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Public officials receive qualified immunity from damages liability for constitutional violations if they reasonably could have believed *their actions were constitutional under* clearly established law. *In this regard qualified immunity is quite unusual. In most other legal contexts, failure to know the law is virtually never excused. The only other context where notice or knowledge of illegality plays any role is in criminal law, but even mistakes of penal law are rarely excused.*

In this Article, Professor Armacost uses fair notice in criminal law as a paradigm for analyzing the role of notice in constitutional damages actions. She argues that fair notice in the criminal context is a proxy for fault. Whereas in most criminal cases fault inheres in the wrongfulness of the prohibited conduct, notice becomes important when only an intentional violation of a known legal duty makes the defendant blameworthy. In such cases, the notice inquiry ensures against penal liability without fault.

Professor Armacost then applies the paradigm of notice as a proxy for fault to qualified immunity. The animating notion behind the immunity inquiry is that it would be "unfair" to hold officials to rules they could not reasonably have known. The objective clarity of the law acts as a surrogate for the official's subjective state of mind: If the law governing the official's conduct was clear, immunity is denied because any reasonably conscientious official would have known and obeyed the law. Conversely, an official who engaged in conduct that was neither clearly prohibited nor contained indicia of its own wrongfulness is not blameworthy and immunity will attach. In such cases, qualified immunity's notice inquiry—whether the law was clear—acts as a proxy for fault.

Finally, Professor Armacost argues that the fault-notice connection borrowed from criminal law explains a puzzling feature of constitutional damages law: The Supreme Court has repeatedly stressed the importance of individual, fault-based liability and resisted a move toward respondeat superior liability. However, the ubiquity of indemnification of individual officials by their governmental units means that officials rarely bear the monetary burden of liability. Professor Armacost contends that fault-based, individual liability—which identifies a particular official as a "constitutional wrongdoer"—serves a moral blaming function that has significant independent value regardless of who ultimately bears the financial responsibility.

Qualified Immunity: Ignorance Excused

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"A plea of ignorance or mistake of law is rarely encountered in prosecutions for serious crimes .... [N]o sane defendant has pleaded ignorance that the law forbids killing a human being or forced intercourse or taking another's property or burning another person's house."[1]

"[G]overnment officials ... [are] shield[ed] ... from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.... The contours of the right must be sufficiently clear that a reasonable official would understand that what [she] is doing violates the right."[2]

"The majority ... intimates that [Judge] Lanier could not have been aware that sexually assaulting women in his chambers when they arrived to conduct official business with him constituted a violation of the victims' due process rights [because the] right to freedom from willful sexual assault at the hands of a sitting judge has not been 'made specific' by prior court decisions ...."[3]

I. INTRODUCTION

One of the primary purposes of qualified immunity in constitutional damages actions is to ensure that governmental officials can anticipate when their actions are likely to subject them to liability. Thus, even if an official's conduct actually violated the Constitution, she is immune from liability if a reasonable official *could have believed* that her actions were lawful. In other words, ignorance of the law—at least reasonable ignorance—is excused.

In this regard qualified immunity is quite unusual. It seems to rest on the idea that people should not be held to rules they did not know. In most other areas of law, however, no one thinks to ask whether people had notice of the content of the law; people are bound by the rules and ignorance of the law is virtually never an excuse. In tort, for example, a defendant could not prevail in a negligence suit by arguing that she was not aware her careless behavior could constitute legal negligence.[4] Similarly, a contract defendant would lose if her

1. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 384 (2d ed. 1960).
2. Anderson v. Creighton, 483 U.S. 635, 638, 640 (1987).
3. United States v. Lanier, 73 F.3d 1380, 1413, 1414 (6th Cir. 1996) (Daughtrey, J., dissenting), *vacated*, 117 S. Ct. 1219 (1997).
4. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1984) ("Negligence is conduct, and not a state of mind.... [I]t may ... arise where the negligent party has considered the possible consequences carefully, and has exercised his best judgment.").

only defense was failure to comprehend that her contractual commitments were enforceable.[5] In the administrative and regulatory context as well, failure to know the law is generally not an excuse, at least as far as civil liability is concerned.[6] The only other body of law, other than qualified immunity, where notice or knowledge of the illegality of one's behavior seems to have any importance at all is in the criminal context. But even there, as every ordinary citizen knows, ignorance of the law is almost never excused: A criminal defendant very rarely succeeds by arguing that although she violated the penal law, she should be excused because she could reasonably have believed that the law did not prohibit her behavior. By contrast, the same argument frequently succeeds in constitutional damages actions.

Qualified immunity has most often been explained as a way of furthering certain instrumental goals of constitutional damages liability under 42 U.S.C. § 1983.[7] One of the primary purposes of section 1983 liability is to deter unconstitutional conduct by governmental

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5. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21, at 63 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential te the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-4, at 28 (3d ed. 1987) (stating that an agreement will be binding "even if the parties were unaware that society offers remedies for the breach of such an agreement [unless] from the statements or conduct of the parties or the surrounding circumstances, it appears that the parties do not intend to be bound or do not intend legal consequences"); E. ALLAN FARNSWORTH, CONTRACTS § 3.7, at 122 (2d ed. 1990) (noting that although parties to agreements, "especially routine ones, often fail to consider the legal consequences of the actions by which they manifest tbeir assent[,] [t]he fact that one gives the matter no thought does not impair the effectiveness of one's assent, for there is no requirement that one intend or even understand the legal consequences of one's actions").

6. For example, compare *Cheek v. United States*, 498 U.S. 192 (1991) (construing "willfully" in a criminal tax statute te require knowledge of illegality), with *Domanus v. United States*, 961 F.2d 1323 (7th Cir. 1992) (construing "willfully" in the parallel civil statute as not requiring knowledge of illegality and noting that construction of the statute has been adopted by every jurisdiction te have reached the issue).

7. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territery, 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 te the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

officials.[8] It is argued, however, that too much liability could cause officials to be overly cautious and to fail to carry out their public responsibilities "with the decisiveness and the judgment required by the public good."[9] The overdeterrence rationale for qualified immunity posits that governmental officials are subject to skewed incentives, which make them especially sensitive to the prospect of damages liability. On the one hand, they are engaged in the kinds of work and personal interactions that tend toward conflict and harm, and are likely to lead to liability suits. On the other hand, public officials unlike their private counterparts, cannot personally appropriate many of the benefits of their good performance, which tend to flow to the general public.[10] This unbalanced incentive structure may drive officials toward inaction, underenforcement, delay and other defensive tactics that limit their personal costs but disadvantage the public.[11] Under this reading, qualified immunity affords a "margin of error" for public officials who make reasonable mistakes about the exact boundaries of constitutional law, which in turn provides the right balance between deterring unconstitutional actions and avoiding overdeterrence of socially useful behavior.

Although the instrumental explanation for qualified immunity is surely a significant part of the story, it also has some weaknesses. For example, the instrumental rationale has largely ignored or underestimated the impact of indemnification.[12] If goverumental officials

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8. The Supreme Court has also identified compensation as an important goal of constitutional damages liability. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (stating that compensation is fundamental to the purpose of section 1983); Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980) (noting that two of section 1983's main purposes are "deterrence and compensation"); Carey v. Piphus, 435 U.S. 247, 254 (1978) (noting that the basic purpose of an award of damages in a section 1983 action is compensation). Many of the Court's holdings construing section 1983, however, have limited damages awards in ways that significantly undermine that goal. *See generally* John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84-90 (1989) (discussing the limitations imposed by the Supreme Court on section 1983 compensation).

9. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); *see* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("The[ ] social costs [of liability] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" as well as "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." (internal quotation marks omitted)).

10. *See* PETER H. SCHUCK, SUING GOVERNMENT 60-68 (1983).

11. *See id.* at 68-77 (discussing "the official's decisional calculus").

12. One possible explanation for the failure of instrumental theories to consider the effects of indemnification is the difficulty of identifying the actual scope of entity reimbursement for liability costs. Indemnification for costs incurred in connection with section 1983 suits is a matter of state law, *see* 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 16.24, at 338 (3d ed. 1997), and state statutes differ widely as to the scope of coverage, extent of local autonomy over terms and conditions of reimbursement,

do not bear the financial effects of individual liability then, as compared to their private counterparts, they may simply have less to gain *or* lose. In other words, given indemnification and absent some systemic bias, incentives might be balanced such that officials *will*, in fact, consider all the societal costs and benefits of their actions.[13] If so, governmental liability would present little or no risk of overdeterrence, making qualified immunity unnecessary.[14]

In addition, if instrumental concerns were the whole story one might have predicted a regime that embraced respondeat superior liability against governmental entities—with or without a qualified immunity defense—and eschewed individual liability altogether.[15]

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and limits on amounts of reimbursement. *See generally*, SCHUCK, *supra* note 10, at 85-88 (discussing the many variations among state indemnification statutes). Based largely on the variety of state statutes and the fact that many provide for denial of reimbursement on various grounds, Professor Schuck has concluded that "indemnification . . . is neither certain nor universal." *Id.* at 85; *see* William C. Mathes & Robert T. Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damages Actions*, 53 GEO. L.J. 889, 912 (1965) ("[I]t appears that the indemnity practice is so irregular that its function as a 'conduit to governmental liability' is fortuitous at best."). *But see* Louis L. Jaffe, *Suits Against Governmental Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963) (concluding that "characteristically the [governmental] officer has been indemnified").

The more important question, but also the more difficult one, is how much indemnification actually goes on? Based on what little empirical and anecdotal evidence is available, it appears that indemnification of liability costs and legal fees, while not necessarily certain ex ante, is widespread in practice. *See* John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 811 (1979). Professor Jeffries, who has taught at the FBI Academy for nearly 20 years, reports that he "routinely" asks the classes of police officers if they "know personally of any case where an officer sued under § 1983 was not defended and indemnified by his or her agency." Professor Jeffries reports the uniform answer is "no," and "[i]f there were any real risk that police officers would be left to defend § 1983 actions on their own, this population would know it." Jeffries, *supra*, at 50 n.16.

13. *See* Jeffries, *supra* note 12, at 75.

14. Professor Jeffries offers the tentative conclusion that even with indemnification, the incentives of governmental actors are probably skewed, as compared to their private counterparts, due to certain peculiar features of government employment law and the political tendency to overestimate costs that appear as budget items and discount costs that fall elsewhere. *See id.* at 75-77.

15. Peter Schuck, who has provided the most nuanced and extensive account of the possible instrumental effects of governmental liability, argues for a regime of respondeat superior liability for governmental entities. *See generally* SCHUCK, *supra* note 10, at 82-121 (discussing problems with existing indemnification systems and suggesting a scheme of respondeat superior as an alternative). For additional arguments in favor of broader entity liability, see Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249 (arguing for respondeat superior liability or fault-based entity liability); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273 (1994) (arguing for respondeat superior liability when the governmental agent acts under the entity's authority); Harold S. Lowis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755 (1992) (proposing a modified respondeat superior liability for entities and fault-based liability for individual officials); Susannah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65

Such a regime could provide maximum incentives for governmental entities to train and monitor their employees while mitigating overdeterrence tendencies caused by fear of personal liability.[16] The legal regime we have instead has, on the one hand, rejected respondeat superior liability,[17] adopting more limited "custom or policy" liability for municipalities and absolute immunity for states.[18] On the other hand, assuming widespread indemnification, the regime has left individual officers *legally* vulnerable to damages actions within a world of *de facto* entity liability.

This Article seeks neither to refute nor to defend the instrumental argument for qualified immunity but rather to suggest that this explanation is only part of the story. Another important rationale for qualified immunity, described by the Supreme Court as independent from the instrumental one, is that it would be *unfair* to hold governmental officials to constitutional rules *they could not reason-*

N.C. L. Rev. 517 (1987) (arguing that Congress intended respondeat superior liability rather than the current liability scheme based on policy or custom); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935 (1989) (arguing that respondeat superior liability is the best means of providing for compensation and deterring constitutional violations under section 1983).

16. The Supreme Court made precisely these arguments in denying qualified immunity to municipalities. *See* Owen v. City of Independence, 445 U.S. 622, 651-52 (1980) (opining that the threat of entity liability would "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights" and suggesting that individual officials would not be overdeterred by entity liability).

17. It could be asserted that personal liability with indemnification would be equally as effective in decreasing the risks of overdeterrence as respondeat superior liability. I would argue, however, that there are important differences between the two regimes that bear on the issue of overdeterrence: First, even if indemnification is widespread, it is not automatic. To the extent that states and localities reserve the right to withhold indemnification on various grounds or delay the indemnification determination until the end of the action, officials face significant uncertainty about their individual situations. In addition, there may also be uncertainty as to the extent, quality, and terms of the legal defense available to officials who find themselves subject to suit. *See generally* SCHUCK, *supra* note 10, at 85-88 (discussing the wide variety of indemnity statutes and the types of limits imposed by each). Finally, officials themselves indicate significant aversion to being sued in their individual capacities, even when they are likely to be indemnified. *See* Jeffries, *supra* note 12, at 51 n.17. In sum, the uncertainties and anxieties that accompany personal capacity suits suggest that entity liability would be functionally very different from the current regime of personal liability with indemnification.

18. The Eleventh Amendment is the source of state sovereign immunity from section 1983 actions in federal court. The Supreme Court has held that Congress has the power to override state sovereign immunity pursuant to section 5 of the Fourteenth Amendment if Congress expresses in clear statutory language its intent to do so. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). In *Quern v. Jordan*, 440 U.S. 332 (1979), the Court held that section 1983 is not a sufficiently clear expression of congressional intent to abrogate state sovereign immunity. The Court has also held that states are not "persons" within the meaning of section 1983, precluding suits against state entities in state court. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

ably have known.[19] The fairness rationale suggests that sometimes notice or knowledge of the illegality of one's behavior[20] may be necessary for the imposition of section 1983 liability. Seeing qualified immunity through the lens of notice also implicates a useful comparison between section 1983 law and criminal law, the only other legal context where knowledge of the law seems to matter. At some level these two regimes seem to treat notice of illegality very differently. In criminal law, the requirement of fair notice has rhetorical appeal but the operating assumption is that ignorance of the penal law is not excused.[21] By contrast, in constitutional damages actions qualified immunity dictates that ignorance of the law—at least reasonable ignorance—will quite often be excused.

I argue, however, that the approaches to notice in section 1983 law and criminal law are more similar than they first appear and that we can learn much from the comparison: When it is recognized that criminal notice is a proxy for fault, the fault/notice connection can be exploited in the constitutional damages context with significant explanatory power. Moreover, while it might appear that notice of illegality plays a lesser role in criminal cases than in constitutional ones, notice is important in *precisely the same kinds of cases* in both contexts: where knowledge of illegality provides the element of fault necessary to justify the imposition of liability.

The Article proceeds as follows: Part II discusses notice in the criminal context. Although there is a well-articulated commitment to fair notice in criminal law, in only a relatively small category of cases—*Lambert v. California*[22] and its progeny, and a class of criminal regulatory cases—has notice of illegality been found to be determinative. That is because the requirement of notice in criminal law is a proxy for fault, and most of the time criminal fault arises from the

19. *See* Wood v. Strickland, 420 U.S. 308, 317-22 (1975) (discussing public official's "good faith" immunity).

20. I recognize, of course, that "notice" and "knowledge" are not the same thing. As will become apparent, what courts mean by "notice" in the qualified immunity context is that officials *knew or should have known*—either because the law governing their specific conduct was clear or because their behavior contained indicia of its own wrongfulness—that their conduct could lead te constitutional damages liability. Thus, as this Article will make clear, "notice" in this context means something less than actual notice, and "knowledge of illegality" includes constructive knowledge. *See* BLACK'S LAW DICTIONARY 314 (6th ed. 1990) (defining constructive knowledge as knowledge that exists if "one by exercise of reasonable care would have known a fact").

21. *See* John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207-10 (1985) (noting the conflict between the requirement of fair notice and the no-defense-for-ignorance rule).

22. 355 U.S. 225 (1957).

inherent "badness" of the prohibited conduct; no one needs a criminal statute to tell her that homicide or theft is unlawful. Notice becomes important as an independent inquiry, however, in cases where knowledge of illegality serves as the only element of blameworthiness that would justify criminal liability. Thus, courts have required knowledge of illegality—occasionally as a constitutional matter, but more often as a matter of statutory construction—when nothing in the nature of the crime or the defendant's circumstances served as an adequate signal of possible criminal liability.[23]

Part III takes the analytical framework developed in the criminal context—notice as a surrogate for fault—and applies it to coustitutional damages actions. Qualified immunity obtains unless the law was sufficiently clear to alert a reasonable official that her conduct was unlawful. The rationale for immunity in such cases is a matter of fairness: Governmental officials cannot fairly be blamed for violating rules they could not reasonably have known. My thesis is that the "clearly established law" inquiry is a surrogate for fault in much the same way that fair notice ensures against liability without fault in the criminal context. In qualified immunity analysis, the clarity of the law is a proxy for the official's subjective intent: If the law governing her actions was clear, it may be assumed that any reasonably conscientious official would have known and obeyed it, whereas an official who acted in good faith under law that provided inadequate guidance is not blameworthy.

Applying the paradigm from criminal law, one would expect a defense of qualified immunity when knowledge of illegality is an essential element of the wrongfulness of the defendant's conduct. Many actions that could give rise to section 1983 suits fall into that category. Much of constitutional law—for example, the complex rules governing searches and seizures, the situation-specific requirements of due process, and the regulation of speech by public employers—is relatively unpredictable and unclear in its application to particular circumstances. In those contexts there is frequently very little distinction between constitutional as opposed to unconstitutional conduct. For example, an illegal search is often not very different from a law enforcement action that would not only be lawful, but that society would wish to promote. Officials who make reasonable legal judgments that are later adjudicated unconstitutional may not be sufficiently blameworthy to warrant the imposition of constitutional damages liability. In such cases it is easy to see why a defense of qualified

23. *See infra* notes 102-42 and accompanying text.

immunity—excusing a failure to know the law—would be available. The above-described rationale for qualified immunity only holds, however, when nothing else inherent in the defendant's conduct or circumstances makes her behavior wrongful *apart* from knowledge of illegality. This explains why qualified immunity often drops out of the analysis when the underlying claim requires a showing of bad intent, such as intentional racial discrimination or deliberate indifference to a prisoner's serious medical needs. The argument that qualified immunity is unnecessary in such cases, however, is not based solely on the intentionality of the official's conduct. It also rests on the notion that conduct such as invidious racial discrimination contains indicia of its own wrongfulness: Today, discrimination against someone because she is African-American or Hispanic is viewed as inherently and obviously "bad" behavior, obviating the need for qualified immunity in a case alleging such discrimination. By contrast, in a case alleging intentional "benign" discrimination in college admissions, where there is legal and societal uncertainty surrounding the propriety of affirmative action, qualified immunity might be justified and ignorance of the law excused.

Parts II and III of the Article demonstrate that there is much to be learned by viewing qualified immunity through a lens derived from criminal law in which notice of illegality serves as a proxy for fault. Part IV posits that the fault/notice connection may also provide an answer to a puzzling feature of section 1983 law and provide a normative "link" between Parts II and III. On the one hand, the Supreme Court has repeatedly stressed the importance and value of individual, fault-based liability, resisting scholarly criticism of the Court's refusal to embrace respondeat superior liability. On the other hand, governmental employers routinely indemnify their employees for the costs of liability, creating a de facto (if not de jure) entity liability in which the blameworthy individual rarely bears the monetary burden. This Part offers an explanation for the apparent incongruity between the Court's asserted commitment to individual liability and the functional entity liability created by indemnification. I find the beginnings of an answer in the recent case of *United States v. Lanier*, in which the Supreme Court drew an explicit parallel between qualified immunity law and fair notice in criminal law.[24] An important

24. 117 S. Ct. 1219, 1227 (1997). The *Lanier* Court contended that "the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . *the same protection* from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* (emphasis added).

rationale for eschewing penal liability without fair notice—in other words, without fault—is that a criminal conviction entails moral stigma, and defendants should not be subjected to societal opprobrium and the risk of incarceration unless they are blameworthy. I argue that constitutional damages liability also entails a level of societal condemnation or stigma because constitutional violations are different from, and worse than, other kinds of civil violations. I argue, further, that fault-based, individual liability—in which a particular official is identified as a "constitutional wrongdoer"—serves a moral blaming function that has independent value regardless of who ultimately bears the financial cost of liability.

II. NOTICE AND MENS REA IN CRIMINAL LAW

A. *The Role of Notice*

The doctrine of notice in criminal law stands for the idea that crimes must be defined in advance so that individuals have prior warning of what is forbidden. The notice requirement is understood to be a matter of fundamental fairness: Citizens must be informed of their legal obligations lest they unwittingly find themselves in violation of the law and subject to criminal punishment.[25] Concerns about notice have been invoked to justify a number of related doctrines. For example, the principle of legality requires that crimes be defined ahead of time by legislatures—and not created ad hoc by courts—in order to provide advance notice of the law's demands. The vagueness doctrine prohibits criminal statutes that do not clearly set out what is forbidden. The rule of lenity requires that ambiguous criminal statutes be construed in order to avoid an interpretation that could take the defendant by surprise.[26] As Professor Jeffries has persuasively argued, however, the broad rhetoric of fair notice is misleading if one is looking for a commitment to anything like "actual notice."[27] For example, the notice requirement is deemed satisfied with the mere

25. *See* United States v. Cardiff, 344 U.S. 174, 176 (1952) (stating that a lack of notice sets "as much of a trap for the innocent as the ancient laws of Caligula").

26. *See also Lanier*, 117 S. Ct. at 1225 (listing the vagueness doctrine, the canon of strict construction, and non-retroactivity as manifestations of the fair warning requirement). *See generally* Jeffries, *supra* note 21, at 205-06 (discussing how notice underlies the relationship between the principle of legality, the void for vagueness doctrine, and the rule of strict construction).

27. *See* Jeffries, *supra* note 21, at 205-12.

publication of the laws, no matter how inaccessible the source.[28] Moreover, concerns about notice can be cured by judicial construction, even if the interpretation appears in very old cases or amounts to a virtual rewriting of the statutory text.[29] And perhaps most significantly, the person who acts in honest ignorance of the law's commands is out of luck: Ignorance of the law is ordinarily not an excuse for violating a penal statute.[30]

This is not to conclude, however, that ideas of notice are unimportant to the scope of criminal liability. The core notion behind the requirement of fair notice is that penal sanctions should not be imposed for behavior[31] that the ordinary, law-abiding citizen would have no reason to think violated the law.[32] In other words, citizens should not be subject to criminal liability—including the risk of incarceration and moral stigma—unless the prohibited conduct would be "blameworthy in the average member of the community."[33] As will be explained more fully below, fair notice is a way of ensuring that criminal liability is not imposed without fault. Most of the time criminal fault—the measure of blameworthiness required to justify penal sanctions—is satisfied without any separate inquiry into whether the defendant knew that her actions could constitute a violation of criminal law.[34] Notice or knowledge of illegality[35] does,

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28. *See id.* at 207.

29. *See generally id.* at 206-08 (arguing that the actual administration of the vagueness doctrine often contradicts the notice rationale).

