel and unusual punishment prohibited by the Eighth Amendment.[72] The trial court dismissed claims against five of the guards and granted summary judgment on the grounds of qualified immunity to the remaining three.[73] Although the magistrate who rendered the decision did not determine whether the use of the hitching post was unconstitutional,[74] the Eleventh Circuit affirmed the trial court and answered the constitutional question, finding that while the hitching post's use for punitive purposes—as opposed to behavior control—violated the Eighth Amendment, Hope could not demonstrate, as required by circuit precedent, that the federal law by which the guards' conduct should be evaluated was established by cases that were "materially similar" to the facts in his own case. The guards were thus granted qualified immunity.[75]

In its analysis, the Eleventh Circuit utilized the standard set forth in *Harlow*, stating that the standard "look[s] to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time . . . ."[76] The court interpreted the standard to mean that clearly established law must be demonstrated by circuit cases with facts that are "materially similar" to the case at bar.[77] Although Hope proffered *Gates v. Collier*[78] and *Ort v. White*,[79] which dealt with inmates being handcuffed to a fence[80] and de-

69. *Id.*

70. *Id.* at 734–35.

71. *Id.* at 735.

72. Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).

73. *Id.*

74. *Hope*, 536 U.S. at 735.

75. *Hope*, 240 F.3d at 981–82.

76. *Id.* at 981 (quoting Swint v. City of Wadley, Ala., 51 F.3d 988, 995 (11th Cir. 1995)).

77. *Id.*

78. 501 F.2d 1291 (5th Cir. 1974). The case found several forms of corporal punishment impermissible, including handcuffing inmates to fences or cells for long periods. *Id.* at 1306.

79. 813 F.2d 318 (11th Cir. 1987). The case warned that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable

prived of water after refusing to carry the water keg to the worksite,[81] respectively, the court distinguished the cases on minor factual distinctions and thus determined that no binding precedent had been established in the Eleventh Circuit.[82]

Hope appealed to the United States Supreme Court, and the Court granted certiorari.[83] In its decision reversing the Eleventh Circuit, the Court concluded that the lower court's approach was too rigid and that it applied the "materially similar" requirement of the clearly established law analysis too narrowly.[84] The Court explained that the term "clearly established" does not mean that the "very action in question [must have] previously been held unlawful" before the official is stripped of qualified immunity.[85] The Court relied heavily on *United States v. Lanier*[86] to explain that officials can still be on notice that their conduct violates established law even in novel factual circumstances as long as the officials have "fair warning" that their conduct is unconstitutional.[87] The Court further explained that, as held in *Lanier*, "fair warning" did not require a showing of fundamentally similar cases, but that even cases with "notable factual distinctions" could possibly place a reasonable official on notice that his actions were unconstitutional.[88] Indeed, the Court specifically noted that "the . . . precedent of *Gates* and *Ort* . . . put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful."[89] The Court further noted that under the "fair and clear warning" standard, *Gates* and *Ort* were "sufficient to preclude the defense of qualified immunity at the summary judgment stage."[90] The Court thus rejected the Eleventh Circuit's requirement that cases be materially similar before satisfying the clearly established standard and stated that the proper analysis would require an examination of whether the guards had "fair warning" that their conduct violated Hope's constitutional rights.[91]

[E]ighth [A]mendment violation." *Id.* at 324.

80. *Gates*, 501 F.2d at 1306.

81. *Ort*, 813 F.2d at 320–21.

82. *Hope*, 240 F.3d at 981. The Eleventh Circuit distinguished *Gates* because the decision was based on the prison's unconstitutional "maintenance, operation and administration." *Id.* The court distinguished *Ort* because the inmate was denied water only until after he performed his job duties. *Id.*

83. Hope v. Pelzer, 534 U.S. 1073 (2002).

84. Hope v. Pelzer, 536 U.S. 730, 739 (2002).

85. *Id.* (quoting Mitchell v. Forsyth, 472 U.S. 511, 535, n.12 (1985)).

86. 520 U.S. 259 (1997).

87. *Hope*, 536 U.S. at 740–41.

88. *Id.* at 740 (quoting *Lanier*, 520 U.S. at 269).

89. *Id.* at 745–46.

90. *Id.* at 746.

91. *Id.* at 741.

What does all of this mean for qualified immunity? Should the lower courts interpret the decision as the beginning of the end of the doctrine or "simply an admonition to the Eleventh Circuit not to be so harsh or rigid in its analysis?"[92] The lower courts' interpretation and application of the Court's instruction in *Hope* remains to be seen. The Eighth Circuit, however, appears to be attempting a fair application of *Hope*..