30. Some jurisdictions permit an iguorance excuse if the government has affirmatively misled the defendant. For example, the Model Penal Code, which has been adopted with modifications in a significant number of states, provides that mistake as te criminality is exculpatory where the defendant:

> acts in reasonahle reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion, or judgment; (iii) an administrative order or grant of permission; or (iv) an official intorpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

MODEL PENAL CODE AND COMMENTARIES § 2.04(3)(b) (Official Draft and Revised Comments 1985) [hereinafter MODEL PENAL CODE]. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.02, at 150-57 (2d ed. 1995) (describing circumstances in which mistakes of criminal law have been permitted under common law).

31. I use the words "behavior" and "conduct" interchangeably in this Article to include all elements of the criminal offense, including any required state of mind.

32. *See* Jeffries, *supra* note 21, at 211.

33. Lambert v. California, 355 U.S. 225, 229 (1957) ("A law which punished conduct which would not be blameworthy in the average member of the community would be teo severe for that community to bear.").

34. I am using words such as "fault," "wrongdoing," and "blameworthiness" to signify legal culpability, as in the violation of a legal norm of which the actor knew or should have known. *See generally* Jeffries, *supra* note 8, at 96 n.49 (using "fault" and "wrongdoing" in the conventional legal sense); Michael S. Moore, *"The Moral Worth of Retribution", in*

however, become important as an independent inquiry when it serves as the only element that makes the prohibited conduct blameworthy.

Criminal prohibitions against homicide, assault, theft, or rape, for example, require no separate notice inquiry because "no sane defendant [could plausibly plead] ignorance that the law forbids killing a human being or forced intercourse or taking another's property or burning another person's house."[36] There is broad societal agreement about the inherent wrongfulness of such conduct and the blameworthiness of those who engage in it.[37] Knowledge of prohibi-

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RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PHILOSOPHY 181 n.1 (Ferdinand Schoeman ed., 1987).

35. For a discussion of what the courts mean by "knowledge of illegality," see *infra* note 64.

36. HALL, *supra* note 1, at 384. As Professor Hall noted:

> A plea of ignorance or mistake of law is rarely encountered in prosecutions for serious crimes; it is raised almost solely in relation to minor offenses. . . . In the relatively few cases of major crimes where ignorance of law was pleaded, no challenge was raised concerning the validity of the moral principle generally implied, but it was claimed that the situation in which the defendant acted was "exceptional."

Id.

37. Of course the set of behaviors that would be considered by most people to be "bad" or "wrongful" is, at least to some degree, contingent on changes in legal and social norms. I think it is fair to say, however—and many criminal law scholars over the years have so argued—that much of traditional criminal law embodies basic moral principles upon which there is, and has been over time, general and widespread agreement. Criminal prohibitions against homicide, assault, rape, and certain kinds of theft fall into that category. *See, e.g.*, Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 20, 21 (1957) (noting that "the criminal law represents certain moral principles" and that it tends to be restricted to "conduct that is plainly immoral and widely disapproved"); Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) ("[Criminal conduct] is conduct which, if duly shown to have taken place, will incur the formal and solemn pronouncement of the moral condemnation of the community."); Moore, *supra* note 34, at 181 n.1 (noting that "most serious crimes are also serious moral breaches"). On the other hand, it is surely true that what is generally understood to be wrongful changes over time: Some conduct once thought by most people to be blameworthy is no longer regarded with the same opprobrium. Adultery and fornication are examples of conduct that were once more widely viewed as wrongful than they are today. Indeed, although many states continue to keep adultery and fornication statutes on the books, they are only rarely invoked. The notion of inherent wrongfulness is also contingent in the other direction: As new norms of behavior are embodied in law and thus become part of the socialization of ordinary citizens, these norms define additional behaviors that ordinary citizens would know to be wrongful. For example, a governmental official who failed to hire based on race or an ordinary citizen who dumped raw sewage into a river would be expected to "know better" in light of modern legal and societal views about racial discrimination and environmental regulation. That what is deemed "inherently wrongful" is contingent on changing norms of behavior does not undermine the point that, at any time, some conduct is widely regarded as wrongful. *See generally* Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965) (discussing the relationship between popular morality and the use of criminal sanctions in regulating business practices); Susan L. Pilcher, *Ignorance, Discretion, and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 35-39 (1995) (urging that the contingent nature of blameworthiness argues for inviting defendants to raise a defense of "apparent innocence" that would be decided by a jury).

tions against such crimes, moreover, "results not from men's learning criminal law as amateur lawyers, but from the significance of the public condemnation of, and imposition of punishment for, certain highly immoral acts."[38] Regardless of any knowledge of the actual content of the written criminal law, the defendant who commits such violations knew, or should have known, better. Thus, when it comes to criminal offenses against persons or property that violate basic notions of morality and civility, notice or knowledge of illegality[39] can plausibly be presumed and ignorance of the law is ordinarily not excused. In such cases the blameworthiness that inheres in the prohibited behavior makes unnecessary any additional inquiry into questions of notice.

It is important to recall at this juncture that an essential component of the blameworthiness of criminal behavior is the requirement of "mens rea" or a "guilty mind."[40] Moreover, as I will explain more fully below, the requirement of mens rea is closely related to issues of notice. Mens rea involves the question of whether the defendant had the requisite state of mind—defined in terms such as malice, willfulness, intent, knowledge, recklessness, or negligence[41]—as to one

38. HALL, *supra* note 1, at 381; *see* Jeffries, *supra* note 21, at 211 (concluding that fair notice is not about "whether a trained professional, given access to the appropriate sources and the time to consider them, would have foreseen the application of the law"); Dan M. Kahan, *Ignorance of Law Is An Excuse—But Only for The Virtuous*, 96 MICH. L. REV. 127, 147 (1997) (arguing that the criminal law "embodies moral norms that have an existence independent of the law itself").

39. It should be clear already that what courts mean by "fair notice" is something less than actual notice and "knowlege of illegality" includes constructive knowledge. *See supra* note 20.

40. Since at least the 12th century it has generally been accepted that mens rea is essential te the imposition of criminal liability. *See* RICHARD J. BONNIE ET AL., CRIMINAL LAW 116 (1997); *see also* JOEL PRENTISS BISHOP, CRIMINAL LAW § 287 (9th ed. 1930) ("It is therefore a principle of our legal system, as probably it is of any other, that the essence of an offense is the wrongful intent, without which it cannot exist."). Early conceptions of mens rea had the flavor of "general moral blameworthiness" which apparently entailed an "unfocused judgment about the general character and disposition of the actor." BONNIE ET AL., *supra*, at 118. Over time the requirement of mens rea in the sense of "moral guilt came to be supplanted by the requirement of specific forms of intent evolved separately for each particular felony." Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1019 (1932). *See generally id.* at 988-94, 1017 (tracing the historical development of mens rea and concluding that the meaning of mens rea has evolved "to mean, not so much a mind bent on evil-doing in the sense of moral wrong . . . as an intent to do that which unduly endangers social or public interests"). The vocabulary of general moral blameworthiness, however, has continued to persist in mens rea terms such as "bad faith," "evil intent," "evil disposition [or] wrong or unlawful purpose," and "evil heart or purpose." *See generally* BONNIE ET AL., *supra*, at 119.

41. One of the major contributions of the Model Penal Code was its use of a limited number of carefully defined culpability terms—purpose, knowledge, recklessness, and negligence—to replace the myriad and imprecise range of mens rea terms employed by the common law. *See generally* PAUL ROBINSON, CRIMINAL LAW § 4.1, at 211-12 (1997).

or more elements of the crime. The concept of mens rea includes two distinct, but closely related ideas:[42] First, the defendant must be *aware of the facts* that make her conduct criminal.[43] For example, a defendant who is convicted of transporting a hazardous substance in a manner not consistent with federal regulations must know (or have reason to know) that she was shipping sulfuric acid and not distilled water.[44] Similarly, an individual who honestly believed that the property she allegedly stole was not the property of another would not be guilty of theft.[45] As criminal law theorists frame it, this notion of mens rea, often called "ignorance or mistake of fact," is a limitation on criminality in either of two ways: It excuses in the general sense that proof that the defendant was mistaken about a fact "demonstrates that, despite all appearances, he acted in a morally blameless manner."[46] Alternatively, it exculpates in the specific sense of negating a particular element of mens rea contained in the definition of the crime charged.[47] The other notion of mens rea is *awareness of wrongdoing*.

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42. *See generally* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 108-09.

43. The notion that mens rea requires at least some conscious appreciation of the relevant facts suggests a state of mind defined by intent, knowledge, or at least recklessness. All of these terms implicate some "state of awareness" of conduct or circumstances. MODEL PENAL CODE, *supra* note 30, § 2.02 cmt., at 240. Negligence, on the other hand, is exemplified by the actor who "inadvertently creates a substantial and unjustifiable risk of which he ought to be aware." *Id.* Liability for negligence attaches "if given the nature and degree of the risk, his failure to perceive it is, considering the nature and purpose of the actor's conduct and the circumstances known to him, a gross deviation from the care that would be exercised by a reasonable person in his situation." *Id.* at 240-41. There is some debate about whether a showing of negligence as to one or more elements of the crime is enough to justify criminal liability. *See generally* HALL, *supra* note 1, at 133-41 (arguing that negligence should not suffice for penal liability); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 36, at 100-03 (2d ed. 1961) (arguing that negligence does not satisfy the ordinary requirement of criminal mens rea); Packer, *supra* note 42, at 143-45 (viewing "negligence as an extension of rather than a departure from the values symbolized by the *mens rea* concept" and embracing occasional use of the negligence standard in criminal law). The Model Penal Code, however, has embraced negligence as sufficient to satisfy the requirement of mens rea:

> [N]egligence as here defined, should not be wholly rejected as a ground of culpability that may suffice for purposes of penal law, though it should properly not generally be deemed sufficient in the definition of specific crimes and it should often be differentiated from conduct involving higher culpability for the purposes of sentence.

MODEL PENAL CODE, *supra* note 30, § 2.02 cmt., at 243-44. The Model Penal Code default rule when no mens rea is specified for an element of the offense is recklessness. *Id.* § 2.02(3), at 226.

44. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563-64 (1971).

45. *See* Morissette v. United States, 342 U.S. 246 (1952).

46. DRESSLER, *supra* note 30, § 12.02, at 134. The defendant who transports sulfuric acid, reasonably believing it to be distilled water, falls into this category.

47. The distinction between these two approaches depends upon whether the crime at issue is a "general intent" crime, where courts apply the "culpability" approach to mistake of fact, or a "specific intent" crime, where courts apply an "elemental" approach. *See generally id.* § 12.02-.03, at 134-36 (contrasting specific intent, general intent, and strict liability offenses).

For example, does the defendant who shipped sulfuric acid know that there is a legal rule that makes her conduct criminal? It is "hornbook law" that although ignorance or mistake of fact[48] negates criminal liability, ignorance or mistake of criminal law—as we have already seen—ordinarily does not.[49]

It is generally accepted that some minimal level of mens rea is essential to the imposition of criminal liability.[50] Quite often, moreover, mens rea or mental awareness as to one or more elements of the

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For an example of the latter approach, consider a defendant being tried under a statute penalizing anyone who "knowingly converts the property of another." The defendant who honestly believed that the property she allegedly stole was her own would lack the required mens rea of knowledge. *See, e.g.*, *Morissette*, 342 U.S. at 252 (holding that conviction for knowingly converting federal property required that the defendant know the property was not abandoned and noting that by requiring "mental culpability" courts have "sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes"). In such cases, "a mistake-of-fact claim is not a true defense but simply a failure of the prosecutor to prove an essential element of the crime." DRESSLER, *supra* note 30, § 12.02, at 135.

48. There has been much ink spilt in discussing and categorizing various kinds of legal and factual mistakes. One of the difficulties is that there is not always agreement about whether a particular mistake is one of fact or one of (non-criminal) law and sometimes the distinction seems to be only one of characterization. For example, was the mistake in *Morissette*, 342 U.S. at 246, a mistake of fact or a mistake of property law? The defendant claimed that he believed the property he allegedly converted—spent bomb casings from military exercises—had been abandoned. *Id.* at 248-49. Characterized one way, the mistake appears to be one of fact: Morissette thought the government had discarded the bomb casings and left them for anyone to take. Just as plausibly, however, Morissette's mistake could be described as one of non-criminal law: He did not realize that the casings were government property. *See generally* BONNIE ET AL., *supra* note 40, at 134 & 165. In *Morissette* (and other cases involving specific intent crimes) the characterization does not matter because both mistakes of fact and mistakes of non-criminal law excuse the defendant if the mistake negates the specific intent required by the governing statute. As to general intent crimes, however, the usual common law rule is that while mistakes of fact are exculpatory, analogous mistakes of non-criminal law are not. For example, in some states a woman could be convicted under a bigamy statute for marrying a man whose divorce turned out to be invalid (mistake of non-criminal law), *see* State v. Woods, 107 Vt. 354, 357 (1935), but not for marrying a man who fraudulently represented himself to be unmarried (mistake of fact), at least if her belief was reasonable. *See* State v. Audetto, 81 Vt. 400, 404 (1908). Treating these two cases differently is hard to reconcile, and courts have not provided much in the way of rationale save for the "reflexive invocation of the principle that 'ignorance of the law is no excuse.'" BONNIE ET AL., *supra* note 40, at 166; *see* HALL, *supra* note 1, at 377 (arguing that the "crucial difference is not between fact and law, but between what is and what is not morally significant"). The Model Penal Code quite sensibly treats mistakes of fact and non-criminal law as equally exculpatory to the extent that either mistake negates mens rea as to a material element of the offense. *See* MODEL PENAL CODE, *supra* note 30, § 2.04(1), at 267; *see also* DRESSLER, *supra* note 30, § 13.02, at 157 (arguing that "one who believes that her conduct is lawful, based on a reasonable mistake of law, has acted without culpability as to her mistake and, therefore, should be acquitted").

49. *See* Packer, *supra* note 42, at 108-09.

50. Although there is some controversy over whether negligence is enough to justify criminal liability, *see supra* note 43, most of the controversy surrounds the question whether strict liability can be the basis for criminal sanctions. *See infra* note 79. Importantly, however, while the law virtually always requires some level of mens rea as to one or more of the elements of the crime, mens rea as to the *fact of illegality* is ordinarily not required.

crime will be crucial to distinguishing blameless from blameworthy behavior.[51] As the following examples illustrate, the requirement of mens rea is closely related to ideas of fair notice. For example, mistakes that negate mens rea are exculpatory because a defendant who acts "under circumstances that make the act criminal, but . . . is unaware of those circumstances, surely . . . has not had fair warning that [her] conduct is criminal."[52] Similarly, one of the primary objections to "strict criminal liability"—liability without mens rea[53]—is that it could cause ordinarily law-abiding citizens to stumble innocently into criminal behavior. Thus statutes that impose liability without adequate mens rea and those that provide insufficient notice suffer from the same defect: They may describe conduct that has no "built-in" indicia[54] of blameworthiness.

When criminal law "faithfully reflect[s] prevalent community standards of minimally acceptable conduct," as in prohibitions against homicide or assault, it is not difficult to reconcile the principle that ignorance of the law is no excuse with the notion that mens rea is essential to justify criminal liability.[55] The problem occurs in situations involving minor or regulatory offenses, many of which criminalize conduct under circumstances where the fact of illegality may not be known, or even suspected, by the ordinary, law-abiding citizen.

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51. *See generally* BONNIE ET AL., *supra* note 40, at 114-68, 173 ("One of the major functions of the mental element in crime is to draw the line between criminal and non-criminal behavior."); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933) ("Acts alone are often colorless; it is the state of mind which makes all the difference between innocence and criminality."); Richard A. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 363-73, 380-88 (1989) (identifying a trend in American criminal law toward a tolerance of negligent or strict liability crimes as a decline in "criminal law's concern with moral blameworthiness"); *see, e.g.*, *Morissette*, 342 U.S. at 250 ("[The requirement of mens rea] is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

52. Packer, *supra* note 42, at 123.

53. *See infra* notes 71-84 and accompanying text (discussing strict liability crimes).

54. *See, e.g.*, Amicus Curiae Brief For Appellant at 11-12, Lambert v. United States, 355 U.S. 225 (1957) (No. 47) (urging reversal of defendant's conviction for violation of a registration statute on the ground that "neither the [defendant's] status nor her conduct provided any 'built-in' notice that she was committing a crime"). *See infra* notes 102-32 and accompanying text (discussing notice objections to regulatory offenses).

55. Packer, *supra* note 42, at 145. As Professor Hart noted:

> If the legislature does a sound job of reflecting community attitudes and needs, actual knowledge of the wrongfulness of the prohibited conduct will usually exist. Thus almost everyone is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of the wrongfulness can fairly be assumed. For any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct.

Hart, *supra* note 37, at 413.

This, in part, was the concern in *Lambert v. California*.[56] In *Lambert*, the defendant was convicted for violating an ordinance requiring felons, convicted in California or elsewhere, who remained in Los Angeles for more than five days to register with the police department.[57] The Supreme Court struck down the registration provision on the ground that the defendant lacked fair notice.[58] The problem with the ordinance was that remaining in Los Angeles without registering was not intrinsically bad behavior,[59] and "circumstances which might [have moved the defendant] to *inquire* as to the necessity of registration [were] completely lacking."[60] The Court concluded that the defendant's default was "entirely innocent" unless she had "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply."[61] In other words, the statute was defective because it posed a significant risk that the average, law-abiding citizen in the defendant's situation could inadvertently violate it.[62] Only "an

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56. 355 U.S. 225 (1957).

57. *See id.* at 226-27.

58. *See id.* at 229-30. There were several aspects of the registration statute that seemed to trouble the Justices: First, the statute punished an omission—failure to register—rather than a commission; second, it was based on the defendant's status—being a felon in Los Angeles—rather than on an activity; and third, the offense was malum prohibitum rather than malum in se. *See id.* at 228-29. Dressler suggests that *Lambert* could be read to require that all three of these factors be present before a statute raises fair notice concerns. *See* DRESSLER, *supra* note 30, § 13.02, at 153; *see, e.g.*, University Heights v. O'Leary, 429 N.E.2d 148, 151 (Ohio 1981) (rejecting due process challenge to firearms registration statute on the ground that the violation was active rather than passive, the nature of the activity signaled the possibility of regulation, and the gun registration law was not "solely for the convenience of law enforcement agencies"). The Court's lack of clarity, as well as its failure adequately to distinguish earlier cases such as *United States v. Balint*, 258 U.S. 250 (1922), *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Morissette*, 342 U.S. 246 (1952), has created significant confusion about how *Lambert* should be read. *See generally* Packer, *supra* note 42, at 120-22, 131-136, 149-50 (discussing the conflict between *Morissette* and *Balint* and the lack of resolution in *Lambert*).

59. *See Lambert*, 355 U.S. at 228 ("[The defendant's conduct] is unlike the commission of acts or the failure to act under circumstances that should alert the doer to the consequences of his deed."); *see also* United States v. Freed, 401 U.S. 601, 608 (1971) (noting as the salient factor in *Lambert* that "[b]eing in Los Angeles is not *per se* blameworthy").

60. *Lambert*, 355 U.S. at 229 (emphasis added). The Court continued:

> Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine te read or in a language foreign to the community.

Id. at 229-30.

61. *Id.* at 229.

62. *See generally* Jeffries, *supra* note 21, at 211-12 (stating that *Lambert* stands for the proposition that criminal liability is unacceptable "where the prototypically law-abiding individual in the actor's situation would have had no reason to act otherwise"); Kahan, *supra* note 38, at 147 (stating that the mistake of law defense protects persons who "make mistakes about [ ]

intention not to comply with the ordinance despite knowledge of its contents"[63] made the conduct in *Lambert* blameworthy; knowledge of illegality[64] served as a proxy for fault.

It should be noted that knowledge of illegality in the criminal context is not a "proxy" in the sense in which the term is sometimes used: Proxy often embodies notions of agency. For example, a "proxy" might describe an individual who represents and acts for a principal.[65] In a related use, proxy denotes a characteristic or circumstance, "*A*", that is employed to indicate the likely presence of another characteristic or circumstance, "*B*", because the two are thought to be highly correlated and *A* is easier to identify or measure than *B*. In this usage, a proxy is of interest because it is thought to be evidence of something else that is deemed important.[66] Knowledge of illegality in

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duties, which involve no independent moral obligation and which aren't a matter of common civic knowledge").

63. *See* Amicus Curiae Brief For Appellant at 13, Lambert v. California, 355 U.S. 225 (1957) (No. 47).

64. It is not always clear in the criminal cases exactly what the courts mean by "notice" or "knowledge of illegality"—whether actual knowledge, reason to know, or something else—and courts' definitions of notice seem to change, even within the same case. For example, in *Lambert*, the Supreme Court asserted that "[t]he question is whether a registration act of this character violates due process where it is applied to a person who has *no actual knowledge* of his duty to register, and where no showing is made of the *probability of such knowledge*." 355 U.S. at 227 (emphasis added). The same confusion between actual notice and negligent or reckless failure to know appears in the plurality opinion in *Screws v. United States*, 325 U.S. 91 (1945), in which the Court construed the criminal analogue of section 1983 to require knowledge of illegality. In *Screws*, the Court variously described the minimum required level of mens rea as "*specific intent* to deprive a person of a [clear] federal right," *id.* at 103 (emphasis added), "*purpose* to deprive the victim of a constitutional right," *id.* at 107 (emphasis added), and "act[ing] in *reckless disregard* of constitutional prohibitions or guarantees, *id.* at 106 (emphasis added). *See generally* BONNIE ET AL., *supra* note 40, at 117-18 (noting courts' inconsistency in construing mens rea terms in criminal statutes); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2179-93 (1993) (criticizing the plurality opinion in *Screws* for its imprecision in describing the level of mens rea required to avert vagueness concerns); Packer, *supra* note 42, at 132 (decrying courts' lack of clarity in discussing issues of notice and mens rea). I argue that taken together, the criminal cases stand for the idea that the defendant must either know, or have reason to know, that her conduct was blameworthy, a state of mind probably akin to gross negligence or recklessness.

65. BLACK'S LAW DICTIONARY, *supra* note 20, at 1126.

66. For example, race is sometimes used as a proxy for diversity. *See, e.g.*, Eugene Volokh, *Diversity, Race as a Proxy, and Religion as a Proxy*, 43 U.C.L.A. L. REV. 2059, 2059 (1996) (arguing that a "reasonable, unprejudiced decisionmaker could certainly conclude that race can sometimes be a useful proxy for . . . intellectual diversity"). Gender may be used (rightly or wrongly) as a proxy for charactoristics such as strength or sensitivity. *See, e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law As a Quest for Perfect Proxies* (copy on file with author) (discussing sex-respecting rules as proxies). Also, during World War II being Japanese-American was, sadly, used as a proxy for disloyalty. *See, e.g.*, Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative*

criminal law, however, is not only *evidence of fault*, it actually *constitutes fault* in cases where only defendant's conscious awareness of law-breaking makes her conduct blameworthy.[67] Knowledge of illegality fulfills the same function in cases like *Lambert* as is fulfilled by the inherent wrongfulness of offenses such as homicide and assault; it satisfies the requirement of criminal fault.[68]

Explicit constitutional holdings relying on *Lambert*-like reasoning, it must be conceded, occur relatively infrequently.[69] *Lambert* represents the unusual case where nothing in the defendant's circumstances would have led her *even to consider the possibility* of criminal

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Action for African Americans, 1 MICH. J. RACE & L. 165, 173 (1996) (noting that during World War II "race supposedly served as a proxy for disloyalty").

67. Notice in the qualified immunity context, however, *is* a proxy for fault in the more technical sense that "clearly established law" is a surrogate for subjective bad faith. *See infra* notes 223-26 and accompanying text.

68. The connection between mens rea and notice is more clearly articulated in the amicus brief filed for appellant in *Lambert* than it is in the Supreme Court's opinions. *See* Amicus Curiae Brief For Appellant at 12-20, Lambert v. United States, 355 U.S. 225 (1957) (No. 47). *See generally* Packer, *supra* note 42, at 129-33 (discussing Amicus Brief for Appellant in *Lambert*).

69. *See, e.g.*, Roberts v. Maine, 48 F.3d 1287, 1300 (1st Cir. 1995) (citing *Lambert* in overturning a defendant's conviction under a state statute mandating 48-hour incarceration for refusal to take a blood/alcohol test on the ground that "[a]bsent adequate notice that particular conduct has been criminalized, a person may not be convicted or punished for it"); Sisson v. United States, 630 F. Supp. 1026, 1032-33 (D. Ariz. 1986) (holding that a sergeant had no reasonable notice that he was in violation of an Air Force regulation requiring that officials receive permission before engaging in off-duty income producing activities); Hermanson v. State, 604 So. 2d 775, 776 (Fla. 1992) (holding that a state statute criminalizing child abuse and its spiritual treatment accommodation provision are, when taken together, ambiguous and result in a denial of due process because a "person of ordinary intelligence cannot be expected to understand the extent to which reliance on spiritual healing is permitted and the point at which this reliance constitutes a criminal offense"); State v. McKown, 461 N.W.2d 720, 723 (Minn. Ct. App. 1990) (affirming the dismissal of a manslaughter charge in the death of a child whose parents failed to obtain medical care on religious grounds because "[t]he manslaughtor statute gives no notice of when its broad proscription might override the seemingly contradictory permission given by the child neglect statute to treat the child by such spiritual means"); State v. Winkelman, 442 N.E.2d 811, 816 (Ohio Ct. App. 1981) (citing *Lambert* in overturning defendant's conviction under a state law prohibiting anyone who has been indicted for or convicted of a felony to possess a firearm on the ground that due process required notice of the defendant's inclusion in the class of persons covered by the statute). *But see, e.g.*, University Heights v. Seay, 718 F.2d 1279, 1284-86 (4th Cir. 1983) (upholding the conviction for defrauding the government of a federal beneficiary who failed to disclose her common law marriage when she was asked whether she had remarried); Walker v. Superior Court, 763 P.2d 852, 872 (Cal. 1988) (denying a due process challenge to a conviction for child abuse of parents who failed to obtain medical help for their child on the ground that "persons relying on prayer treatment must estimate rightly . . . the point at which their course of conduct becomes criminally negligent"); Hall v. State, 493 N.E.2d 433, 435 (Ind. 1986) (rejecting a due process challenge); Commonwealth v. Barnhart, 497 A.2d 616, 621, 627-28 (Pa. Super. Ct. 1985) (same); State v. Drummonds, 334 N.E.2d 538, 540-42 (Ohio Ct. App. 1975) (distinguishing *Lambert* and upholding the conviction under a statute prohibiting the possession of firearms by convicted felons because the statute required "knowing possession" and its purpose was to protect health and safety).

liability. Courts, however, often self-consciously construe criminal statutes and decide criminal cases so as to avoid criminalizing innocent conduct: conduct that a law-abiding citizen would have had no reason to suspect was unlawful. Thus, although *constitutional* holdings of lack of notice are relatively rare, the requirement of criminal fault and the connection reflected in *Lambert* between fault and notice are familiar and influential parts of the criminal landscape.[70]

Consider, in that regard, a category of crimes that have been labeled "public welfare"[71] or "regulatory" offenses. Unlike most traditional crimes, regulatory crimes frequently involve conduct that is not intrinsically wrongful, at least in the sense that homicide or assault is wrongful.[72] When public welfare offenses began to appear in American law in the early- to mid-nineteenth century,[73] some courts were willing to uphold criminal convictions under them without proof that the defendant knew or should have known the facts that made the conduct criminal.[74] Without the requirement of mens rea, the defendant in such cases lacked the blameworthiness ordinarily re-

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70. *See generally* Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1072 (1983) (discussing cases that reflect courts' "reluctance to criminally punish a person before fault has been established"); Sayre, *supra* note 51, at 55 (noting the "almost unbroken line of authorit[y]" that "the essence of an offense is the wrongful intent, without which it cannot exist"); Singer, *supra* note 51, at 372-73 (arguing that the Supreme Court has never explicitly held that criminality without mens rea is constitutional).

71. The term "public welfare offenses" was given currency in an article of the same name by Professor Sayre in 1933. *See* Sayre, *supra* note 51, at 55. Although a number of scholars had recognized the trend toward criminal regulatory liability, Sayre's article was the first to suggest that "a new kind of criminal offense might have been established." *See* Singer, *supra* note 51, at 373 (arguing that Sayre's article was "enormously influential" and that "its own mistakes were perpetuated for many years to come").

72. This distinction is reflected in the labels "malum in se"—describing behavior that is wrong in itself—and "malum prohibitum"—describing acts that are wrong because they are prohibited. *See generally* HALL, *supra* note 1, at 337-42 (discussing the origins and historical development of the distinction); Perkins, *supra* note 70, at 1072-77 (same).

73. The earliest examples of criminal regulation in American law were state and local penal sanctions involving the sale of liquor and adulterated milk. *See generally* Sayre, *supra* note 51, at 63-65 (discussing early criminal regulation).

74. For example, in a number of states, selling liquor to a minor could lead te criminal liability—no matter how careful or reasonable the defendant had been—if the buyer turned out to be underage. *See* Singer, *supra* note 51, at 365. By the mid- to late-nineteenth century some courts had extended criminal regulatory enforcement without proof of mens rea from liquor and adulterated milk te other kinds of police regulations. *See* Sayre, *supra* note 51, at 66 n.43. Sayre argues that the growth of the criminal "public welfare offense" came about at a time when:

> the demands of the increasingly complex social order required additional regulation of the administrative character unrelated to questions of personal guilt.... [T]he new emphasis being laid upon the protection of social interests fostered the growth of a specialized type of regulatory offense involving a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of the innocent individual defendants and punish without proof of guilty intent.

Id. at 67-68.

quired to justify criminal liability.[75] The advent and proliferation of criminal liability in this class of cases[76]—sometimes called "strict liability" crimes[77]—was met with unease in the courts[78] and controversy in the literature.[79] The dispute over criminalization of regulatory misbehavior, though often framed in terms of mens rea, impli-

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75. *See* Sayre, *supra* note 51, at 67 (noting that public welfare offenses used the machinery of criminal law to enforce "a new type of twentieth century regulatory measure involving no moral delinquency").

76. *See infra* notes 80-82 (suggesting that strict liability crimes were not as prevalent as some scholars argue).

77. As a number of commentators and courts have pointed out, much of what is called "strict liability" is not actually liability without *any* mens rea: "Indeed, there is no such thing as a 'strict liability' offense except in terms of a partial rather than a complete discarding of *mens rea*, since there is always some element of any offense with respect to which a mental element is attached." Packer, *supra* note 42, at 140. For example, bigamy and statutory rape are often regarded as examples of strict criminal liability. But in both cases, it is the exclusion of mens rea *as to a circumstance element*—in the bigamy context, the circumstance that one or both parties is still legally married to someone else, and as to statutory rape, the circumstance that the alleged victim is under the age of consent—that results in the strict liability characterization. Two other important examples of strict liability for "real crimes" as opposed to regulatory crimes, are felony-murder and misdemeanor-manslaughter statutes. These statutes impose liability for homicide without evidence of mens rea as to the result, i.e., the death of the victim. *See, e.g.*, Staples v. United States, 511 U.S. 600, 607 n.3 (1994) (noting that "the term 'strict liability' is really a misnomer" as applied to offenses construed to require the defendant to know, for example, that he is "dealing with some dangerous or deleterious substance"). *See generally* BONNIE ET AL., *supra* note 40, at 199-202; Packer, *supra* note 42, at 140-42 (discussing felony-murder and misdemeanor-manslaughter rules). Real strict liability would mean that the "sole question put to the jury is whether the jury believes the defendant to have committed the act proscribed by the statute." Richard A. Wasserstrom, *Strict Liability in Criminal Law*, 12 STAN. L. REV. 731, 733 (1960).

78. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 256 (1952) (noting that courts have had "misgivings" about enforcing criminal liability without fault for public welfare offenses); People *ex rel.* Price v. Sheffield Farms-Slawson-Decker Co., 121 N.E. 474, 476-77 (N.Y. 1918) (Cardozo, J.) (justifying conviction for mala prohibita violations only because they were punishable by moderate fine and no imprisonment); MODEL PENAL CODE, *supra* note 30, § 1.04 cmt., at 72 (noting that imprisonment is never appropriate for malum prohibitum offenses).

79. *See, e.g.*, Perkins, *supra* note 70, at 1081 (arguing that the "modern trend," even as to mala prohibita offenses, is te require mens rea and that strict liability for crimes malum in se "catapult[s] us back te the dark ages"). Among the literature discussing strict liability, see, for example, HALL, *supra* note 1, at 342-59 (refuting arguments for strict criminal liability); WILLIAMS, *supra* note 43, at § 89, at 255-61 (discussing arguments for and against strict criminal liability); Hart, *supra* note 37, at 422-25 (arguing against strict liability); Gerhard O. W. Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34 (1955) (analyzing mens rea and mala prohibita crimes); Ingeberg Paulus, *Strict Liability: Its Place in Public Welfare Offenses*, 20 CRIM. L.Q. 445 (1978) (defending the use of strict liability for public welfare offenses); G. L. Peiris, *Strict Liability in Commenwealth Criminal Law*, 3 LEGAL STUD. 117 (1983) (comparing strict liability doctrines in Canada, Australia, New Zealand, South Asia, and Africa); Sayre, *supra* note 40, at 974 (tracing the development of the mens rea requirement); Singer, *supra* note 51, at 389-407 (responding to the arguments in favor of strict liability); W.T.S. Stallybrass, *The Eclipse of Mens Rea*, 52 LAW. Q. REV. 60 (1932) (discussing mens rea requirements and strict liability); James E. Starrs, *The Regulatory Offense in Historical Perspective*, *in* ESSAYS IN CRIMINAL SCIENCE 235 (Gerhard O.W. Mueller ed., 1961) (arguing against strict liability for regulatory offenses); Wasserstrom, *supra* note 77, at 731 (rejecting the argument that all strict liability is unjustifiable).

cates precisely the kinds of concerns raised in *Lambert*: Defendants who violate regulatory statutes that do not require proof of mens rea as to particular elements of the defendant's conduct or circumstances may have no reason to think they are acting unlawfully. In other words, they may be wholly innocent of criminal wrongdoing.

While strict criminal liability was apparently tolerated to some degree by state courts in the mid-nineteenth and into the twentieth century, it remained controversial. Strict liability was also less common than was once thought[80] and it was largely limited to particular contexts.[81] Moreover, for precisely the reasons outlined above, courts frequently found ways to avoid enforcing regulatory crimes without mens rea[82] and, in more recent times, the drafters of the Model Penal Code have taken a strong position against the imposition of strict criminal liability.[83]

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80. In an exhaustive review of the history of public welfare offenses, Singer disputes the conclusions of Sayre and others as to the widespread proliferation of strict criminal liability in the nineteenth and twentieth centuries. *See generally* Singer, *supra* note 51, at 363-88. Singer argues that the majority of strict liability offenses in the late nineteenth century dealt with the control of liquor and the protection of minors and not with public health or welfare. *See id.* In addition, he argues that many courts continued to require a showing of guilty knowledge in such cases and many allowed a defense of reasonable mistake. *See id.* Singer concludes that the so-called "'explosion' of strict liability during the latter part of the ninetoenth century is exaggerated, at best." *Id.* at 363. In the last 30 years of the twentieth century, as well, Singer observes a "marked movement away from strict liability criminality" highlighted by the Model Penal Code's rejection of strict liability crimes. *Id.* at 374.

81. Singer points out that of the cases cited by Sayre in support of his conclusion that strict liability in the ninetoenth century was widespread, 30% involved the regulation of liquor and another 10% concerned either the transportation of liquor or the corruption of minors. *See id.* at 368. Far from supporting the conclusion that "the nineteenth century blossomed in strict liability criminal statutes," according te Singer, "a fairer reading of the cases shows that, [only] in a few isolated areas, almost all of which were the obvious targets of specialized political forces (what teday would be called one-issue intorest groups), there were decisions favoring the imposition of criminal liability without requiring *mens rea*." *Id.* at 372.

82. *See generally* Packer, *supra* noto 42, at 149 (noting as "encouraging evidence" that state courts are paying more attention to the "centrality of *mens rea*" and that state courts are willing to invalidate legislation that is construed to dispense with mens rea and are less willing to assume the "dogma that legislatures mean to dispense with *mens rea* by failing explicitly to provide for it"); Perkins, *supra* note 70, at 1078-79 (arguing that mala prohibita crimes are not generally enforced on the basis of liability without fault because, although fault is presumed, the defendant can introduce exculpatory evidence to establish the lack of fault); Singer, *supra* note 51, at 363-73, 380-89 (citing instances in which courts mitigated strict liability by requiring knowledge or by permitting reasonable mistake as a defense).

83. The drafters of the Model Penal Code rejected strict liability crimes, permitting only strict liability "violations," which are punishable by fine, forfeiture, or other civil penalty and conviction of which does not give rise to the disabilities that accompany a criminal conviction. *See* MODEL PENAL CODE, *supra* note 30, §§ 1.04(5) & 2.05, at 66 & 281. The drafters opted for negligence as the minimal requirement of criminal intent with a default rule of recklessness where the statute is silent on mens rea as te any particular element of the crime. *See id.* § 2.02, at 225-26. *See generally* Singer, *supra* note 51, at 380-89 (discussing the influence of the Model Penal Code in the debate over strict liability).

In a series of modern federal regulatory cases, which I discuss below, the courts have again confronted instances of criminal liability in which defendants may lack the degree of culpability ordinarily required to support penal sanctions. In these cases notice of illegality—mens rea as to the *content of the law*—has served as a lightning rod for concerns about criminalizing innocent behavior.[84]

B. Notice as a Proxy for Fault

In a series of cases construing federal criminal regulatory statutes, the Supreme Court has taken two seemingly conflicting approaches to issues of notice: In one group of cases involving so-called "public welfare offenses"—for example, possessing unregistered hand grenades,[85] shipping mislabeled drugs or chemicals,[86] or transporting dangerous chemicals through congested, metropolitan areas[87]—the Court has taken a "traditional crimes" approach, upholding criminal sanctions with no explicit inquiry into the defendant's knowledge of illegality. By contrast, in another group of cases—involving, for example, tax offenses,[88] unauthorized use of food stamps,[89] and structuring of currency transactions[90]—the Court has required proof that the defendant knew her conduct was illegal. The difference between the Court's approaches in the two groups of cases rests on the connection between fault and notice.

The statutes at issue in these cases are problematic to the extent they target conduct that is not inherently wrongful. If nothing in the nature of the prohibited conduct, *even if done intentionally or knowingly*, would signal the defendant that her behavior was subject to regulation and might be illegal,[91] even a requirement of mens rea as te the *elements* of the crime may not ensure that the defendant is blameworthy. These cases are formally couched in terms of statutory

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84. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 207 (1991) (noting that criminalizing behavior that is not inherently culpable raises fair notice concerns).

85. *See* United States v. Freed, 401 U.S. 601, 607 (1971).

86. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971).

87. *See* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

88. *See* Cheek v. United States, 498 U.S. 192, 194 (1991).

89. *See* Liparota v. United States, 471 U.S. 419, 425 (1985).

90. *See* Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

91. LaFave and Scott make this point in discussing notice issues raised hy statutory vagueness. They argue that the requirement of scienter does not necessarily cure vagueness concerns hecause "it is possible willfully te bring about certain results and yet be *without fair warning* that such conduct is proscribed." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW § 2.3, at 130-31 (1986) (emphasis added).

construction: The Court purports to ask whether Congress *intended* the statutes at issue to require knowledge of illegality. The inquiry that explains the results in these cases, however, is whether, apart from such knowledge, the defendant can be deemed blameworthy. In other words, is there something about the violation or the defendant's circumstances that should have alerted her to the probability of regulation *or* is knowledge of illegality the only element of blameworthiness in the definition of the crime?

The group of cases involving so-called "public welfare offenses" is illustrated by *United States v. Freed*.[92] The defendant in *Freed* was convicted under a federal statute making it unlawful for any person "to receive or possess a firearm which is not registered to him."[93] The defendant tried to overturn his conviction by arguing that he did not know the hand grenades at issue were unregistered. The Court held that the only knowledge required to be proven was that the instrument possessed was a grenade, which fell within the statutory definition of "firearm."[94] The Court rejected the defendant's argument that the statute should be construed to require knowledge that possessing an unregistered grenade was illegal.[95] The Court reasoned that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[96] Unlike the conduct at issue in *Lambert*, possession of hand grenades is sufficiently unusual and dangerous that it cannot be said that "circumstances which might move one to inquire as to the necessity of registration are completely lacking."[97] As the Court explained in *United States v. International Minerals & Chemical Corp.*,[98] a case involving the transportation of

92. 401 U.S. 601 (1971).

93. 26 U.S.C. § 5861(d) (1968, Supp. V), *quoted in Freed*, 401 U.S. at 607.

94. *See Freed*, 401 U.S. at 607 (concluding that the district court should not have dismissed the indictment for lack of an allegation of scienter).

95. *See id.*

96. *Id.* at 609. Many of the firearms covered by the act were "major weapons" of a sort not generally used or possessed by ordinary citizens such as "machine guns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets and large caliber weapons including mortars, anti-tank guns, and bazookas." *Id.* at 616 (Brennan, J., concurring in the judgment).

97. Lambert v. California, 355 U.S. 225, 229 (1957).

98. 402 U.S. 558 (1971). In *International Minerals*, the defendant, a manufacturer of acid, was convicted of shipping sulfuric acid in interstate commerce in violation of federal regulations requiring certain information to appear on the shipping documents. The Court held that actual knowledge of the regulation was not required, reasoning that where "dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *Id.* at 564-65. Criminal liability of this sort against shippers of hazardous chemicals—sophisticated repeat players who are required by law to be conversant with legal regulations governing their trade—raises no concerns about criminalizing

sulfuric acid, regulation of hazardous materials or instrumentalities is not like regulation of "[p]encils, dental floss, [or] paper chips" which "may be the type of products [that] might raise substantial due process questions if Congress did not require . . . *'mens rea'* as to each ingredient of the offense."[99]

Criminal liability can be defended in cases like *Freed* and *International Minerals* on the ground that those who handle items which by their very nature pose an obvious risk to public safety should not be surprised to find those items are subject to regulation. The defendants in these cases were not in a position analogous to the defendant in *Lambert*, who had no reason even to *inquire* about the possibility of legal regulation of her mere presence in Los Angeles. Rather, the potential dangerousness of the defendant's product or activity was enough to signal the likelihood of legal obligations in connection with those products and activities. Under such circumstances the failure to know the applicable legal rules itself entailed some degree of fault.[100] In these cases notice is important in that the

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innocent behavior. *See also* United States v. Balint, 258 U.S. 250 (1922) (upholding a conviction for selling narcotics against defendant's claim that he did not know the drugs were covered by the federal act).

99. *International Minerals*, 402 U.S. at 564, 565. The Supreme Court's holding in *Staples v. United States*, 511 U.S. 600 (1994), is not to the contrary. In *Staples*, the defendant was convicted for possessing an unregistered firearm in violation of the same statute at issue in *Freed*. The weapon was a semi-automatic model that would not have required registration except that it had been modified—allegedly unbeknownst to the defendant—to enable it to fire automatically. *See id.* at 603-04. The Court held that the statute required knowledge of the automatic character of the weapon just as in *Freed* where the defendant had to "know" the item he possessed was a hand grenade and in *International Minerals* where the defendant had to know that he was transporting sulfuric acid rather than distilled water. *See id.* at 619. The Court reasoned that "there is a long tradition of widespread lawful gun ownership by private individuals in this country" which "did not apply to the possession of hand grenades." *Id.* at 610. Thus, without knowledge of the automatic nature of the weapon the statute would "impose criminal sanctions on a class of persons whose mental state—ignorance of the charactoristics of weapons in their possession—makes their actions entirely innocent." *Id.* at 614-15. The Court continued:

> Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in *Freed*. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential [alone] cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting [the statute] as not requiring proof of knowledge of a weapon's characteristics.

Id. at 611-12. Although *Staples* could be considered a case of mistake of fact rather than law, the point is that the Court read the statute to require a showing that the defendant knew *something* that would have alerted him to the likelihood that his weapon would be regulated; that was especially important where the penalty for violating the statute was 10 years in prison.

100. Defendants who commit regulatery offenses are at fault in the sense that there is a "conscious intent to engage in . . . [an] activity . . . which the defendant knew or should have

defendant had to know *something*, if only the likely existence of the regulatory statute or "sufficient facts to alert [her] to the probability of regulation of [her] potentially dangerous conduct."[101] Once it is established, however, that the defendant had *reason to know* her activities were subject to regulation, the defendant will not be heard to argue that she lacked fair notice. No separate inquiry into whether the defendant actually knew the legal rules is required.

In the second group of regulatory cases, however, the requirement of blameworthiness has been deemed to require *actual* knowledge of illegality. The Supreme Court reached that conclusion in a line of tax cases involving federal criminal prosecutions for "willfully" failing to pay income tax, file a return, keep certain records, or provide required information.[102] As noted above, it is ordinarily sufficient to satisfy the requirement of criminal blameworthiness that the prohibited acts were done with scienter, regardless of whether the defendant knew the acts were illegal.[103] In the tax context, however, the Court concluded that blameworthiness required "voluntary, intentional violation of a known legal duty."[104] In other words, only knowledge of the *illegality* of defendant's actions satisfied the requirement of criminal fault. The Court reasoned that the complexity of the tax laws created a trap for the innocent taxpayer who was seeking in good faith to comply.[105] Requiring knowledge of illegality would ensure that only blameworthy rather than merely

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known to be subject to criminal sanctions if certain consequences ensued." Wasserstrom, *supra* note 77, at 743. The Supreme Court explained in *Staples* that:

> In . . . situations [involving public welfare statutes] we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," he should be alerted to the possibility of strict regulation, and . . . the defendant [must] "ascertain at his peril whether [his conduct] comes within the inhibition of the statute."

511 U.S. at 607-08 & n.3; *see also* Morissette v. United States, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation [of a public welfare offense], usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."). It must be conceded that the fault being described here is that of failing to know the law; the defendant is being punished because she *should have known* better. *See generally* Hart, *supra* note 37, at 419 (arguing that "the crime of ignorance of the statutes or their interpretation" involves "blame of a very distinctive kind" that is "largely unrelated, in gravity or any other respect, to the external conduct itself, or its consequences, for which the actor is purportedly convicted"); Jeffries, *supra* note 21, at 209 (noting that if ignorance of the law is justified on the grounds that it creates an incentive to know the law, the "unawareness of illegality is itself the wrong" that is being punished).

101. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 522 (1994).