IV. THE EIGHTH CIRCUIT'S APPLICATION OF *HOPE*

A review of recent rulings rendered by the Eighth Circuit reveals that the court is taking great pains to follow the instructions of the Supreme Court in *Hope*. For instance, in the recent case of *Meloy v. Bachmeier*,[93] the court, citing *Hope*, noted that "[t]o be clearly established, a right's contours must be clear enough that a reasonable official would understand his or her conduct was unconstitutional,"[94] and that the correct standard is a "flexible" one, "requiring some, but not precise factual correspondence with precedent, and [application of] general, well-developed legal principles."[95] The court further stated that it looks "to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in [the Eighth] [C]ircuit."[96] The court concluded by recognizing that "[a]lthough earlier cases need not involve fundamentally or materially similar facts, the earlier cases must give officials 'fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'"[97]

The court made similar references to *Hope* in *Treats v. Morgan*,[98] *Hawkins v. Holloway*,[99] *McCoy v. City of Monticello*,[100] *Shade v. City of Farmington, Minnesota*,[101] and *Hill v. McKinley*.[102] In all but the latter case, the Eighth Circuit not only acknowledged *Hope* as the appropriate standard in a qualified immunity analysis, but followed the Supreme Court's instructions and made a proper application.[103] The Eighth Circuit's compliance with *Hope* should give hope to this circuit's civil rights plaintiffs.

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92. Christopher D. Balch, *Is There Hope After* Hope? *Qualified Immunity in the Eleventh Circuit*, 54 MERCER L. REV. 1305, 1309–10 (2003).
93. 302 F.3d 845 (8th Cir. 2002).
94. *Id.* at 848 (citing *Hope*, 536 U.S. at 739–40).
95. *Id.* (quoting Burton v. Richmond, 276 F.3d 973, 976 (8th Cir. 2002)).
96. *Id.* (quoting Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001)).
97. *Id.* (quoting *Hope*, 536 U.S. at 741).
98. 308 F.3d 868, 874–75 (8th Cir. 2002).
99. 316 F.3d 777, 788 (8th Cir. 2003).
100. 342 F.3d 842, 846 (8th Cir. 2003).
101. 309 F.3d 1054, 1059 (8th Cir. 2002).
102. 311 F.3d 899, 902–03 (8th Cir. 2002).
103. In *Hill*, the court found that defendant officers violated the privacy rights of Hill, a pre-trial detainee, after placing her on a restraining board "face-down, naked, and in a

V. CONCLUSION

The state of qualified immunity remains to be seen. While *Hope v. Pelzer*[104] is a seemingly landmark decision in this area of law sometimes referred to as constitutional torts, one has to remember that our courts—the interpreters of our laws—are guided by some of the most brilliant minds in our legal system. Brilliant minds never think alike. In the law, what quacks like a duck and walks like a duck, is not necessarily a duck at all. Hence, what is considered to be "fair warning" in one circuit might be perceived as something wholly different in another. One thing is certain: having a provision that at least attempts to redress the wrongs committed by our government against our citizens is not to be taken for granted. At least we have the opportunity to address the problems complained about in this article.

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spread-eagle position," for a period of three hours after the officers perceived her as a safety-risk. *Hill*, 311 F.3d at 901–02. The court, however, granted the officers qualified immunity, thereby reversing the district court, because of Supreme Court precedent "direct[ing] that the lower courts not take too broad a view of what constitutes clearly established law." *Id.* at 904 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Although the court acknowledged *Hope*, it summarized its perception of the appropriate standard by stating that while a case "need not be on all fours" with precedential cases, it "must be sufficiently analogous to put a reasonable officer on notice that his conduct was unconstitutional." *Id.* at 904 (citing Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002)). In a scathing dissent, Judge Hansen noted that the Supreme Court had recently "reiterated the test for determining whether the law was 'clearly established' for the purpose of granting qualified immunity" and that "[u]nder this analysis, a court must ask whether the state of the law gave the officers 'fair warning' that their conduct was unconstitutional." *Id.* at 910 (Hansen, J., dissenting) (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)). Judge Hansen then applied the relevant case law to conclude that the officers, in fact, were not entitled to qualified immunity due to clearly established law demonstrating that the officers' conduct was unconstitutional. *Id.* at 910–11 (Hansen, J., dissenting).

104. 534 U.S. 1073 (2002).