102. The first case in the series was *United States v. Murdock*, 290 U.S. 389 (1933).

103. *See supra* notes 36-39 and accompanying text.

104. United States v. Bishop, 412 U.S. 346, 360 (1973).

105. *See id.* at 360-61.

inadvertent violators would be subject to penal sanctions.[106] The Court solidly reaffirmed this view more recently in *Cheek v. United States*,[107] in which the defendant was convicted under statutory provisions imposing criminal liability on anyone who "willfully attempts in any manner to evade or defeat any tax imposed by [Title 26]" or who "fails to . . . make . . . a return."[108] The defendant in *Cheek* claimed that based on "indoctrination" he had received from attending seminars by anti-tax advocates (including lawyers giving advice on the constitutionality of the income tax) and, based on his own study, he sincerely believed that the tax laws were being unconstitutionally enforced and that his behavior was lawful.[109] The Court reaffirmed that the tax laws "carv[e] out an exception to the traditional rule" that ignorance of the law is not an excuse.[110] The Court explained that:

> [t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen te know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.[111]

Significantly, the defendant in *Cheek* was not excused to the extent that his failure to comply resulted from his views about the constitutional validity of the tax laws rather than an honest mistake

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106. The Court explained that its "consistent interpretation of the word 'willfully' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." *Id.* at 361. *See generally* United States v. Pomponio, 429 U.S. 10 (1976) (per curiam) (citing *Bishop* in requiring a voluntary and intentional violation of the law, but clarifying that evil motive is nothing more than specific intent).

107. 498 U.S. 192, 193-94 (1991).

108. 26 U.S.C. §§ 7201, 7203 (1994).

109. *See Cheek*, 498 U.S. at 195-96.

110. *Id.* at 200.

111. *Id.* at 199-200. The Court held that it is enough te negate the willfulness requirement if the defendant honestly believed she was acting lawfully, regardless of whether the belief was reasonable. *See id.* at 200. The Court purported merely to be construing the statute; however, it is clear that the impulse for the holding was the desire to avoid criminalizing innocent behavior. *See also* United States v. Harris, 942 F.2d 1125, 1131-32 (7th Cir. 1991) (overturning criminal tax convictions where issue was sufficiently unsettled in the law that defendants "could not have ascertained the legal standards applicable to their conduct"); United States v. Mallas, 762 F.2d 361, 363 (4th Cir. 1985) (reversing defendant's conviction for tax evasion because the prosecution's theory was "far too tenuous and competing interpretations of the applicable law far too reasonable to justify [the] conviction[]"); United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979) (reversing the conviction for failure to report income gained by selling blood plasma because "the tax question was completely novel and unsettled by any clearly relevant precedent"). *But see* United States v. MacKenzie, 777 F.2d 811, 816-17 (2d Cir. 1985) (upholding the conviction for tax evasion and conspiracy on the ground that the statute requiring employers to withhold taxes from employee wages was not impermissibly vague).

arising from the complexity of the tax code. On the constitutional issue, he acted with "full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable."[112] Thus, the concerns about lack of blameworthiness that gave rise to the ignorance of law defense in the tax context were not implicated.[113]

The Court's approach in a number of recent cases outside of the tax context can also be attributed to concerns about criminalization without fault. In these cases, the Court again constrned words requiring scienter, such as "knowingly" or "willfully," to require not only knowledge or willfulness as to conduct or circumstances, but knowledge or willfulness as to the illegality of the prohibited conduct. The offenses at issue in these cases did not involve dangerous activities or instrumentalities that could have provided the necessary signal of likely regulation. Accordingly, the Court required knowledge of illegality as a proxy for fault because dispensing with the knowledge requirement would have eliminated the "only morally blameworthy element in the definition of the crime."[114] For example, in *Liparota v. United States*,[115] the defendant, a restaurant owner not authorized to receive food stamps, was convicted under a statute that subjects to criminal penalties anyone who "knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [law and regulations]."[116] The government urged that the statute was satisfied if the defendant knew he was possessing or using food stamps regardless of whether he knew that such

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112. *Cheek*, 498 U.S. at 205-06.

113. A defendant's success in raising an ignorance of law defense does not, of course, guarantee acquittal. The jury can infer knowledge of the law from the circumstances surrounding the alleged offense as well as from the defendant's education and experience. *See, e.g.*, Staples v. United States, 511 U.S. 600, 615 n.11 (1994) (noting that knowledge of the automatic nature of a firearm could be inferred from "circumstantial evidence, including external indications signaling the nature of the weapon"); Liparota v. United States, 471 U.S. 419, 434 (1985) (holding that the "[g]overnment may prove by reference to facts and circumstances surrounding the case that [the defendant] knew that his conduct was unauthorized").

114. *Liparota*, 471 U.S. at 423.

115. *Id.* at 419.

116. 7 U.S.C. § 2024(b)(1) (1994). The statute provides in relevant part:

> [W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both.

Id. The issue in the case was whether the defendant had to "know" that his use of food stamps was not authorized. *See Liparota*, 471 U.S. at 420-21.

possession or use was unlawful.[117] The Court disagreed, reasoning that criminal regulation of food stamps risked prosecution of "third parties who may well have had no opportunity to acquaint themselves with the rules."[118] The Court noted that the government's reading was a plausible one but ultimately rejected it largely to avoid "criminaliz[ing] a broad range of apparently innocent conduct."[119] For example, without the requirement of knowledge of illegality, a person could be convicted for purchasing food stamps from a store that, unbeknownst to her, charged higher than normal prices to food-stamp users.[120]

Most recently, in *Ratzlaf v. United States*,[121] the Court construed criminal statutes prohibiting individuals from "structuring a transaction"—breaking a single transaction into multiple transactions—"for the *purpose* of evading" a financial institution's obligation to report cash transactions of more than $10,000.[122] The defendant argued that the statute required proof not only that he knew his behavior would avoid the bank's reporting requirement but also that he knew it was illegal to do so.[123] The Court agreed, reasoning that the conduct being regulated was not "inevitably nefarious" apart from knowledge of illegality. The Court found that there are myriad reasons why a person might structure transactions of various sorts to avoid the effects of taxes or regulations that are unrelated to the kinds of criminal activities, such as laundering of drug money and tax

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117. *See Liparota*, 471 U.S. at 423.

118. *Id.* at 430.

119. *Id.* at 426. The Court noted the connection between the background assumption that mens rea is required and the avoidance of criminalizing innocent behavior. *See id.* at 425-26.

120. *See id.* at 426. The dissent argued that the food-stamp user who was overcharged could not be convicted unless she knew the "circumstances of the transaction that made it illegal," presumably the fact that the stereowner was price discriminating. *Id.* at 437 (White, J., dissenting). Awareness of the fact of the overcharge, however, would not be enough to answer the majority's objection because such awareness would provide no signal to the ordinary food-stamp user that she was acting unlawfully.

121. 510 U.S. 135 (1994).

122. 31 U.S.C. §§ 5311-25 (1994). The statute provides in relevant part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) [requiring financial institutions to report certain transactions]
>
> . . . .
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Id. § 5324. The criminal enforcement provision at issue provides in relevant part:

> A person willfully violating this subchapter [31 U.S.C. § 5311-25] or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

Id. § 5322(a).

123. *See Ratzlaf*, 510 U.S. at 138.

evasion, that Congress sought to check through the legislation at issue.[124]

The lower courts have followed the Supreme Court's lead, construing a number of other federal statutes to require knowledge of illegality, for example, in criminal prosecutions for interstate wagering,[125] violations of the Bank Secrecy Act,[126] violations of the Trading

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124. *See id.* at 144 & n.11. Similar concerns also help to explain the Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In *X-Citement Video* the defendant challenged his conviction for "knowingly . . . ship[ping] in interstate . . . commerce . . . any visual depiction . . . involv[ing] the use of a minor engaging in sexually explicit conduct." *See id.* at 65-68 (quoting 18 U.S.C. § 2252(1)(A)). The issue was whether the statute should be construed to require knowledge of either or both the nature of the materials and the fact that the performer was a minor. The most natural reading, according to the Ninth Circuit, was to apply "knowingly" to *neither* of those two elements. The Supreme Court rejected that reading, requiring knowledge as to both elements, based on the presumption that a scienter requirement "should apply to each of the statutory elements *which criminalize otherwise innocent conduct.*" *Id.* at 72 (emphasis added). Against the background of First Amendment protection of non-obscene, sexually explicit materials involving adults, the Court concluded that "one would reasonably expect to be free from regulation when trafficking in [protected materials]" and "[t]herefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id.*; *see also* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 521-22 (1994) (refusing to dispense with intent requirement in a statute criminalizing the use of the mail to sell "any equipment . . . which is primarily intended . . . for use with illegal drugs" but construing "primarily intended" to refer to the equipment's likely use rather than to the defendant's subjective state of mind).

125. *See, e.g.*, Cohen v. United States, 378 F.2d 751, 756 (9th Cir. 1967) (construing 18 U.S.C. § 1084(a) (1964) to require knowledge of illegality because in the defendant's state "the conduct prohibited [using the telephone to transmit bets or wagers] . . . would be a neutral act, free of culpability unless the actor were aware of the statutory prohibition"). Although the Tenth Circuit came to the contrary conclusion in *United States v. Blair*, 54 F.3d 639, 641 (10th Cir. 1995), construing section 1804(a) not to require knowledge of illegality, Richard Murphy and Erin O'Hara speculate that the difference in the cases is explained by the fact that gambling is generally illegal in all of the states in the Tenth Circuit but not in Nevada, where the events at issue in *Cohen* took place. *See* Richard S. Murphy & Erin A. O'Hara, *Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information*, 5 SUP. CT. ECON. REV. 217, 264-65 n.117 (1997) (explaining the difference between the cases in terms of information costs). Thus, unlike in *Cohen*, the court in *Blair* would have had no reason to worry that knowledge of illegality provided the only element of blameworthiness in the definition of the offense.

126. In *United States v. San Juan*, 545 F.2d 314 (2d Cir. 1976), the defendant was convicted under 31 U.S.C. § 1058, which makes it a crime "willfully" to violate a provision requiring anyone who transports into the United States monetary instruments exceeding $5,000 to file a report with the U.S. Customs Service. The court overturned defendant's conviction because "[w]ithout proof of any knowledge of, or notice to, Mrs. San Juan of the reporting requirements, a jury could not determine beyond a reasonable doubt that she had the requisite willful intent." *Id.* at 318. The court noted that because the reporting provisions "require the registration of an otherwise innocent item . . . on which a duty is not generally collected . . . the Government should make some effort to bring the reporting requirement to the traveler's attention." *Id.* at 319. The court reasoned similarly in *United States v. Granda*, overturning a conviction under the Bank Secrecy Act:

> The isolated act of bringing money in excess of $5,000 into the country is not illegal or even immoral. What is required is merely a filing of a proper form. Proof of the requisite knowledge and willfulness, therefore, is almost impossible unless affirmative steps are taken by the government to make the laws' requirements known.

With the Enemy Act,[127] violations of the Arms Export Control Act,[128] and violations of registration requirements under the Narcotics Control Act.[129] In addition, several recent cases have invoked *Ratzlaf*[130] in construing federal statutes involving firearms[131] and federal elections law to require knowledge of illegality.[132]

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565 F.2d 922, 926 (5th Cir. 1978); *see also* United States v. Schnaiderman, 568 F.2d 1208, 1211 n.8 (5th Cir. 1978) ("In a case [under the Bank Secrecy Act] the proper instruction would include some discussion of the defendant's ignorance of the law since the defendant's alleged ignorance of the reporting requirements goes to the heart of his or her denial of the specific intent necessary to commit the crime."); *cf.* United States v. Dichne, 612 F.2d 632, 637-38 (2d Cir. 1979) (holding that there was sufficient evidence to support a finding that the defendant had knowledge of the reporting requirement where the government had placed a number of large posters in the airport and given verbal warnings over the public address system in the airport torminal, co-conspirator statements indicated efforts to avoid reporting, and defendant was a knowledgeable import-export broker).

127. In *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983), the court held that conviction for "willful" violation of the Trading With the Enemy Act, 50 U.S.C., App. § 5(b), and regulations promulgated thereunder, required proof that the defendants knew the "necessity for obtaining, and the possibility of obtaining [the required] license." The defendants' convictions resulted from their actions in connection with the 1980 Mariel boatlift of refugees from Cuba. The court reasoned that the regulation under which defendants were convictod "criminalized bohavior (travel to, from, and within Cuba), which previously had been expressly authorized in [a] published regulation . . . and which, in fact, remained lawful, except when done in connection with the transportation of Cuban nationals, an activity which also is not generally criminal." *Frade*, 709 F.2d at 1391; *cf.* United States v. Macko, 994 F.2d 1526, 1533-35 (11th Cir. 1993) (holding that there was sufficient circumstantial evidence—based on defendants' efforts to conceal their activities, their possession of brochures outlining the applicable regulations, and their experience in the import-export business—to sustain the jury's conclusion that defendants knew they were violating Cuban trade embargo regulations ımder the Trading With the Enemy Act).

128. *See, e.g.*, Unitod States v. Golitschek, 808 F.2d 195, 197 (2d Cir. 1986) (reversing the conviction of an Austrian citizen who was the subject of an nndercover "sting" operation conductod by the U.S. Customs Service on the ground that there was insufficient evidence of a "willful" violation, which required a showing of knowledge of illegality); *cf.* Unitod States v. Murphy, 852 F.2d 1, 7 (1st Cir. 1988) (holding evidence was sufficient to support the jury's conclusion that defendant violated a known legal duty); Unitod States v. Durrani, 835 F.2d 410, 423 (2d Cir. 1987) (same).

129. In *United States v. Mancuso*, 420 F.2d 556, 558 (2d Cir. 1970), the court reversed the defendant's conviction under the Narcotics Control Act for failing to register his prior narcotics conviction upon either his departure on an overseas flight or his return to the Unitod States. The court, construing the statute to require knowledge of illegality, reasoned that this construction would avoid serious constitutional (due process) concerns and would best comport with traditional notions of mens rea. *See id.* (citing Morissetto v. United Statos, 342 U.S. 246 (1952)); *cf.* United States v. Juzwiak, 258 F.2d 844, 847 (2d Cir. 1958) (upholding a conviction under the Narcotics Control Act where there was a showing of the probability that the defendant had knowledge of the duty to register).

130. In response to the Supreme Court's opimon in *Ratzlaf*, Congress amended 31 U.S.C. § 5324, the anti-structuring provision, to eliminato the willfulness requirement. *Ratzlaf* had held that the willfulness langnage contained in section 5322, the general criminal enforcement provision, required knowledge of illegality for prosecutions under section 5324. The amendment removed the anti-structuring provision from section 5322 and created a new criminal liability subsection applicable only to section 5324 violations. *See* Money Laundering Suppression Act of 1994, H.R. 3474, 103d Cong., Title IV, § 411 (1994). The Conference Report statos that under amended section 5324, knowledge of illegality—i.e., knowledge that it is illegal to evade the

The Court's sensitivity to issues of notice and fault also increases with the level of potential criminal sanctions to which the defendant is exposed.[133] For example, the defendant in *Liparota* was subject to a fine of up to $10,000 or imprisonment for up to five years,

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bank's reporting requirement—is not required but "a person who innocently or inadvertently structures"—is unaware of the bank's obligation to report—would not be criminally liable. H.R. CONF. REP. NO. 103-652, 103d Cong. 194 (1994). The amendment also modified the civil penalty provision so that it could be imposed on a person who technically satisfied the requirements for criminal prosecution but who did not know that structuring was illegal. *See id.* at 195. The Report's explanation that the amended civil penalty provision can apply to violators who mistake the lawfulness of structuring suggests that Congress intended prosecutors to "weed out" less blameworthy violators. Moreover, the solution chosen by Congress leaves in place the Court's construction of "willful" in 31 U.S.C. § 5322. Thus, Congress's response does not call into question lower court decisions relying on the Court's *reasoning* in *Ratzlaf*.

131. *See* United States v. Obiechie, 38 F.3d 309, 316 (7th Cir. 1994) (holding that the conviction for "willfully" violating a prohibition against dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A) requires knowledge of the licensing requirement); United States v. Hern, 926 F.2d 764, 767 (8th Cir. 1991) (construing "willfully" in statute regulating the sale of firearms to require the "intentional violation of a known legal duty"). The legislative history surrounding the Firearms Owners' Protection Act suggests that Congress added mens rea requirements such as the word "willfully" in the provisions at issue in *Obiechie* and *Hern* in order to ensure that "law-abiding citizens would not be subject to severe criminal penalties for unintontional missteps." *Obiechie*, 38 F.3d at 312. *See generally* David T. Hardy, *The Firearms Owners' Protection Act: A Historieal and Legal Perspective*, 17 CUMB. L. REV. 585, 604-07 (1987) (discussing the enactment of the Firearms Owners' Protection Act). *But see* United States v. Langley, 62 F.3d 602, 606 (4th Cir. 1995) (holding that a conviction for knowing possession of a firearm by a convicted felon does not require that the defendant had knowledge that he was a convicted felon); United States v. Collins, 957 F.2d 72, 76 (2d Cir. 1992) (construing willfulness in firearms statute to require a showing that the defendant intended to commit an act which the law forbids).

132. *See* United States v. Curran, 20 F.3d 560, 570-71 (3d Cir. 1994). The court in *Curran* held that a conviction for causing election campaign treasurers to submit false reports te the Federal Election Commission in violation of 18 U.S.C. §§ 2(b) & 1001 required proof that the defendant was aware that the campaign treasurers were required accurately te report the actual source of contributions to the Commission, that the defendant's actions were intended to cause the treasurers to submit an inaccurate report, and that the defendant knew his actions were unlawful. *See id.*

133. In the controversy over strict criminal liability a number of scholars have argued that criminal liability for public welfare offenses is justified because the sanctions are ordinarily less severe—fines instead of incarceration—and conviction of such offenses is nominally criminal but does not carry the same stigma as conviction of a traditional crime. *See* Staples v. United Statos, 511 U.S. 600, 616 (1994) (noting that "the penalty imposed . . . has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*" and observing that public welfare offenses "almost uniformly involved statutos that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary" (citations omitted)); Morissette v. United States, 342 U.S. 246, 256 (1952) ("[P]enalties [for public welfare offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation."). Conversely, the more serious the sanction the more vehement the criticism of strict liability criminality. *See, e.g.*, MODEL PENAL CODE, *supra* note 30, § 1.04, at 72 (taking the view that imprisonment is never appropriato for strict liability offenses); Perkins, *supra* note 70, at 1080 (noting with disapproval that some strict liability, mala prohibita crimes are punishable by imprisonment); *see also* Singer, *supra* note 51, at 394-96 (rejecting the argnment that small penalties justify strict criminal liability).

or both.[134] Similarly, violation of the statute at issue in *Ratzlaf* could result in a fine of up to $250,000 or five years in prison, or both.[135] By contrast, in *International Minerals*, where the criminal sanction was less onerous—a fine of not more than $1,000 and/or imprisonment of not more than one year—the Court declined to read the statute to require knowledge of illegality.[136] In cases involving relatively small fines and minimal incarceration, the courts have been more willing to trust prosecutors, judges, and juries to make sure that ouly blameworthy defendants are prosecuted and convicted,[137] thus mediating against the risk of overcriminalization.[138]

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134. *See* Liparota v. United States, 471 U.S. 419, 420 n.1 (1985).

135. *See Ratzlaf*, 510 U.S. at 140; *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (noting concerns about harsh penalties where violation of child pornography statute carried penalty of up to 10 years in prison as well as substantial fines and forfeiture); United States v. Frade, 709 F.2d 1387, 1392 (11th Cir. 1983) (requiring knowledge of illegality where violation of regulations pursuant to Trading With the Enemy Act was punishable by a fine of $50,000 or imprisonment for 10 years or both); Cohen v. United States, 378 F.2d 751, 757 (9th Cir. 1967) (requiring knowledge of illegality for violation of prohibition against interstate wagering punishable as a felony subject to two years in prison and a fine of $10,000).

136. *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (Stewart, J., dissenting); *see also* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 343 (1952) (upholding conviction for "knowing violation" of a regulation requiring transporters of explosives and flammable liquids to "avoid, so far as practicable . . . driving inte or through" certain congested areas without knowledge of illegality where violation was punishable by fine of up to $1,000 and/or up to one year of imprisonment); United States v. Dotterweich, 320 U.S. 277, 285 (1943) (upholding misdemeanor conviction and fine of $500 against president of a pharmaceutical company for shipping misbranded and adulteratod drugs without a showing that the defendant knew the drugs were misbranded or adulterated). *But see* Unitod States v. Yermian, 468 U.S. 63, 69-70 (1984) (holding that a statute criminalizing the making of false statements "in any matter within the jurisdiction of [a federal agency]" did not require actual knowledge of the agency jurisdiction). The statute at issue in *Yermian* carried a significant maximum penalty: a $10,000 fine or imprisonment for not more than five years. *See id.* at 64 n.1. The majority was apparently not convinced that the "intentional and deliberate lies prohibited by the statute (and manifest in [the defendant's conduct])" could be characterized as "wholly innocent" or as a "trap for the unwary." *Id.* at 74, 75. Yermian, whose conviction rested on statements in an official Defense Department questiomaire that itself warned that false representations could subject him to criminal liability, did not present the Court with facts tending to support his innocence. *See id.* at 65 (describing the defendant's actions).

137. *See Dotterweich*, 320 U.S. at 285 (expressing willingness to trust "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" to avoid overcriminalization even when defendant would face some risk of incarceration). A number of scholars have argued that relying on prosecutors and juries to avoid overcriminalization is problematic. *See, e.g.*, Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2488-89 (1995) (arguing that prosecutorial discretion cannot be trusted te mitigate overcriminalization in the environmental contoxt because charging decisions are inherently subjective and the politics of environmental regulation could lead to the perception, if not the reality, of prosecuterial abuse); Pilcher, *supra* noto 37, at 5 (rejecting as solutions to the risk of overcriminalization in the regulatory context, prosecutorial discretion, sentencmg discretion, jury nullification, and executive clemency and proposmg that juries are the only institution that is "competont to bring contemporary community expectations to bear on questions of criminal liability for 'apparently innocent' conduct"); Katherine H. Setness, *Statutory Interpretation of Clean Water Act Section*

The federal criminal cases described above are formally statutory construction cases. In *Liparota* and *Ratzlaf*, for example, the Court apparently assumed that Congress *could*, as a constitutional matter, pass a statute that did not require knowledge of illegality.[139] The Court's application of mens rea to the fact of illegality in these cases is not, however, fully explained by resort to traditional tools of statutory construction.[140] In addition to textual and other statutory considerations, the Court was also strongly influenced by a presumption that statutes should be construed to avoid criminalizing conduct likely to be engaged in by law-abiding citizens, at least in the absence of clear legislative signals to the contrary.[141] Thus, although knowledge of illegality was apparently not constitutionally *required* in cases such as *Liparota* and *Ratzlaf*, ideas of notice and blameworthiness

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1319(c)(2)(A)'s Knowledge Requirement: Reconciling the Needs of Environmental and Criminal Law, 23 ECOLOGY L.Q. 447, 487-88 (1996) (arguing that political pressure may lead prosecutors to charge individuals who are "blameless offenders"); Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. § 6928*, 6 TUL. ENVTL. L.J. 187, 253 (1993) (arguing that prosecutors and juries cannot be trusted to avoid convicting individuals who are ignorant that their conduct was in violation of federal environmental regulations); *cf.* Sharon M. Tomao, Note, *The Cultural Defense: Trnditional or Formal?*, 10 GEO. IMMIGR. L.J. 241, 249-50 (1996) (claiming that prosecutors take into account immigrants' ignorance of the law when deciding whether to prosecute).

138. The Supreme Court's dispositions in *Freed* and *Staples* are illustrative of the Court's sensitivity to the level of sanctions facing the defendant. Both cases involved criminal prosecution under the National Firearms Act, 26 U.S.C. § 5861(d), which makes it a crime, punishable by up to ten years in prison, for any person te possess a firearm that is not properly registered. Recall that in *Freed* the Court rejected the defendant's argunent that the statute should be construed to require knowledge that failure to register a hand grenade was illegal. In *Staples*, the defendant alleged that he knew he possessed a firearm but not that it was an automatic weapon. The government, relying on the opinion in *Freed*, urged that the defendant need only to have known that he possessed a "firearm" within the meaning of the statute but not that it was an automatic weapon—for which registration was required—as opposed to a semiautomatic weapon—for which no registration would be required. The Court rejected the government's argument because in a world with "a long tradition of widespread lawful gun ownership by private individuals," *Staples*, 511 U.S. at 610, dispensing with mens rea as to the nature of the weapon would "criminalize a broad range of apparently innocent conduct." *Id.* When considering a statute that could result in a sentence of up to 10 years in prison, the Court was careful to choose a construction the Court believed necessary to separate blameworthy conduct—possession of a hand grenade—from conduct more likely to be innocent—possession of a regulated firearm that was difficult to distinguish from an unregulated one.

139. *See, e.g., Liparota*, 471 U.S. at 424 n.6 ("Of course, Congress must act within any applicable constitutional constraints in defining criminal offenses. In this case, there is no allegation that the statute would be unconstitutional [if mens rea as to illegality were not required].").

140. *See, e.g., id.* at 424-25 ("Either interpretation would accord with ordinary usage" and "the legislative history contains nothing that would clarify the congressional purpose on this point").

141. *See* Packer, *supra* note 42, at 149 (noting that state courts are increasingly unwilling to presume that legislatures intend to dispense with mens rea when they fail explicitly to provide for it in criminal statutes).

have considerable force in explaining the scope of criminal liability prescribed by the courts.[142]

III. QUALIFIED IMMUNITY, FAULT, AND NOTICE

Part II began by noting that most of the time people are presumed to know the criminal law and there is no separate inquiry into whether they had notice of the rules under which their behavior would be judged. That presumption is reflected in the maxim "ignorance of the law is no excuse." Concerns about fair notice are prominent—and failure to know the criminal law is excused—only when notice of illegality is the only element that makes the defendant's conduct blameworthy. In qualified immunity analysis, however, concerns about notice are front and center: A primary purpose of qualified immunity is to make it possible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."[143] As courts have framed it, immunity obtains unless the right allegedly violated was "sufficiently particularized to put potential defendants *on notice* that their conduct probably [was] unlawful."[144] Qualified immunity, by starting from the premise of non-liability for officials who could have believed they were acting lawfully, seems to turn what is the exception in the criminal context into the rule in constitutional cases.

A. Qualified Immunity: The Notice Inquiry

Actions under section 1983 can involve any one or more of a dizzying array of constitutional claims[145] including illegal searches and seizures, retaliatory discharges, cruel and unusual treatment of

142. Richard Singer argues that the Supreme Court has never actually upheld as constitutional a strict liability statute. *See* Singer, *supra* note 51, at 398-407 (discussing cases). He asserts that none of the cases that have been held up as examples of such a holding "actually sustains liability, although several contain language strongly supportive of the idea." *Id.* at 398.

143. Davis v. Scherer, 468 U.S. 183, 195 (1984).

144. Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986).

145. By its terms, section 1983 provides a cause of action for statutory violations as well as for constitutional ones. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980). However, the largest and most important category, by far, of section 1983 cases involves constitutional claims. In recent years, moreover, the Supreme Court has substantially curtailed the applicability of section 1983 to statutory claims. *See generally* PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 237-61 (2d ed. 1994). It is fair to say, then, that the scope of section 1983 liability has been shaped almost exclusively in suits alleging constitutional violations.

prisoners, and deprivations of life, liberty, or property without due process of law to name only a few. These claims can be brought against an equally broad range of governmental officials, including police officers, parole officers, social workers, school teachers, and governors.[146] The variety of claims and defendants notwithstanding, the Supreme Court has articulated a one-size-fits-all test for determining whether any particular executive official[147] is entitled to receive a qualified immunity from suit.[148]

Qualified immunity was first recognized as a defense to constitutional damages liability in *Pierson v. Ray*, a Fourth Amendment suit by black ministers against police officers who arrested them for using segregated facilities.[149] The Supreme Court adopted the state common law rule granting immunity to arresting officers who act in good faith and with probable cause, even if the innocence of the arrestee is later proven.[150] In *Pierson* and the cases immediately following, the qualified immunity analysis was described as having both an objective and a subjective prong. The official was not immune from suit if she "knew or reasonably should have known that the action [s]he took within [her] sphere of official responsibility would violate . . . constitutional rights . . . *or* if [s]he took the action with the malicious intention to cause a deprivation of constitutional rights."[151] In these early cases, the Court also suggested that the scope of qualified immunity in section 1983 actions would vary with the range

146. In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court recognized an implied cause of action for damages and injunctive relief against federal officials that parallels the section 1983 cause of action against state and local officials. The jurisprudence applicable to section 1983 actions—rules about qualified immunity, absolute immunity, or damages—has been understood to apply equally to *Bivens* cases and vice versa. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 504 (1978) ("[It would be] untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

147. Judges, prosecutors, and legislators who are performing judicial, prosecutorial, or legislative functions, respectively, have absolute immunity from damages liability. *See generally* Imbler v. Pachtman, 424 U.S. 409 (1976) (discussing prosecutorial immunity); Pierson v. Ray, 386 U.S. 547 (1967) (discussing judicial immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (discussing legislative immunity). Qualified immunity is the default rule for such officials when they are denied absolute immunity under the functional analysis. *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 8.01, at 104 (3d ed. 1991) (discussing the functional approach to immunities).

148. The difficulty of trying to apply a unified qualified immunity standard to the broad range of possible section 1983 claims reflects a problem that is endemic to section 1983 analysis: the problem of how to adapt the many and varied shapes and sizes of constitutional (and statutory) claims to the one-size-fits-all structure of the section 1983 cause of action and its defenses.

149. 386 U.S. 547 (1967).

150. *Id.* at 555.

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

of duties and discretion exercised by the particular governmental defendant and with the context in which the official functioned.[152]

The Court has subsequently moved toward an increasingly abstract and objective formulation of qualified immunity. In *Harlow v. Fitzgerald*, the Court significantly blunted the power of the subjective prong by requiring the plaintiff to allege more than "bare allegations of malice" in order to defeat a claim of qualified immunity.[153] The Court virtually abandoned the subjective prong in *Anderson v. Creighton*, opining that "subjective beliefs are irrelevant" to the qualified immunity analysis,[154] and repudiated its earlier suggestion that the scope of qualified immunity would be context specific.[155] The modern test for qualified immunity, applicable to virtually all executive officials[156] across the range of constitutional claims,[157] holds that "government officials . . . 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*."[158]

In order for the law to be "clearly established" for purposes of qualified immunity, moreover, the "contours of the right must be sufficiently clear that a reasonable official would understand that

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152. *See* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

153. 457 U.S. 800, 817-18 (1982).

154. 483 U.S. 635, 641 (1987). Although it is not entirely clear from the context, lower courts have interpreted this statement to mean that motive is irrelevant to the qualified immunity standard rather than simply to the Fourth Amendment probable cause standard. *See generally* 1B SCHWARTZ & KIRKLIN, *supra* note 12, § 9.16, at 358 n.626 (citing cases). *Compare* Mitchell v. Forsyth, 472 U.S. 511, 517 (1985) (describing *Harlow* as having "purged qualified immunity doctrine of its subjective components"), *with* Jeffries, *supra* note 8, at 86 n.22 (speculating that the Supreme Court would hear allegations of bad faith if they were "plausible and concrete" rather than "broad and unsubstantiated").

155. *See Anderson*, 483 U.S. at 642-43 (stating that qualified immunity analysis should not turn on precise duties or rights); *see also* Procunier v. Navarette, 434 U.S. 555, 562-63 (1978) (stating that reasonableness under the circumstances is determinative). As this Part of the Article will demonstrate, however, the way qualified immunity actually works out in practice is highly context specific. *See* LOW & JEFFRIES, JR., *supra* note 145, at 49-50 (noting that there has developed a "law of qualified immunity for police officers, a law of qualified immunity for school board officials, a law of qualified immunity for prison guards, and so forth").

156. *See* Malley v. Briggs, 475 U.S. 335, 340 (1986) ("Our cases also make plain that 'for executive officers in general . . . qualified immunity represents the norm.' " (quoting *Harlow*, 457 U.S. at 809)). Prosecutors have absolute immunity from section 1983 damages liability. *See supra* note 147.

157. *See Anderson*, 483 U.S. at 645 ("*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.' ").

158. *Harlow*, 457 U.S. at 818 (emphasis added). *See generally* 1B SCHWARTZ & KIRKLIN, *supra* note 12, § 9.17, at 361-62 (criticizing the lower courts for complicating the analysis with "two-, and three-part tests" when the "controlling inquiry is [simply] whether the official violated clearly established federal law").

what [s]he is doing violates that right."[159] It is not enough, in other words, that the broadly defined right to be free from unreasonable searches or cruel and unusual punishment is clear; the right allegedly violated must be described at a particularized level in factually analogous case law that would have provided more concrete guidance for the official's conduct.[160] The line between liability and immunity is "not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances."[161] The question for qualified immunity, as one court has framed it, is:

> whether the right was reasonably well settled at the time of the challenged conduct and whether the manner in which the right related to the conduct was apparent.... [C]ourts may neither require that state actors faultlessly anticipate the future trajectory of the law nor permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis.[162]

Thus, when "in the light of pre-existing law" the unlawfulness of the conduct would not have been "apparent" to a reasonable official, immunity will obtain.[163] Conversely, if courts have ruled similar conduct unlawful under analogous (though not factually identical) cir-

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159. *Anderson*, 483 U.S. at 640 (internal citations and quotation marks omitted) (emphasis added).

160. *See, e.g., id.* at 639 ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

161. Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1578 (11th Cir. 1992) (Edmondson, J., dissenting) (internal quotation marks and citations omitted), *adopted by* 998 F.2d 923 (11th Cir. 1993); *see* Henderson v. DeRobertis, 940 F.2d 1055, 1058-59 (7th Cir. 1991) (opining that the law is not clear until "a particular constitutional right has been stated so that reasonably competent officers would agree on its application te a given set of facts"); Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985) ("While cases involving the exact fact pattern at bar are unnecessary, case law in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly.").

162. Martinez v. Colon, 54 F.3d 980, 988 (1st Cir. 1995) (citations omitted).

163. *Anderson*, 483 U.S. at 640. Although a finding of clarity does not require unanimity among authorities, one or two holdings that support the right asserted by the plaintiff may not be enough. *See, e.g.*, Hilliard v. City and County of Denver, 930 F.2d 1516, 1519-21 (10th Cir. 1991) (holding that the two circuit court opinions identified by the plaintiff did not render the law "clearly established" given the inconsistent approaches of other courts). Genuine disagreement among authorities will result in a finding that the law is not clearly established. *See, e.g.*, Singer v. Maine, 49 F.3d 837, 847-48 (1st Cir. 1995) ("In view of the divergence of opinion among the circuits with respect to the various issues . . . the law in this area was unsettled at the time of these events."); Richardson v. Selsky, 5 F.3d 616, 621-24 (2d Cir. 1993) (noting that divergent treatment of a prisoner's claimed due process right by different circuits showed that the law was not clearly established).

cumstances, then "government officials will be deemed 'on notice' " of that clear law and qualified immunity will likely be denied.[164]

The prominence of notice in the qualified immunity analysis[165] is striking compared to the relatively more limited (although by no means unimportant) role of notice in criminal law. Moreover, while criminal law begins with the assumption that "every person . . . is bound to know the law"[166] and ignorance of the law is no excuse, governmental officials are immune from constitutional damages liability as long as their actions "could reasonably have been *thought*

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164. Melton v. City of Oklahoma City, 879 F.2d 706, 729 n.36 (10th Cir. 1989), *rev'd in part on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *see* Calhoun v. Gaines, 982 F.2d 1470, 1475 (10th Cir. 1992) (stating that the qualified immunity standard requires that "there be some, but not necessarily precise, factual correspondence between previous cases and the case at bar" and in order to escape liability officials must "know well developed legal principles and . . . relato and apply them to analogous factual situations"). Courts have deemed the law clear if there is a "universe of authority" pointing to the existonce of the right, Elder v. Holloway, 975 F.2d 1388, 1392 (9th Cir. 1992), *rev'd on other grounds*, 510 U.S. 510 (1994), or there exist "fairly analogous precedents" that tend to establish the relevant constitutional rule, Horta v. Sullivan, 4 F.3d 2, 13 (1st Cir. 1993). Some courts look only to Supreme Court precedent and to precedent from their own jurisdictions to establish the boundaries of clear law. The Second Circuit appears to have taken that approach. *See* Russell v. Scully, 15 F.3d 219, 223 (2d Cir. 1994). Other courts find the law sufficiently clear if the "weight of authority" from other circuits supports the constitutional rule urged by the plaintiff, Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992), or if there is "such a clear trend in the caselaw that [the court] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994); *see also* Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) ("For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to tbe unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct . . . would be found wanting.").

165. The notice aspect of qualified immunity is underlined by the fact that courts consider not only the extent of factual similarity between extant case law and the defendant's circumstances but also other factors that bear on whether the defendant could reasonably have been aware of that law. For example, one court has listod as factors to be considered: the jurisdiction from which the authority arose, its geographical proximity to the forum of the allegedly unconstitutional conduct, the timing of the precedent in comparison to the events at issue, the level of dissemination of information within the pertinent profession, and the frequency of similar litigation. *See* Johnson-El v. Schoemehl, 878 F.2d 1043, 1049 (8th Cir. 1989). The timing of the case law that declared defendant's conduct unlawful may also be important. *See, e.g.*, Lintz v. Skipski, 25 F.3d 304, 306 (6th Cir. 1994) (opining that officials must be allowed some "time to adjust" to new judge-made law, particularly if the ruling "changed the direction of law in th[e] circuit"); Robinson v. Bibb, 840 F.2d 349, 350 (6th Cir. 1988) (suggesting that a short time frame between decisions clearly establishing the law and defendant's conduct could be an "extraordinary circumstance," which under *Harlow* might allow the defendant to show that he should not be imputed knowledge of the right); Schlothauer v. Robinson, 757 F.2d 196 (8th Cir. 1985) (holding the law not clearly established by an Eighth Circuit opinion handed down only 11 days before the incident giving rise to the suit). *See generally* 1B SCHWARTZ & KIRKLIN, *supra* note 12, § 9.23, at 388-89 (discussing the body of case law on this issue).

166. 1 MATTHEW HALE, PLEAS OF THE CROWN 42 (1680), *quoted in* Livingsten Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 645 (1941).

consistent with the rights they are alleged to have violated."[167] What accounts for this apparent difference?

There are a number of "easy"—but in my view ultimately wrong—answers that might be offered in response to the puzzle posed above. First, it might be argued that criminal law is more likely than constitutional law to prohibit the kinds of conduct that everyone should know are wrongful: Whereas our moral intuitions[168] should tell us that homicide or robbery is wrongful behavior, the notion that street-level officials have clear moral intuitions about the complex judicially articulated rules governing the Fourth Amendment warrant requirement or defining the requisites of due process is less persuasive. But distinguishing criminal and constitutional law on the basis of moral intuitions is ultimately unsuccessful. As Part II of the Article demonstrated, there are many criminal regulatory prohibitions that may not closely track our moral intuitions about right and wrong. On the other hand, some constitutional violations, such as deliberately ignoring a seriously ill prisoner's need for medical care, using excessive force to subdue an unarmed and handcuffed arrestee, or firing a person because of race, correlate fairly closely with intuitions about what constitutes bad behavior. Thus, both constitutional law and criminal law include rules that are more or less closely correlated with intuitive notions of wrongfulness; these two areas of law do not divide neatly on that ground.

Another possible answer is that criminal law is "clearer" and more accessible than constitutional law and thus the boundaries of criminal law are easier to know. That explanation is, again, true in some instances and not in others. Prohibitions against homicide and theft are relatively clear and understandable to the ordinary citizen: "Thou shalt not kill" and "Thou shalt not steal" are not difficult to comprehend. On the other hand, some criminal statutes are quite intricate and their boundaries difficult to ascertain.[169] To make

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167. *Anderson*, 483 U.S. at 638 (emphasis added); *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *id.* at 344-45 (stating that police officers applying for warrants are immune if a reasonable officer "could have believed" that there was probable cause to support the application); Collins v. Marina-Martinez, 894 F.2d 474, 478 (1st Cir. 1990) ("[A] plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity.").

168. By the term "moral intuitions" I mean the sense ordinary people have of the boundaries of acceptable behavior, whether that judgment is a matter of conscience, socialization, education, or some combination of factors. I recognize that moral intuitions are to some degree contingent and subject to change. *See supra* note 37.

169. For example, compare *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), with *McNally v. United States*, 483 U.S. 350 (1987), which disagree on whether the mail fraud

matters worse, it is well-settled that an unclear statute can be "cured" by judicial construction. Thus, the meaning of a particular criminal statute might be discoverable only by sifting through the case law interpreting the statute, a process which "[f]or the trained professional . . . is time-consuming and tricky" and "for the average citizen, it is next to impossible."[170] Similarly, while much of constitutional law is not clearly defined as to its application in particular circumstances, in other contexts governmental officials are able to predict with some accuracy how the rules will apply. Much of search and seizure law, where law enforcement officials are repeat players in applying and litigating the boundaries of the Fourth Amendment, illustrates that phenomenon.[171] Again, both constitutional law and criminal law fall along a continuum of clarity and accessibility.

Finally, it might be argued that criminal law is more stable than constitutional law and thus more easily known. This generalization, however, also fails. The extensive proliferation of modern regulatory statutes, often requiring teams of lawyers to keep their clients abreast of changes in the law, belies the notion that criminal law is stable and predictable.[172] Similarly, constitutional law varies from contexts in which the law is rapidly changing—affirmative action in college admissions is a modern example—to those in which the law is really quite stable or changes only incrementally.[173]

What is interesting and useful about these "easy" answers is exactly that constitutional law and criminal law are *not easily distinguishable* along the lines suggested above: Some constitutional rules *are* less intuitive, less accessible, and regulate behavior that is less obviously blameworthy than much of traditional criminal law. Others, however, look very much like traditional criminal prohibitions: They proscribe conduct that seems inherently wrongful. These similarities between constitutional law and criminal law suggest that the connection between fault and notice in criminal law can teach us something about the role of notice in constitutional cases.

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statute, 18 U.S.C. § 1341 (1994), proscribes schemes to defraud citizens of their intangible rights to honest and impartial government.

170. Jeffries, *supra* note 21, at 208.

171. *See infra* notes 200-05 and accompanying text.

172. *See generally* Pilcher, *supra* note 37, at 32 (noting estimates of over 300,000 federal regulations that are punishable by criminal penalties and asserting that in the area of traditional substantive criminal law Congress regularly enacts new provisions and enhances existing ones).

173. *See infra* note 195 (discussing the Supreme Court's jurisprudence of "new rules").

My thesis is that qualified immunity—like fair notice in criminal law—employs notice or knowledge of illegality as a proxy for fault. I argue, moreover, that notice serves that function in the constitutional damages context in *precisely the same kinds of cases* in which knowledge of illegality would be required in the criminal context: where only knowledge that the relevant conduct is forbidden makes the defendant's actions blameworthy. The notice inquiry seems more pervasive in section 1983 actions precisely because constitutional claims are *more* likely to involve conduct of the sort that is prohibited by criminal regulation, where persons might reasonably be iguorant of the law, and *less* likely to entail inherently blameworthy conduct, where reasonable people would (or should) know what the law demands.

B. When Ignorance is Excused—Fourth Amendment Claims

Another important rationale for qualified immunity, in addition to the instrumental one, is that qualified immunity avoids the unfairness that would result if governmental officials were subject to liability for violating rules they did not or could not reasonably have known.[174] Under that view, qualified immunity ensures that public officials will not be penalized for conduct which, given the state of the case law, even a conscientious, law-abiding official could reasonably

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174. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court identified as rationales for official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and]
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good.

Id. at 240; *see* Davis v. Scherer, 468 U.S. 183, 196 (1984) ("Nor is it always fair . . . to demand official compliance with statute and regulation on pain of money damages" where officials are "subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively' " (quoting SCHUCK, *supra* note 10, at 64)); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[A]n official . . . could [not] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."); Owen v. City of Independence, 445 U.S. 622, 669 (1980) (Powell, J., dissenting) (urging qualified immunity for municipalities on the ground that "basic fairness" requires that officials acting in good faith should not be exposed to liability "unless there was notice that a constitutional right was at risk"); Wood v. Strickland, 420 U.S. 308, 319 (1975) (arguing that liability for "every action which is found subsequently to have been violative of a [citizen's] constitutional rights and to have caused compensable injury would unfairly impose upon the [official] the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties"). *See generally* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 273-75 (1995) ("The fairness argument rests on the assumption that holding government officials accountable for actions that are not clearly unconstitutional is unjust, especially in light of the sometimes elusive character of constitutional rights.").

have believed to be lawful.[175] Thus, the logic behind the fairness argument for qualified immunity echoes ideas of fair notice in criminal law: If the law did not clearly prohibit the defendant's conduct—and indeed any reasonable official acting in good faith could have done what the defendant did—then the defendant is not blameworthy.[176]

In order to flesh out the connection between notice and fault suggested by the fairness rationale, I turn to a discussion of qualified immunity in Fourth Amendment search and seizure cases, the context in which the qualified immunity analysis has been most clearly and specifically articulated. In *Malley v. Briggs*, the Supreme Court held that police officers who search pursuant to a warrant are entitled to qualified immunity unless "no reasonably competent officer would have concluded" that the information offered in the warrant application established probable cause.[177] In other words, "if officers of reasonable competence *could disagree on this issue,* immunity should be recognized."[178] The parallel standard for warrantless searches, annonnced in *Anderson v. Creighton*, affords immunity if a reasonable official "could have believed" that the particular circumstances confronting the officer constituted probable cause and exigent circumstances.[179]

The *Anderson* dissent argued that qualified immunity is unnecessary in the Fourth Amendment context because the underlying constitutional standard—"probable cause"—already embodies a reasonableness inquiry.[180] The dissenting justices complained that extending qualified immunity to Fourth Amendment violators would apply "a double standard of reasonableness" that "affords a law enforcement official two layers of insulation from liability."[181] This

175. *See* Hunter v. Bryant, 502 U.S. 224 (1991) (stating that qualified immunity is appropriate if a reasonable official "could have believed" her actions were lawful); Anderson v. Creighten, 483 U.S. 635, 638 (1987) (stating that qualified immunity shields officials from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged te have violated"); Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) (stating that governmental officials are immme unless "the law clearly proscribed the actions" they took).

176. *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957) (holding that behavior that would be engaged in by the ordmary law-abiding citizen cannot be the grounds of criminal conviction absent knowledge of illegality).

177. 475 U.S. 335, 341 (1986).

178. *Id.* (emphasis added).

179. 483 U.S. at 641.

180. *Id.* at 661 (Stevens, J., dissenting).

181. *Id.* at 659 (Stevens, J., dissenting); *see* Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) (Posner, J.) (complaining that qualified immunity on top of probable cause gives defendants "two bites at the apple").

objection is partly a matter of semantics: Had an "equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument [against qualified immunity] would not be available."[182] But the dissenters' criticism goes deeper. Their argument is that qualified immunity in the Fourth Amendment context is unjustified because it provides a defense against two levels of fault: It immunizes not only the official who reasonably, but inaccurately, believed that her search would uncover evidence of crime—a mistake about the circumstances surrounding the search—but also the official who reasonably, but erroneously, believed that she had satisfied the Fourth Amendment probable cause standard—a mistake about the meaning of constitutional law.[183]

What explains a rule that immunizes governmental officials for mistakes of constitutional law? To answer that question, I turn to my thesis that qualified immunity employs notice as a proxy for fault. My criminal law paradigm predicts that notice of illegality comes into play when the conduct at issue carries no indicia of its own wrongfulness, in other words, when it involves the kinds of actions that a reasonable, law-abiding official might have taken.[184] It might be argued, however, that *any* violation of the Constitution entails blameworthy conduct.[185] As the *Anderson* dissent argued in the Fourth Amendment context, an official who conducts an unconstitutional (unreasonable) search is, by definition, engaging in conduct that a reasonable official would have avoided. There are, however, persuasive arguments for the contrary view that officials who act unconstitutionally are not necessarily blameworthy.[186]

To take the clearest example of Fourth Amendment illegality without fault, suppose a damages action invokes a "new" constitutional rule[187] that was only recognized after the events occurred that

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

183. *See id.* at 661 (Stevens, J., dissenting). As Justice Stevens argued:

> [I]t is worth emphasizing that the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work. The concept of probable cause leaves room for mistakes, provided always that they are mistakes that could have been made by a reasonable officer.

Id. (Stevens, J., dissenting).

184. *See supra* notes 56-64, 102-32 and accompanying text.

185. *See, e.g.*, Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009 (1990) (arguing that wrongdoing is a "social construct that does not necessarily include states of mind or fault").

186. *See generally* Jeffries, *supra* note 8, at 99-101 (rejecting the view that fault is inherent in unconstitutionality).

187. *See infra* note 195 (discussing the Supreme Court's "new rules" jurisprudence).

gave rise to the constitutional damages suit. For example, in *Pembaur v. City of Cincinnati*, police officers were found to have acted unconstitutionally when they neglected to obtain a *search warrant* to enter a private medical clinic in order to execute an *arrest warrant* for a third person.[188] The rule establishing the requirement of a search warrant under those circumstances, however, was recognized four years *after* the events in question.[189] Although their conduct was found to have been unconstitutional, it is hard to argue that the police officers in *Pembaur* were "at fault," as their only error was in failing to predict the direction of constitutional law. In the words of the *Harlow* Court: "If the law at [the time the events occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could [she] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[190] Qualified immunity attaches in such cases because, in the absence of notice or knowledge of what the Constitution requires, governmental officials who act unconstitutionally are not blameworthy.

The "new rule" problem occurs in the Fourth Amendment context, despite the fault-like language of the constitutional text[191] and the probable cause standard.[192] That is because much of Fourth Amendment jurisprudence is couched in the form of prophylactic rules which involve most significantly the complex set of judicial holdings that define the contours of the warrant requirement.[193] The new rule

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188. *See* 475 U.S. 469, 484 (1986).

189. *See* Steagald v. United States, 451 U.S. 204 (1981) (finding that the arrest warrant for a third party did not protect the petitioner's Fourth Amendment interest in being free from unreasonable searches of his home).

190. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see* Mitchell v. Forsyth, 472 U.S. 511, 535 (1985) (stating that an official does not forfeit her immunity because she "gambled and lost on the resolution of [an] open question"); Pierson v. Ray, 386 U.S. 547, 557 (1967) (stating that governmental officials are not "charged with predicting the future course of constitutional law"); *see also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77 (1989) (arguing that qualified immunity is justified when a section 1983 claim invokes changed law or "when prior development did not foreshadow the constitutional principle").

191. The Fourth Amendment protects the right to be free from "*unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added).

192. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949) ("[P]robable cause exists where the 'facts and circumstances within [the officers'] knowledge and of which they had *reasonably* trustworthy information [are] sufficient in themselves to warrant a man of *reasonable* caution in the belief that' an offense has been or is being committed." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925) (emphasis added))).

193. *See* Jeffries, *supra* note 8, at 97 n.54 (noting that "[a]s the case law [on the warrant requirement] has actually developed, it is perfectly possible to be reasonably mistaken about the requirements of [F]ourth [A]mendment reasonableness").

phenomenon, moreover, is by no means limited to Fourth Amendment cases.[194] The notion that some constitutional rulings are new and unpredictable is salient across the range of constitutional claims as evidenced by the Supreme Court's retroactivity jurisprudence and its holdings disallowing habeas corpus relief based on "new rules."[195] In damages cases invoking new rules, qualified immunity's notice inquiry ensures against liability without fault.

The fairness rationale, however, argues for qualified immunity in other contexts beyond those involving new rules. Even when Fourth Amendment analysis resembles a less rule-like, more unstructured inquiry into the "reasonableness" of the official's actions, a finding that the official acted without probable canse does not obviate the need for a notice inquiry. To see why, it is necessary to appreciate both the *kinds* of situations faced by law enforcement officials and the *nature* of the legal standards they are required to apply. On the one hand, law enforcement officials are faced with the difficult task of conforming their conduct—in a virtually infinite variety of factual circumstances—to a set of imprecise constitutional standards, the parameters of which are unclear even to trained lawyers. Law enforcement requires the exercise of significant discretion, "often on inadequate information in situations bordering on emergency."[196] Moreover, police officers are subject to vague constitutional standards such as "reasonable suspicion" and "probable cause,"[197] which provide only limited gnidance for their actions. As "[t]he numerous dissents, concurrences and reversals [in Fourth Amendment cases] indicate . . . even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause,"[198]

194. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980) (rejecting qualified immunity for municipalities based upon the good faith of its officers and applying retroactively a rule requiring a "name clearing" hearing for employee discharges accompanied by reputational harm).

195. The Supreme Court has expressly recognized in a number of contexts that some judicial holdings are new rules, in the sense that they represent a significant break from past precedent. *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) (arguing that a number of doctrines involving new rules raise issues that are best analyzed as involving the law of constitutional remedies); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991) (noting that qualified immunity, the law of habeas corpus, and the retroactivity doctrine all revolve around the notion of new rules and urging a unified analysis of these three areas).

196. Jeffries, *supra* note 12, at 77.

197. The governing definition of "probable cause" is a "fair probability" of criminal activity—to justify an arrest—or evidence—te justify a search—under all the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983).

198. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972).

let alone street-level officials acting in situations that do not afford them the luxury of unhurried consideration of fact and law. The Fourth Amendment standard, in other words, "retains an irreducible element of subjectivity, so that there will be situations where officers must simply *guess* at whether a judge would find the standard satisfied."[199]

On the other hand, although the Fourth Amendment standard is, at some level, unavoidably subjective and indeterminate, it would be inaccurate to conclude that it is no more clearly defined—at least for those who are called upon to apply it—than the command to act "reasonably." Fact patterns that give rise to probable cause judgments tend to repeat themselves with minor variations in facts and circumstances.[200] Police officers, moreover, are "frequent litigants" who are likely to see hundreds of such determinations by magistrates and trial judges[201] over the courses of their careers.[202] In addition,

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199. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897 (1991) (emphasis added). *See* SCHUCK, *supra* note 10, at 66 ("[I]n many situations in which police officers must act quickly . . . 'no guidelines can do much more than restate the law and urge officials te obey that law and, in the gray areas, to use their judgment.'" (quoting J.Q. WILSON, THE INVESTIGATORS 83 (1978))). As the Court explained in *Anderson v. Creighton*, "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." 483 U.S. 635, 644 (1987) (citation omitted).

200. As Professor Stuntz has noted: "A police officer . . . will see hundreds of probable cause judgments over the course of his career . . . . And those judgments are not all sui generis: there is a good deal of repetition, so that particular fact patterns may, in slightly different guises, crop up again and again." Stuntz, *supra* note 199, at 896. Examples of repeated fact patterns in the Fourth Amendment context include airport search cases, *see* Florida v. Royer, 460 U.S. 491 (1983), and the informant tip cases, *see Gates*, 462 U.S. at 213; Stuntz, *supra* note 199, at 896 n.30.

201. *See generally* Stuntz, *supra* note 199, at 896. When issues involving suppression of evidence are litigated in suppression motions or at trial, police officers routinely testify and are thereby exposed te the intricacies of constitutional criminal procedure. In a survey of police knowledge of criminal procedure, police officers reported that having their own evidence suppressed or observing cases in which evidence collected by fellow officers was suppressed was the most significant way in which they learned about changes in Fourth Amendment search and seizure law. *See* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1036 (1987) (citing survey responses that indicate police officers' beliefs that in-court experiences teach them the most about changes in search-and-seizure law); *see also* RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 88 (1984) (reporting similar responses from police officers in a number of different cities).

202. In addition, police officers in both the state and federal system have extensive interactions with prosecutors, who are obviously well-schooled in the details of the criminal constitutional decisions applicable to police investigative activities. Prosecutors have the legal expertise as well as the incentives te make sure that police officers are well aware of constitutional constraints on their activities. Indeed, the decision whether to bring charges, the ability to defeat defendants' motions to suppress evidence, and the success of any subsequent indictment and trial may depend on assuring that police work conforms to constitutional requirements. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Procedure? Two Audiences, Two*

officials are often subject to detailed and comprehensive training in Fourth Amendment law, both when they join the force and at regular intervals thereafter.[203] This extensive and repeated exposure to the details of Fourth Amendment law[204] as applied to similar facts and circumstances provides law enforcement officials with a certain amount of proficiency "in giving content to [the probable cause standard], or at least in predicting how the courts will give content to it."[205]

The courts' approach to qualified immunity in Fourth Amendment cases appreciates both the lack of concrete guidance provided by constitutional standards such as "probable cause," and the fact that an otherwise vague constitutional standard can provide relatively clear guidance through repeated applications of the standard under similar circumstances: Courts have acknowledged—and their immunity determinations reflect—that in many cases, existing precedent will provide only very general guidance for the officer's conduct in her particular circumstances. As the Supreme Court explained, "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted [a] determination [in one case] will seldom be useful precedent for another."[206] In addition, many (if not most) Fourth Amendment claims—with the possible exception of excessive force claims[207]—do not contain indicia of wrongdoing that would signal officials of the likelihood that their

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Answers, 94 MICH. L. REV. 2466, 2536-37 (1996) (noting the close collaboration between prosecutors and police officers in investigating suspects, deciding whether to charge, defending suppression motions, and taking cases to trial).

203. Federal and state law enforcement officers are trained in "academies" that offer detailed instruction about all aspects of policing, including constitutional criminal procedure. *See generally id.* at 2535 (citing National Association of State Directors of Law Enforcement Training 1978 Survey, *reproduced in* JOHN D. FERRY & MARJORIE KRAVITZ, POLICE TRAINING: A SELECTED BIBLICGRAPHY (National Criminal Justice Reference Service of the U.S. Dep't of Justice, 1980)). Importantly, these officers also receive updating in the form of "continuing education classes and periodic dissemination of written material[s]" containing judicial opinions relevant to police work. *Id.* Steiker reports that "F.B.I. agents are required to attend an annual legal training session" in which they are informed of "all relevant federal constitutional decisions [from] the previous year." *Id.* at 2535 n.331 (setting forth information obtained in a telephone conversation with the chief counsel of the Boston Division of the F.B.I.). At least one F.B.I. chief counsel reported that he prepares a written analysis of any federal case that is of immediate importance and distributes it to all the agents in his division. *See id.*

204. Fourth Amendment case law that is formulated in criminal cases is, of course, applicable to Fourth Amendment suits under section 1983.

205. Stuntz, *supra* note 199, at 896.

206. Ornelas v. United States, 116 S. Ct. 1657, 1662 (1996) (internal quotation marks and citations omitted).

207. *See infra* Part III.E.

conduct was unlawful.[208] Indeed, quite often there is very little difference between unconstitutional conduct and actions that are "not only legally permissible, but socially desirable, even essential to maintaining adequate order and security."[209] Qualified immunity will attach under such circumstances because an official who is found after the fact to have engaged in unconstitutional conduct that carried no signal of wrongdoing—and whose only "fault" consisted in her failure to predict whether a court would agree with her assessment that a particular set of facts constituted probable cause[210]—is not blameworthy.[211]

Courts have also recognized, however, that here as in the criminal context, when prohibited actions carry no indicia of their own wrongfulness, such actions *are* blameworthy if the actor has actual or constructive "knowledge that the relevant conduct is legally forbidden."[212] In many Fourth Amendment cases, knowledge (or reason to know) that the conduct is probably unconstitutional is an "essential element" of its wrongfulness.[213] The question for qualified immunity in such cases is whether existing case law was sufficiently clear to have put a reasonable official on notice of the likely unconstitutionality of her action because only the violation of a clear legal duty makes her conduct blameworthy. Moreover, in order to provide the requisite notice, the law must be clear in a "particularized" sense. Only if the constitutional rule has been fleshed out in circumstances sufficiently analogous to enable "a reasonable official [to appreciate] that *what [she] is doing* violates [a constitutional] right" is an official who violates that right subject to damages liability.[214]

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208. See *infra* Parts III.C (introduction), III.C.1, III.C.3, III.D.2, and notes 370-73 and accompanying text for a discussion of qualified immunity as applied to claims such as excessive force that may involve inherently wrongful conduct.

209. Jeffries, *supra* note 12, at 78. As Professor Jeffries frames it: "An unconstitutional search and seizure may differ only slightly from good police work." *Id.*

210. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972) (Lombard, J., concurring).

211. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable.").

212. Hall, *supra* note 37, at 36. Professor Hall argues that knowledge of illegality is a requirement of blameworthiness in malum prohibitum crimes where "normal conscience (moral attitudes) and understanding cannot be relied upon to avoid the forbidden conduct . . . ." *Id.*

213. *Cf. id.* at 35 (discussing knowledge in the criminal context as an "essential element" of the immorality of certain "minor offenses, newly created ones, and those regulating certain businesses").

214. *Anderson*, 483 U.S. at 640 (emphasis added); *see* Melton v. Oklahoma City, 879 F.2d 706, 731 (10th Cir. 1989), *overruled in part on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc) ("[W]here the law is clearly established, there is no justification for excusing individuals

In a general sense, the right to be free from unreasonable searches is quite "clearly established" by the Fourth Amendment. Thus, one could argue that every action that violates that Amendment violates a clearly established right, "no matter how unclear it may have been that the *particular action* is a violation."[215] But, "if the test of 'clearly established law' were to be applied at [that] level of generality, it would bear no relationship" to the relevant inquiry: whether the law is clear enough that "officials [can] reasonably anticipate when their conduct may give rise to liability for damages."[216] For that purpose, the right allegedly violated must have been "clearly established" at a fact-specific level that would have enabled a reasonable official to appreciate that the situation she confronted fit within the prohibited category.[217] This does not mean that there is immunity unless "the very action in question has previously been held unlawful," but it does mean that "in the light of pre-existing law the unlawfulness must be apparent."[218]

The qualified immunity regime described above closely resembles my earlier analysis of fair notice in the criminal regulatory context. Recall that regulatory offenses raise notice concerns because, quite often, the prohibited conduct is not inherently blameworthy. When conduct subject to criminal sanctions contains no indicia of wrongdoing, the courts have addressed issues of fault by inquiring whether the defendant could be expected to have appreciated the unlawfulness of her actions.[219] Individuals who handle or transport hazardous materials or who engage in dangerous activities can reasonably be expected to know that such activities are likely to be regulated; thus, ignorance of the law under those circumstances is not an excuse. When, however, nothing about a defendant's conduct or circumstances would have signaled the likelihood of criminal regulation, actual notice of illegality may be required.

The Fourth Amendment context carries similar expectations for law enforcement officials: Because these officials are repeat players and frequent litigants in Fourth Amendment cases, they either know or should know the contours of Fourth Amendment law,

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from liability for their actions . . . . [O]fficials are presumed to know and abide by clearly established law.").

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

216. *Id.* (internal quotation marks omitted).

217. *Id.* at 640 (emphasis added); *see also* Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986) (noting that "[t]he right must be sufficiently particularized to put potential defendants on notice that their [particular] conduct probably is unlawful").

218. *Anderson*, 483 U.S. at 640.

219. *See supra* notes 102-32 and accompanying text.

at least to the extent that it has been made concrete in cases involving analogous circumstances.[220] If the law governing the defendant's actions under similar circumstances was clear, the official should have known and applied it. Thus, law enforcement personnel will not be entitled to qualified immunity if their conduct was proscribed in analogous, factually-similar cases[221] or, as will be explained in more detail below, if their actions were inherently wrongful.[222] Officers will, however, be entitled to qualified immunity when liability is premised on the invocation of a "new" rule *or* when no factually-analogous case provided clear guidance and the defendant's only error was in failing accurately to predict the court's after-the-fact probable cause judgment.

It should be observed that unlike notice in criminal law, notice in qualified immunity analysis serves as a proxy for fault in the more technical sense:[223] The *objective* clarity of the law[224] applicable to the official's actions is a surrogate for the official's *subjective* state of mind. (Indeed, the Supreme Court moved to an objective standard precisely in order to avoid litigating subjective bad faith and to facilitate summary disposition of qualified immunity claims.[225]) The animating notion for using clear law as a surrogate for subjective fault is that no reasonably conscientious and competent official would fail to recognize and eschew conduct that is clearly unconstitutional under analogous precedent. Thus, the existence of factually-analogous case law clear enough to have provided notice of illegality is a

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220. Unlike in the regulatory context, however, it is not enough that police officers knew or should have known that they are *subject* to regulation if they could not reasonably have appreciated what that regulation *required.*

221. *See, e.g.*, Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (stating that "[t]he most common error" in qualified immunity analysis is that plaintiffs refer "to general rules and to the violation of abstract 'rights' " but qualified immunity is lost only if preexisting law *"dictate[s] . . .* the conclusion for every like-situated, reasonable government agent that what [the] defendant is doing violates federal law *in the circumstances"*).

222. *See* Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996) ("A plaintiff can [rebut a claim of qualified immunity] either by showing that a closely analogous case has already established both the right at issue and its application to the factual situation at hand, or by showing that the violation was so obvious that a reasonable person would necessarily have known about it.") (citations omitted), *cert. denied*, 117 S. Ct. 958 (1997).

223. *See supra* notes 65-68 and accompanying text.

224. The clarity of the law is a purely legal question. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987) (stating that the defendant should be permitted as a matter of law to argue that the law was unclear); Hunter v. Bryant, 502 U.S. 224, 228 (1991) (stating that "the court should ask whether the agent acted reasonably under settled law").

225. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (discussing the benefits of an objective standard for judicial efficiency).

proxy for the offending official's bad faith.[226] Conversely, when the law governing an official's conduct did not clearly prohibit her actions, she cannot be presumed to have acted in bad faith and qualified immunity will attach.

C. *Qualified Immunity and "Bad" Conduct*

I began my analysis of qualified immunity by demonstrating how the fault/notice connection makes sense of immunity in Fourth Amendment cases.[227] The Supreme Court has held that qualified immunity is a unitary defense, presumptively intended to apply to the full range of constitutional claims.[228] But constitutional provisions vary greatly, both in the nature of the conduct they prohibit—from searches without probable cause, to deliberate indifference to a prisoner's serious medical needs, to police brutality—and in the level of

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226. *See id.* at 818-19 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."); Alvarado v. Zayas, 816 F.2d 818, 820 (1st Cir. 1987) (stating that qualified immunity is a question of objective reasonableness and the analysis "is not affected by the defendant's particular state of knowledge about the law"). This analysis appears te hold "police officers te the same standard as judges" in assessing the contours of constitutional law. *See* Harris v. District of Columbia, 932 F.2d 10, 16 (D.C. Cir. 1991). As one court has framed it, "[O]fficials are charged with knowledge of constitutional developments at the time of the alleged constitutional violation, including all available case law." Lum v. Jensen, 876 F.2d 1385, 1387 (9th Cir. 1989). In the Fourth Amendment context, however, this expectation is by no means unrealistic given the special circumstances that provide law enforcement officers with extensive exposure to the law of search and seizure. *See supra* notes 200-05 and accompanying text. My colleague, Anne Coughlin, who teaches criminal procedure and "rode" with police officers on a number of occasions when she was living in Nashville, Tennessee, reports that police officers tended to know the relevant constitutional precedents—both state and federal—by case name as well as by facts and holding! Similarly, Craig Wood, a Charlottesville attorney who frequently represents local and state law enforcement officers in section 1983 actions indicated that law enforcement officials tend to know the precedents that apply to the kinds of situations that they are likely to face repeatedly. For example, officers who routinely plan or execute roadblocks in carrying out their duties would be conscious of cases from their own and other jurisdictions describing the specific constitutional limitations on the use of such devices.

227. Any plausible descriptive theory must be able to explain qualified immunity in the Fourth Amendment context, in which the defense has received its most detailed and practical elaboration. The Supreme Court's qualified immunity analysis in Fourth Amendment cases has served as the model for applying qualified immunity to other kinds of constitutional damages claims: *Anderson* and *Malley*—both Fourth Amendment cases—along with *Harlow* are by far the cases most often cited or quoted in laying out the doctrine and application of qualified immunity.

228. *See Anderson*, 483 U.S. at 642-43 (stating that an immunity that varied according to right would not sufficiently protect conscientious officials). I say "presumptively" because on occasion the Supreme Court has left open the question of whether or how qualified immunity might apply in a particular context. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 399 n.12 (1989) (expressly declining to address the "proper application [of qualified immunity] in excessive force cases").

mens rea required to make out a claim—from unreasonable,[229] to "more than negligent,"[230] to intentional.[231] These variations have important implications for qualified immunity analysis: If qualified immunity is about notice as a proxy for fault, constitutional violations that are inherently wrongful should be treated differently from ones that are not. Specifically, if the unconstitutional conduct carries its own indicia of fault, qualified immunity would be expected to "drop out" of the analysis. In such cases, the requirement of blameworthiness would be fully satisfied by the inherent wrongfulness of the unlawful conduct and no additional notice inquiry should be required. The effect of constitutional intent requirements on the qualified immunity analysis is more complicated. As will be explained more fully below, the fact that a constitutional claim requires a showing of willfulness—for example, "deliberate indifference" for Eighth Amendment claims or "intent" for race discrimination claims—does not necessarily obviate the need for qualified immunity. If prohibited conduct carries no indicia of its own wrongfulness and the law governing that conduct is unsettled, the fact that it is done willfully or intentionally addresses neither the defendant's lack of blameworthiness nor her lack of notice of the likely illegality of her actions.

1. Inherently Wrongful Conduct

First, to explore the effect on qualified immunity analysis of the inherent "badness" of the prohibited conduct, consider a claim of racial discrimination in violation of the Fourteenth Amendment. Today there is widespread legal and societal consensus that government-sanctioned, intentional racial discrimination is bad behavior.[232] When governmental officials make invidious distinctions based on race, no one pauses to ask whether they had notice of the rules gov-

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229. The Fourth Amendment prohibits *unreasonable* searches and seizures. *See* U.S. CONST. amend. IV.

230. Deprivations of life, liberty, or property without due process of law are cognizable only if the deprivation was more than simply negligent. *See* Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (suggesting that allowing claims for due process based on negligent acts would trivialize the constitutional right). The Supreme Court left open the question of "whether something less than intentional conduct"—for example, recklessness or gross negligence—would "trigger due process protections." *Id.* at 334 n.3.

231. The Fourteenth Amendment, for example, has been construed te require a showing of intentional discrimination in order to make out an equal protection claim. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

232. For a discussion of the contingent nature of what is deemed inherently wrongful conduct, see *supra* note 37.

erning their conduct. The widely-accepted wrongfulness of intentional discrimination makes any additional judicial inquiry into actual knowledge of illegality unnecessary, or even redundant, because the character of the behavior itself is inconsistent with any reasonable belief in its lawfulness.[233] In Fourteenth Amendment discrimination cases, courts routinely presume knowledge of the law—and deny qualified immunity—based on precisely that reasoning.[234] For example, in *Wade v. Hegner*, the plaintiff (a black parent) sued the white principal of an all-white Chicago public school for allegedly denying admission to the plaintiff's six children.[235] The principal, who had reassured white parents that the school would remain segregated, had been informed by his predecessor that black students could successfully be excluded by describing to their parents the racial hatred that would result from enrollment at the school.[236] The principal told the plaintiff that enrollment of his children "wo[uld]n't work" and that the principal could not protect plaintiff's children from potential violence in or out of school. The principal gave the plaintiff the names of several (predominantly black) alternative schools and did not offer any help in dealing with the hostile community reaction he predicted would occur if the plaintiff sent his children to the all-white school. The court of appeals affirmed the denial of qualified immunity on the ground that no reasonable principal could have failed to realize it was "unconstitutional to intentionally disconrage a black parent from registering his children by threatening the parent with the possible dangers that might ensue."[237] The court reasoned that "[i]t is inconceivable that fifteen years [after the Supreme Court expressed its impatience over delays in implementing *Brown v. Board*

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233. *See generally* Jeffries, *supra* note 8, at 98 n.57 (noting that a governmental defendant's claim not to have known the law prohibiting racial discrimination would be "legally irrelevant because it is factually incredible").

234. As one scholar notes:

> There are cases in which the constitutional right allegedly violated is so clearly settled in its application to wide-ranging fact situations that the finding of a constitutional violation in a particular case dictates a finding as a matter of law that the defendant violated clearly settled law as well. This is often the case with equal protection violations [involving race].

2 NAHMOD, *supra* note 147, at 132; *see* Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996) ("A plaintiff can [rebut a claim of qualified immunity] either by showing that a closely analogous case has already established both the right at issue and its application to the factual situation at hand, or by showing that the violation was so obvious that a reasonable person would necessarily have known about it.").

235. 804 F.2d 67 (7th Cir. 1986).

236. *See id.* at 68.

237. *Id.* at 71. The court rejected defendant's qualified immunity argument that "the law was not clearly established because 'none of the cases cited by the trial court or [the plaintiff] is closely analogous to the fact pattern here.' " *Id.* (citing Defendant's Brief at 19).

of Education] a school official could express surprise that frightening a black family out of the all-white Cicero school system would violate" the Constitution.[238] In cases like *Wade*, courts have not inquired whether defendants had adequate notice that their conduct was likely to be unconstitutional nor have they searched the federal reporters for factually-analogous case law. When the unconstitutional conduct would engender widespread condemnation in the current societal and legal environment—in other words, the conduct carries indicia of its own wrongfulness—knowledge of illegality is unnecessary to ensure against liability without fault and qualified immunity will be denied.[239]

It must be noted, however, that to satisfy the requirement of fault, and avoid a defense of qualified immunity, it is not enough that the defendant knew or should have known that her conduct was probably unlawful in some general sense. For example, a defendant is not deprived of qualified immunity on the ground that she knowingly violated an applicable state regulation.[240] Similarly, not every illegal act that may constitute a tort[241] or even a crime[242] will give rise to a

238. *Id.* at 72.

239. *See* Smith v. Lomax, 45 F.3d 402, 407 (11th Cir. 1995) (holding that "[g]iven the clear state of the law prohibiting racial discrimination in public employment . . . no reasonable [official] . . . would have believed" it was lawful to replace a white employee with a black employee on the basis of race); Bator v. Hawaii, 39 F.3d 1021, 1027, 1028-29 (9th Cir. 1994) (denying qualified immunity on the ground that a reasonable official would have understood that subjecting a woman to "persistent and unwelcome physical and verbal abuse" based on her gender "is exactly the kind of sex discrimination prohibited by the Equal Protection Clause"); Auriemma v. Rice, 910 F.2d 1449, 1457 (7th Cir. 1990) (holding that no reasonable superintendent of a major city police department could reasonably have concluded it was lawful to reorganize the department by demoting (only) white officers and promoting (only) black officers, all in the absence of any affirmative action plan or justification); Goodwin v. Circuit Court, 729 F.2d 541, 546 (8th Cir. 1984) (rejecting qualified immunity as a defense in cases alleging discrimination on the basis of sex); Flores v. Pierce, 617 F.2d 1386, 1392 (9th Cir. 1980) (holding that "[t]he constitutional right to be free from such invidious [racial] discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it"); Antia v. Thurman, 914 F. Supp. 256, 258 (N.D. Ill. 1996) (holding that a police officer who detained and harassed plaintiff based on her race would not be entitled to qualified immunity on her equal protection claim because the "right to be free from intentional discrimination on the basis of race or sex in the enforcement of criminal laws is clearly established"); Oona R.-S. by Kate S. v. Santa Rosa City Schools, 890 F. Supp. 1452, 1472 (N.D. Cal. 1995) (denying qualified immunity because a reasonable school official "would have known that her failure to properly train, supervise, or control a student teacher engaged in intentional discrimination against female students on the basis of their sex would violato the statutory and constitutional rights of those students").

240. *See* Davis v. Scherer, 468 U.S. 183, 193-96 (1984) (declining to adopt a rule that violation of a statute or regulation by a state official is per se unreasonable conduct that would deny the official qualified immunity).

241. *See* Parratt v. Taylor, 451 U.S. 527, 543 (1981) (denying petitioner relief under 42 U.S.C. § 1983 for injury resulting from the negligent acts of a state official), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986).

constitutional claim or result in a denial of qualified immunity. Individual liability for constitutional violations obtains only if "in light of pre-existing law the unlawfulness *under the [C]onstitution* is apparent."[243] Thus, the issue is not whether an official would have realized that her conduct was wrong but whether she would have appreciated that her conduct involved the special kind of unlawfulness against which constitutional damages liability is directed:[244] The "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[245] It is "immaterial," however, for purposes of notice that the "defendant[ ]may not have been thinking in constitutional terms."[246] As the Court explained in *Screws v. United States*, "willful violators of constitutional requirements, which have been [made specific by express terms of the Constitution or decisions interpreting them,] certainly are in no position to say that they had no adequate advance notice that they would be visited with [liability]."[247] Governmental defendants whose official behavior is so far off the mark that it constitutes an obvious abuse of power cannot complain they lacked notice of illegality any more than the criminal defendant who commits homicide or burglary.

To provide an example of the distinction described above, consider the recent case of *United States v. Lanier*.[248] In *Lanier*, a state judge was prosecuted under 18 U.S.C. § 242,[249] the criminal analogue of section 1983, and the Due Process Clause for allegedly raping or sexually assaulting in his chambers five women who were either

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242. *See* Screws v. United States, 325 U.S. 91, 108 (1945) (discussing 18 U.S.C. § 242, the criminal analogue of 42 U.S.C. § 1983).

243. United States v. Lanier, 117 S. Ct. 1219, 1228 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal brackets omitted) (emphasis added)).

244. *See* Martinez v. Colon, 54 F.3d 980, 988 (1st Cir. 1995) ("[C]learly established . . . denotes that at the time the challenged conduct occurred the contours of the right were sufficiently plain that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right."); Estate of Sinthasomphone v. City of Milwaukee, 838 F. Supp. 1320, 1327 (E.D. Wis. 1993) ("The issue . . . is not whether [the defendants] were good or bad cops in general or [on the day in question] . . . [but] whether under *clearly established constitutional doctrine*, the officers were required to know [their actions] would have dire consequences.").

245. *Screws*, 325 U.S. at 109.

246. *Id.* at 106.

247. *Id.* at 105.

248. 117 S. Ct. 1219 (1997).

249. Section 242 provides, in relevant part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any peron in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned not more than one year, or both. . . .

18 U.S.C. § 242 (1994).

seeking employment or had cases pending before his court. The "constitutional notice"[250] question was not whether a reasonable judge should have known that sexual assault and rape is unlawful—the fair notice question in ordinary criminal cases—but whether he should have known that constitutional principles "forbid a sitting judge, in his chambers, and in some cases while in his judicial robes, from fondling and raping women with business before his court."[251] The question, it seems to me, answers itself.[252]

2. The Effect of Subjective Intent

It might be tempting to conclude that all constitutional claims requiring a showing of intentional conduct automatically fall into a category of cases in which qualified immunity is not justified.[253] To the contrary, however, the argument for blameworthiness apart from notice of illegality depends not so much on the *intentionality* of the behavior but on the notion that reasonable officials would know that such behavior is *wrongful.* It is true that actions performed intentionally or knowingly are generally thought to be more culpable than actions that are, for example, merely reckless. Scienter as to *conduct,* however, in the sense of intending to do certain acts or bring about

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250. The *Lanier* Court held that the standard for adequate notice in 18 U.S.C. § 242 cases is the same as the standard for qualified immunity in section 1983 cases. 117 S. Ct. at 1227 & 1228. *See infra* notes 387-400 and accompanying text.

251. United States v. Lanier, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting), *vacated,* 117 S. Ct. 1219 (1997). Judge Daughtrey criticized the majority for "intimat[ing] that [Judge] Lanier could not have been aware that sexually assaulting women in his chambers when they arrived to conduct official business with him constituted a violation of the victim's due process rights." *Id.* at 1413.

252. The Court in *Screws* came to a similar conclusion. The defendants in that case were law enforcement officers who apparently held a grudge against the victim, a young black man. They arrested him late at night—allegedly for stealing a tire—handcuffed him and took him by car to the courthouse square, beat him with their fists and a solid-bar blackjack for 20-30 minutes until he was unconscious, "dragged [him] feet first through the courthouse yard into the jail and threw him on the floor dying." *Screws,* 325 U.S. at 92-93. The victim was later removed to a hospital where he died within the hour and without regaining consciousness. *Id.* at 93. In considering a fair notice challenge to the conviction, the Court opined that while not every prisoner who is "assaulted, injured, or even murdered by state officials" has a constitutional claim, "[t]hose who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of a trial which due process of law guarantees him." *Id.* at 106, 108. The Court further explained that "in determining whether that requisite bad purpose was present, the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." *Id.* at 107.

253. For other scholarly articles that have addressed the interaction between qualified immunity and constitutional intent standards, see Chen, *supra* note 174; Rudovsky, *supra* note 190.

certain results, is not necessarily incompatible with a reasonable belief in the lawfulness of one's actions. As has been argued in the criminal context, while mens rea often defines the difference between "innocence and criminality,"[254] it is also "possible willfully to bring about certain results and yet be without fair warning that such conduct is proscribed."[255] Similarly, a requirement of willful conduct cannot make definite constitutional requirements which are undefined;[256] it does not provide any better notice to be told that one must do something "willfully" if one is not told what that something is.[257]

Imagine, for example, a Fourteenth Amendment claim involving intentional "benign" racial discrimination in the current, rapidly changing legal environment of college admissions. Affirmative action for the purpose of addressing the effects of past racial discrimination does not have the indicia of wrongfulness that inheres in invidious racial discrimination. Moreover, the law governing affirmative action in education is uncertain and there is, as yet, no clear legal consensus[258]—let alone societal consensus—of what is forbidden and what is permitted. When the boundary between legality and illegality is uncertain, an official acting in good faith who strays across the constitutional line is not blameworthy. In such cases, qualified immunity

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254. Sayre, *supra* note 51, at 56.

255. LAFAVE & SCOTT, JR., *supra* note 91, § 2.3, at 131.

256. *Screws*, 365 U.S. at 104, 105. As the majority in *Screws* explained:

> The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. . . .
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> . . . .
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> [However,] a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Id. at 102-03; *see* Jeffries, *supra* note 12, at 56 (pointing out that an employer could intentionally fire a government worker in the "reasonable (but mistaken) belief that the procedures accompanying that discharge accorded with constitutional standards").

257. *See also Screws*, 325 U.S. at 154 (Roberts, J., dissenting) (" 'Willfully' doing something that is forbidden when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully.' "); *see generally* Packer, *supra* note 42, at 123 (discussing *Screws*).

258. *Compare* Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994) (invalidating the University of Maryland's Banneker scholarship program, which was reserved exclusively for African-Americans on the ground that the program was not narrowly tailored to remedy past discrimination) *and* Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1994) (holding that diversity was not a sufficient justification for the University of Texas School of Law to use race as a factor in making admissions decisions), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (holding that race may be taken into account as one factor in promoting diversity in college admissions).

functions to ensure against liability without fault by immunizing officials who lacked notice of the likely illegality of their actions.[259]

3. Wrongful Conduct and Intent in Eighth Amendment Cases

Like invidious race discrimination claims, Eighth Amendment claims by prisoners alleging "deliberate indifference" to a serious medical condition or risk of injury[260] also appear to fall into the category of cases in which qualified immunity arguably should drop out of the analysis: Officials who deliberately ignore a prisoner's obvious, significant need for medical attention or who fail to address a known risk of injury are engaging in seriously culpable behavior.[261]

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259. The law governing affirmative action is significantly more settled in contexts other than education after the Supreme Court's holdings in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995). Prior to these holdings the courts tended to grant qualified immunity in cases challenging affirmative action. *See, e.g.*, Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 61-62 (2d Cir. 1992) (affirming grant of qualified immunity on the ground that a state law providing for minority business set-asides for state-funded highway construction projects was not clearly unconstitutional); Cygnar v. City of Chicago, 865 F.2d 827, 846 (7th Cir. 1989) (affirming grant of qualified immunity for alleged racial discrimination where defendant's actions arose from a good faith affirmative action plan that was not clearly illegal under current law); *see also* Jantz v. Muci, 976 F.2d 623, 628-30 (10th Cir. 1992) (affirming grant of qualified immunity for alleged employment discrimination based on sexual orientation because government classifications based on sexual orientation were neither inherently suspect nor quasi-suspect *under clear law*).

After *Croson* and *Adarand*, courts have tended to deny qualified immunity in cases challenging affirmative action in areas such as employment and contracting. For example, in *Alexander v. Estepp*, 95 F.3d 312, 317-18 (4th Cir. 1996), *cert. denied sub nom.* Prince George's County v. Alexander, 117 S. Ct. 1425 (1997), the Fourth Circuit denied qualified immunity, citing case law that should have led county officials to conclude that their affirmative action program would not satisfy the strict scrutiny requirements of the Equal Protection Clause. By contrast, in *Erwin v. Daley*, 92 F.3d 521, 528 (7th Cir. 1996), also a post-*Croson* case, the Seventh Circuit held that the use of out-of-rank-order promotions and standardization techniques did not preclude a finding of qualified immunity. The court reasoned that in neither *Croson* nor *Adarand* had a majority of the Supreme Court concluded that affirmative action was *never* constitutional. *Id.* at 526-27. The court noted that in *Adarand*, the Supreme Court cited with approval *United States v. Paradise*, 480 U.S. 149 (1987), which had upheld an affirmative action program that involved "exactly the same kind of remedial measure" that was at issue in *Erwin*. 92 F.3d at 527. The court also cited a number of post-*Croson* cases in which lower courts had upheld affirmative action programs using out-of-rank-order promotions. *Id.*

260. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding that deliberate indifference requires that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." (citation omitted)).

261. In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), the Supreme Court explained the rationale for the government's duty under the Due Process Clause to protect those in custody from certain risks of harm:

Of course, there may be factual issues as to whether officials knew about the risk of illness or injury or whether they could reasonably have believed that the alleged risk was not sufficiently serious to warrant intervention.[262] But, assuming the necessary factual showing, an official who ignores obvious signs of a serious medical problem or risk of injury or disease has acted badly; she can hardly argue that she didn't realize her actions could be unconstitutional. For example, in *McCord v. Maggio*, a prisoner brought suit against prison officials alleging that he was required to live and sleep in a roach-infested, windowless, unlighted cell that was flooded with foul water and sewage.[263] The court reasoned that prison officials could not plausibly claim it was "unclear" whether forcing prisoners to sleep "on a bare mattress in filthy water contaminated with human waste" violated the Eighth Amendment.[264] Similarly, in *Munz v. Michael*, the court concluded that "prison officials reasonably should have understood . . . that they were violating a prisoner's Eighth Amendment rights if they beat him while he was bound hand and foot in a padded cell."[265] Likewise, the courts have denied qualified immunity under the following circumstances on the ground that "prison officials who deliberately iguore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law:"[266] where officials knowingly failed to obtain medical care for an arrestee who was bleeding, six months pregnant, and under a doctor's care for pregnancy-related complications;[267] where a paraplegic was forced to live in squalor

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> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. at 200.

The *DeShaney* Court held that there is no duty to protect in noncustodial settings or in situations where the State was aware of particular dangers but "it played no part in their creation, nor did it do anything to render [the plaintiff] more vulnerable to them." *Id.* at 201. The Court explicitly left open the question whether a duty to protect is triggered in contexts that are analogous to custody, such as foster care. *See id.* at 201 n.9.

262. *See* Wilson v. Seiter, 501 U.S. 294, 298-99 (1991) (holding that deliberate indifference requires that the deprivation was sufficiently serious and that the official acted with a sufficiently culpable state of mind).

263. 927 F.2d 844 (5th Cir. 1991).

264. *Id.* at 846, 848.

265. 28 F.3d 795, 800 (8th Cir. 1994).

266. Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992) (citation omitted).

267. *See* Boswell v. Sherburne County, 849 F.2d 1117, 1119-23 (8th Cir. 1988). The plaintiff, Wanda Boswell, was arrested for operating a motor vehicle under the influence of alcohol. Shortly after being incarcerated, Boswell notified prison personnel that she was bleeding. Over the next 10 hours the bleeding worsened and Boswell experienced increasingly severe cramping

because he was denied the use of a wheelchair;[268] where a prison pharmacist arbitrarily refused to fill an inmate's bona fide prescription for anti-seizure medication;[269] and where prison officials forced an inmate to travel by plane in contravention of his treating physician's specific orders, resulting in permanent and irreparable damage to his hearing.[270] In such cases the courts have found it unnecessary to ask whether officials had notice that their conduct would likely violate the Constitution or to scour precedent for analogous cases.[271] When officials engage in conduct that is clearly unconstitutional, qualified immunity drops out of the analysis.[272]

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and pain. Prison personnel refused to notify Boswell's physician or to obtain medical assistance. Boswell finally was transported to the hospital at the insistonce of an off-duty police officer with emergency medical training, where her baby was born and died only 34 minutes later. *See id.* at 1119-20. The court concluded that "a pretrial detainee's right to emergency medical care was both clearly established and clearly contoured . . . when the incident Boswell complains of took place." *Id.* at 1121.

268. *See* Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993). Defendant Weeks was unable te care for his person, shower himself, clean his cell, or take advantage of his limited out-of-cell time because he was denied the use of a wheelchair. *See id.* at 187. The court concluded that "the squalor in which Weeks was forced to live as a resnlt of being denied a wheelchair was clearly foreseeable by [prison officials]" and that "jail employees should have been aware . . . that tbeir deliberate indifference to tbe medical needs of paraplegic inmates constituted an Eighth Amendment violation." *Id.* at 188.

269. *See* Johnson v. Hay, 931 F.2d 456 (8th Cir. 1991). The defendant/pharmacist claimed that he had refused to fill the plaintiff's prescriptions because they were "inappropriate." *Id.* at 458. The defendant, however, made this determination without seeing plaintiff's medical records prior to incarceration, without personally examining the plaintiff or requesting a prison doctor to examine him, without contacting the prescribing physician or notifying any physician that he intended to withhold the prescribed medication, and without contacting the physician who had diagnosed the seizure disorder. *See id.* at 461; *see also* Cummings v. Roberts, 628 F.2d 1065, 1067-68 (8th Cir. 1980) (denying qualified immunity where prison officials deliberately denied access to medical care and refused to carry out treatment prescribed by physicians).

270. *See Hamilton*, 981 F.2d at 1064-67. Officials transported plaintiff to another prison by airplane after he had undergone two surgeries on his ear and in contravention of his surgeon's specific order that plaintiff not be forced or permitted te fly until his medical condition had stabilized. *See id.* at 1064. The court denied qualified inmunity. For a discussion of the court's reasoning, see *supra* text accompanying note 266. *See also* White v. Napoleon, 897 F.2d 103, 106-10 (3d Cir. 1990) (denying qualified imunity where defendant used painful ineffectual treatments which had serious accompanying risks); Hnnt v. Dental Dep't, 865 F.2d 198, 201 (9th Cir. 1989) (holding that prison officials are "deliberately indifferent to a prisoner's serious medical needs wben they deny, delay, or intentionally interfere with medical treatment").

271. *See* Scher v. Engelke, 943 F.2d 921, 925 (8th Cir. 1991) ("[T]he fact that previously no court has held that [retaliatory] searches constitute an eighth amendment violation is irrelevant [if] 'in light of preexisting law the unlawfulness [is] apparent.' ") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

272. *See* Nelson v. Overberg, 999 F.2d 162, 165-66 (6th Cir. 1993) (denying qualified immunity to prison officials who failed even to investigate an inmato's claim that he had been threatened with violence by other inmates); Taylor v. Bowers, 966 F.2d 417, 422-23 (8th Cir. 1992) (denying qualified imunity to a prison physician who delayed surgical intervention to prisoner later foimd to have an acute appendicitis in order te prompt tbe defendant to confess that he had swallowed drug-filled balloons); Heflin v. Stewart County, 958 F.2d 709, 717-18 (6th Cir. 1992) (denying qualified immunity to prison officials who took no steps te try to save the life

Like Fourteenth Amendment benign discrimination claims, many Eighth Amendment violations, while meeting the formal requirement of "deliberate indifference," do not carry their own indicia of fault. When such indicia do not exist, notice of illegality in the form of analogous precedent is necessary to ensure that only culpable officials are exposed to liability. For example, in *Williams v. Anderson* an inmate who became violent in the prison psychiatric unit sued medical personnel who administered a prescribed antipsychotic drug against his will.[273] The court affirmed a finding of qualified immunity on the ground that neither Supreme Court nor lower court cases had clearly addressed the issue of whether an inmate has a right to refuse antipsychotic drugs beyond the right to have a doctor's examination and to have the medication administered as treatment and not as punishment.[274] Similarly, in *Gibson v. Matthews*, the court affirmed a finding of qualified immunity for prison officials who allegedly failed to grant a pregnant prisoner's request for an abortion.[275] The court reasoned that at the time these events took place there were "no reported cases regarding the abortion rights of prisoners" and there was "no ruling or consensus on the issue of whether prison officials were required to furnish or arrange abortions for inmates."[276] A third

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of a prisoner who had attempted suicide by hanging himself); Henderson v. DeRobertis, 940 F.2d 1055, 1057-58, 1060-61 (7th Cir. 1991) (denying qualified immunity to prison officials who during a four-day period forced prisoners to remain in an unheated cellblock despite outdoor temperatures of 22 degrees below zero); Cleveland-Perdue v. Brutsche, 881 F.2d 427, 431-32 (7th Cir. 1989) (denying qualified immunity to prison officials whose failure to remedy alleged inadequacies constituted deliberate indifference to inmates' medical needs); Duckworth v. Frazen, 780 F.2d 645, 653 (7th Cir. 1985) (denying qualified immunity to prison officials for injuries to prisoners sustained when transporting bus caught fire).

273. 959 F.2d 1411, 1412-13 (7th Cir. 1992).

274. *Id.* at 1414-17 ("[A]t the time the defendants acted, it was not clearly established that their actions violated the Due Process Clause of the Fourteenth Amendment. Nor was it established that their actions amounted to the sort of 'deliberate indifference' or 'unnecessary and wanton infliction of pain' independently proscribed by the Eighth Amendment."). In 1990, well after the events at issue in *Williams*, the Supreme Court clarified the rights of prisoners te refuse antipsychotic drugs. *See* Washington v. Harper, 494 U.S. 210, 221-22 (1990) (holding that an inmate has a "significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs" under the Due Process Clause of the Fourteenth Amendment).

275. 926 F.2d 532, 535 (6th Cir. 1991).

276. *Id.* The only other federal case that has considered this issue is *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). In *Monmouth* the Third Circuit affirmed with modification a preliminary injunction prohibiting prison officials from requiring inmates te obtain a court order to obtain an elective, nontherapeutic abortion. The court held that the release requirement violated prisoners' fundamental right to choose te terminate their pregnancies in violation of the Fourteenth Amendment and constituted "deliberate indifference" to a serious medical need in violation of the Eighth Amendment. *Id.* at 351. The court further held that, "in the absence of alternative methods of funding, the County must assume the cost of providing inmates with elective, nontherapeutic abortions." *Id.* Because the plaintiffs in *Monmouth* sought *injunctive relief* rather than damages, qualified

example is *McKinney v. Anderson*, in which the plaintiff/inmate claimed that placing him in a cell with a five-pack-per-day smoker constituted deliberate indifference because it posed an unreasonable risk of future injury to his health.[277] The court agreed, reasoning that scientific evidence had "rapidly accumulated . . . regarding the adverse health effects resulting from exposure to ETS [environmental tobacco smoke]" and noting that the health consequences of ETS are magnified in the prison setting due to the high number of smokers and the lack of segregation of smokers from nonsmokers.[278] The court concluded that given society's increasingly negative attitude toward smoking—embodied in federal, state, and local antismoking statutes—"it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of [future] harm to their health."[279] Importantly, however, the court granted injunctive relief[280] but held that prison officials were immune from damages liability because "at the time the defendants acted, there was no clearly established liability for exposing prisoners to ETS."[281]

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immunity was not at issue. For a discussion of the inapplicability of qualified immunity in suits for injunctive relief, see *infra* note 410.

277. *See* 924 F.2d 1500, 1502 (9th Cir. 1991), *aff'd sub nom.* Helling v. McKinney, 509 U.S. 25 (1993). The prisoner also alleged that prison officials were deliberately indifferent te evidence of current medical problems caused by his exposure te passive cigarette smoke. *Id.* The Ninth Circuit had previously held that exposure to environmental tobacco smoke by those who are sensitive to such exposure because of a preexisting condition may state a claim under the Eighth Amendment. *See* Franklin v. Oregon, 662 F.2d 1337, 1346-47 (9th Cir. 1981). The magistrate concluded that the plaintiff had failed to make the factual showing necessary to support that claim, leaving only the risk of future injury claim. *See McKinney*, 924 F.2d at 1503; *see also McKinney*, 509 U.S. at 27-30 (discussing the procedural history of this case).

278. *McKinney*, 924 F.2d at 1505.

279. *Id.* at 1505-08, 1508; *see* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (stating that the standard for assessing an Eighth Amendment claim "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

280. For a discussion of the rationale for the unavailability of qualified immunity in suits for injunctive relief, see *infra* note 410.

281. *McKinney*, 924 F.2d at 1509. *Compare* Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1988) (holding that the risk of future injury from exposure to ETS may amount to a violation of the Eighth Amendment), *with* Clemmons v. Bohannon, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc) (dismissing claim based on exposure to ETS because the Eighth Amendment "does not sweep so broadly as to include possible latent harms to health"). *See also* Caldwell v. Quinlan, 729 F. Supp. 4, 7 (D.D.C. 1990) (holding that there is no constitutional right to a smoke-free environment); Gorman v. Moody, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989) (same). In *Helling v. McKinney*, 509 U.S. at 36, the Supreme Court held that deliberate indifference to a future serious health problem (such as exposure to ETS) *could* constitute a violation of the Eighth Amendment if on remand the court found that

> society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Id.

As these cases illustrate, qualified immunity is justified when an official would have no reason to think that failing to address a particular risk of harm or injury would later be judged by a court to constitute deliberate indifference within the meaning of the Eighth Amendment. In such cases the official's only fault is her failure to anticipate the direction of constitutional law.

D. Qualified Immunity and Balancing Tests

Many constitutional rights have been described by the courts in terms of balancing tests, which seek to accommodate two or more important but opposing interests.[282] When a constitutional right involves case-by-case balancing, qualified immunity is a particularly powerful defense against damages liability.[283] Viewing qualified immunity through the lens of the fault/notice connection helps to explain why this is so.

1. Qualified Immunity in First Amendment Cases

Consider, for example, the role of qualified immunity in First Amendment retaliation claims against governmental employers. The Supreme Court has held that while a public employer may not retaliate against an employee for exercising her right to freedom of

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282. In *Anderson v. Creighton*, the Supreme Court noted that "[t]he fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable. . . ." 483 U.S. 635, 643-44 (1987).

Professor Aleinikoff has argued that "balancing now dominates major areas of constitutional law." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965-71 (1987). He cites the following examples of contexts in which balancing tests have been employed by the Court: Fourth Amendment search and seizure, Dormant Commerce Clause, First Amendment, Fourteenth Amendment equal protection and substantive due process, the Contract Clause, the privileges and immunities clause, the Fifth Amendment's protections against self-incrimination and double jeopardy, the Sixth Amendment's guarantees of a jury trial and a public trial, the Eighth Amendment's prohibition against cruel and unusual punishment, the Fourteenth Amendment's Due Process Clause in criminal proceedings, separation of powers, and the right to travel. *See id.*

283. I do not discuss the Fourth Amendment probable cause standard as a balancing test, although in some sense it is: Probable cause requires a balancing of the need to "safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" with the need to "give [police officers] fair leeway for enforcing the law in the community's protection." Brinegar v. United States, 338 U.S. 160, 176 (1949). As noted above, however, the Fourth Amendment often (though not always) has a rule-like quality both because of the large number of rules governing the use of warrants and because of the tendency for similar fact patterns to recur. *See supra* notes 200-05 and accompanying text. That makes the Fourth Amendment different from the Due Process and First Amendment standards I discuss in this section, at least for purposes of qualified immunity.

speech,[284] the First Amendment rights of governmental employees are not absolute.[285] The threshold inquiry is whether the speech at issue touches a matter of "public concern" or involves only a matter of "personal interest."[286] This determination, in turn, depends upon a number of factors, including the content and form of the speech and the context in which the statements were made.[287] If the speech is deemed to involve a matter of public concern, the determination of whether the employee was properly dismissed or disciplined[288] for engaging in that speech requires a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern" and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[289]

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284. *See* Perry v. Sindermann, 408 U.S. 593, 598 (1972); Pickering v. Board of Education, 391 U.S. 563, 574 (1968).

285. The government is understood to have a "freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." Waters v. Churchill, 511 U.S. 661, 671 (1994). This extra governmental power to regulate speech comes from the government's legal obligation te perform certain tasks as "effectively and efficiently as possible." *Id.* at 675.

286. Connick v. Myers, 461 U.S. 138, 147 (1983). The Court in *Connick* noted that

> when a public employee speaks not as a citizen upon matters of *public concern*, but instead as an employee upon matters only of *personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. (emphasis added); *see* United States v. National Treasury Employees Union, 513 U.S. 454, 466 (1995) ("[P]rivate speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the governmental employer.").

287. *See Connick*, 461 U.S. at 149; *see also* Smith v. Fruin, 28 F.3d 646, 651 (7th Cir. 1994) (noting that the public concern inquiry "must . . . take inte account the point of the speech in question" and determine whether it was the employee's "point" to raise an issue because it was a matter of public concern rather than one of merely private interest); Koch v. City of Hutchinson, 847 F.2d 1436, 1443-49 (10th Cir. 1988) (en banc) (listing the factors courts have considered in deciding whether speech touches a matter of public concern).

288. The Supreme Court has held that the First Amendment prohibits patronage promotions, transfers, and recalls, as well as firings. *See* Rutan v. Republican Party, 497 U.S. 62 (1990). In *Pierce v. Texas Department of Criminal Justice*, 37 F.3d 1146 (5th Cir. 1994), the Fifth Circuit applied *Rutan* to cases alleging speech-related retaliation. The court held that "retaliation" encompasses "discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Id.* at 1149.

289. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). If the plaintiff's speech is found to have been on a matter of public concern and the *Pickering* balance is determined in the plaintiff's favor, the plaintiff must also prove that the protected speech was a "motivating factor" in the detrimental employment decision. Mt. Healthy v. Doyle, 429 U.S. 274, 287 (1977). The burden then shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision apart from the protected speech. *See* Melton v. City of Oklahoma City, 879 F.2d 706, 713 (10th Cir. 1989), *overruled on other grounds*, 928 F.2d 920 (10th Cir. 1989).

In adopting the *Pickering* balancing test, the Court reasoned that the "enormous variety of fact situations" in which statements by employees might be thought by their public employers to justify dismissal made the formulation of a bright-line rule neither "appropriate" nor "feasible."[290] The only guidance the Court was able to offer was to describe the "general lines along which an analysis of the controlling interests should run," including whether the statements undermined discipline by superiors or harmony among coworkers, whether the statements had a detrimental impact on close working relationships for which loyalty and confidence are especially required, and whether the statements had an adverse effect on the workplace.[291]

Under *Pickering's* case-by-case approach, disciplining or firing an employee for statements thought to be disruptive to the workplace—unlike, for example, a dismissal based on race—is not per se unconstitutional.[292] The government as employer is charged not only with respecting an employee's right to speak, but also with doing particular tasks, and doing them "as effectively and efficiently as possible."[293] Thus, when a public employee acts or speaks in a way that undermines the effective operation of the workplace, her employer "must have some power to restrain her."[294] While the government cannot regulate the speech of ordinary citizens "in the name of efficiency," when the government employs someone "for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."[295] Retaliation based on an employee's speech reaches constitutional dimensions only when the interests of the employee in speaking outweigh the employer's interest in the effective functioning of the workplace. Thus, public employers are permitted to penalize speech that is unduly disruptive, or involves the employee's private affairs, unless the penalty is inordinately burdensome to the public interest.[296] Moreover, the level of potential or actual disruption of the workplace required to justify retaliation depends upon the nature and importance of the employee's particular statements; the more the employee's speech touches a matter of great public concern, the

290. *Pickering*, 391 U.S. at 569.
291. *Id.* at 569-70.
292. *See* Waters v. Churchill, 511 U.S. 661, 668-75 (1994).
293. *Id.* at 675.
294. *Id.*
295. *Id.*
296. The Court has held that the context in which the statements were made as well as the time, place, and manner of the employee's speech are also relevant to the balance. *See* Connick v. Meyers, 461 U.S. 138, 152 (1983).

greater the showing of disruption required by the government.[297] The balance of interests also varies with the nature of the employee's responsibilities within the governmental agency.[298] For example, when "close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[299]

The problem created by this case-by-case approach is that reasonable public officials "knowing only that they must not infringe on employee free speech rights would not necessarily know just what conduct was prohibited."[300] As one federal judge has expressed it:

> Any balancing approach is hard to administer and invites consideration of many factors.... The farther we depart from bright line rules, the more common error becomes. Have defendants gone "too far"? Questions of degree cannot be answered reliably, which means that taking *any* action is risky to a potential defendant.[301]

When the boundaries of constitutional law are defined by this kind of "sliding scale" analysis, involving "questions that lack right, or at

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297. *See id.* at 150 & n.9. As the Supreme Court has noted, this situation-specific balancing is difficult even for judges, let alone for public employers trying to anticipate when their actions could result in liability. *Id.* at 150.

298. *See* Rankin v. McPherson, 483 U.S. 378, 390 (1987).

299. *Connick*, 461 U.S. at 151-52. Courts have held that in certain contexts, such as judges' chambers, *see* Gregorich v. Lund, 54 F.3d 410, 416 (7th Cir. 1995), and police departments, *see* Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), close working relationships are essential and employers must be given more leeway to insist upon confidentiality, loyalty, and cooperation. *See, e.g.*, *Gregorich*, 54 F.3d at 416 ("Among the countervailing governmental interests that have been recognized is the practical reality of governance that those with policy-making responsibilities must have faithful agents."); McDaniel v. Woodard, 886 F.2d 311, 315 (11th Cir. 1989) (noting that "[c]ourts are reluctant to prevent public employees from firing confidential employees because it seems self-evident that you cannot run a government with officials who are forced to keep their enemies as their confidential secretaries"); Meeks v. Grimes, 779 F.2d 417, 423 (7th Cir. 1985) (noting that a judge's chambers is perhaps the "paradigm example" in which close working relationships are essential to the successful performance of the public function); *Hughes*, 714 F.2d at 1419 (stating that "[m]ore so than the typical governmental employer, the [police department] has a significant government interest in regulating the speech activities of its officers ... [and] should be accorded much wider latitude than the normal government employer in dealing with dissension within its ranks" (citations omitted)).

300. Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988); *see* Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986) (stating that while every public official should know that a citizen "does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights *in any given factual situation* has not been well defined") (emphasis added).

301. Walsh v. Ward, 991 F.2d 1344, 1346 (7th Cir. 1993) (Easterbrook, J.). In *Walsh* the plaintiff alleged that he had been promoted to battalion chief—a job that paid more and had shorter, more regular hours, but prevented plaintiff from operating a private business—in retaliation for his speech. *See id.* at 1345. The court held that it was not clearly established that a promotion, at plaintiff's request, but not to a position of his choosing, could violate the Constitution. *See id.* at 1346-47.

least obviously right, answers," officials cannot fairly be blamed for stepping over the line between permitted and forbidden conduct unless that line "ha[s] been marked in advance."[302] Moreover, "[d]ifferences in the nature of the competing interests from case to case make it difficult for a governmental official to determine, in the absence of case law that is *very closely analogous*, whether the balance he strikes is an appropriate accommodation of the competing individual and governmental interests."[303] As one court has framed it: "[When] the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered 'clearly established' " for purposes of qualified immunity.[304] Given these uncertain constitutional lines, it is easy to see why courts have virtually unanimously agreed that qualified immunity in the First Amendment context has especially broad scope.[305]

Thus, qualified immunity protects from liability an official whose only error was in failing to predict how courts would evaluate the relevant competing interests.[306] If, however, an official can be

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302. *Id.* at 1346; *see Gregorich*, 54 F.3d at 414-15 ("We must remember that governmental officials are not expected to be prescient and are not liable for damages simply because they legitimately but mistakenly believed that the balancing of interests tipped in the State's favor.").

303. *Gregorich*, 54 F.3d at 414 (emphasis added); *see* Rakovich v. Wade, 850 F.2d 1180, 1213 (7th Cir. 1988) (noting that immunity protects "all but the plainly incompetent or those who knowingly violate the law" and concluding that "[i]t cannot be said that an imperfect balancing resulting, in hindsight, in a decision on the wrong side of the scales shows plain incompetence or total disregard, unless, of course, the proper balance was clearly illuminated by the light of existing law") (citations omitted); Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987) (opining that a denial of qualified immunity requires "closely corresponding factual and legal precedent"); Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986) (holding that clearly established rights are supported by case law that is "sufficiently particularized to put potential defendants on notice that their conduct is unlawful").

304. *Myers*, 810 F.2d at 1462.

305. *See Benson*, 786 F.2d at 276 ("With *Harlow*'s elimination of the inquiry inte the actual motivation of the officials . . . qualified immunity typically casts a wide net to protect governmental officials from damage liability whenever balancing is required."). At least eight circuits have concluded that because the *Pickering-Connick* test requires fact-specific balancing, the law governing any particular case will rarely be "clearly established" for purposes of qualified immunity. *See, e.g.*, DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995); Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994); Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992); Guercio v. Brody, 911 F.2d 1179, 1183-85 (6th Cir. 1990); Melton v. City of Oklahoma City, 879 F.2d 706, 728-29 (10th Cir. 1989), *overruled on other grounds by* 928 F.2d 920 (10th Cir. 1991) (en banc); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1324 (11th Cir. 1989); *Noyola*, 846 F.2d at 1024-25; Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987).

306. Qualified immunity "relieve[s public employees] from having to decide, at their financial peril, how judges will balance these interests." Greenberg v. Kmetko, 922 F.2d 382, 385 (7th Cir. 1991); *see, e.g.*, Rogers v. Miller, 57 F.3d 986, 991-92 (11th Cir. 1995) (holding that a sheriff was entitled to qualified immunity in a suit alleging that he transferred plaintiffs, with no change in rank or pay, in retaliation for their support of his opponent in the local election because no case law clearly prohibited defendant's conduct); *Guercio*, 911 F.2d at 1185

charged with "knowledge of the law" via the surrogate of "previously-decided case[s] with clearly analogous facts," that official will be deemed blameworthy and qualified immunity will be denied.[307] This "particularity" requirement is, of course, not peculiar to qualified immunity in the First Amendment context. It applies over the range of constitutional claims to limit damages liability to situations where officials could fairly be expected to know that *their particular conduct* would violate the Constitution by requiring the plaintiff to point to previously decided, factually-similar cases.[308] As courts have framed it, however, the requirement of factually-analogous cases is more protective—leads to less liability—in the First Amendment context than, for example, in Fourth Amendment cases. That is because plaintiffs in Fourth Amendment cases are more likely to be able to identify factually-analogous precedent in the litigation-rich environment of search and seizure, where fact patterns tend to recur, whereas in the First Amendment context the law will only infrequently be found to be clearly established at the level of factual-specificity that will defeat qualified immunity.[309] As one court has explained, because of the case-by-case approach required in First Amendment retaliation cases, "[t]here will rarely be a basis for [an] *a priori* judgment [based on prior case law] that the termination or

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(extending qualified immunity to a bankruptcy judge who terminated his confidential secretary for circulating newspaper articles critical of a judicial nominee because "[officials] of reasonable competence in the position of [defendant] . . . could have disagreed upon whether her right te exercise her first amendment right to free speech without being terminated from her employment was outweighed by the public interest in restering morale, cooperation, dignity, public respect and confidence te the [workplace]"); Schalk v. Gallemore, 906 F.2d 491, 499 (10th Cir. 1990) (holding that the issue for qualified immunity is whether "the protectod nature of [plaintiff's] speech was sufficiently clear that [the defendant] should have been on notice that his asserted interest in preventing disruption would not survive a balancing inquiry"); *Noyola*, 846 F.2d at 1026 (extending qualified immunity to state officials who terminated a welfare services technician in retaliation for complaints to his supervisor about the size of individual caseloads because neither the protected status of plaintiff's speech nor his right te remain employed "could have been facially apparent" to defendants under clear law).

307. *Borucki*, 827 F.2d at 848. The qualified immunity inquiry, however, is not whether a reasonable public official would have known it was unlawful to retaliate against an employee on the basis of her speech but "whether plaintiff's rights were so clearly established when she was terminated that [the defendant] should have understood that *his conduct* at the time he ordered her discharge violated her first amendment right to free speech." *Guercio*, 911 F.2d at 1183 (emphasis added).

308. *See supra* notes 159-64 and accompanying text.

309. *See supra* notos 200-05 and accompanying toxt. Unlike police officers, governmental employers are much less likely to be repeat players in First Amendment or other constitutional litigation and they lack the repeated exposure and opportunities for training by which law enforcement officials develop the ability to predict with some accuracy the boundaries of Fourth Amendment law.

discipline of a public employee violated 'clearly established' constitutional rights."[310]

To take a concrete example of qualified immunity in the First Amendment context, in *DiMeglio v. Haines*, the Fourth Circuit considered whether a local zoning commissioner was entitled to qualified immunity in a suit by a zoning inspector who was allegedly reassigned to a different enforcement territory in retaliation for statements made to a citizens group.[311] The court held the employer immune on several grounds: First, the law at the time the events occurred was unclear as to whether an employee's speech is protected when he speaks as an employee rather than as a citizen.[312] Second, under the *Pickering* balancing test, the employer could reasonably have believed that the plaintiff's statements "made seemingly with the imprimatur" of the zoning office, yet in contradiction to his manager's position on a disputed issue, were sufficiently disruptive to outweigh the plaintiff's interest in speaking.[313] Finally, the court noted that it was not clearly established in existing case law that a reassignment to a subset of plaintiff's original enforcement area (without change in duties, salary or perquisites of office) amounted to a constitutional deprivation.[314] The court noted that only a few years prior to the events in the instant case had a "sharply divided Supreme Court" held that something less than action equivalent to dismissal could violate a public employee's First Amendment rights.[315] Moreover, although the Court had acknowledged that a failure to rehire, a denial of a promotion, or a denial of a transfer, might constitute a deprivation,[316] neither the Supreme Court nor the Fourth

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310. *Noyola*, 846 F.2d at 1025. The Eleventh Circuit noted that:

> Because *Pickering* requires a balancing of competing interests on a case-by-case basis, our decisions tilt strongly in favor of immunity by recognizing that only in the rarest of cases will [a] reasonable governmental official[] truly know that the termination or discipline of a public employee violated 'clearly established' federal rights [in the particular sense] that 'what he is doing'. . . violate[d] plaintiff's rights.

Hansen, 19 F.3d at 576; *see also Medina*, 960 F.2d at 1498 ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity.").

311. 45 F.3d 790 (4th Cir. 1995).

312. The court noted that the Fifth Circuit had interpreted *Connick* to hold that whether speech is protected depends upon the distinction between employee speech and speech as a private citizen. *See id.* at 804-05; *see also* Terrell v. University of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986) (considering the issue of whether the speech was made in plaintiff's role as a citizen or as an employee).

313. *DiMeglio*, 45 F.3d at 806.

314. *See id.* at 806-07.

315. *See id.* at 806 (citing Rutan v. Republican Party, 497 U.S. 62, 75-76 (1990)).

316. *See* Rutan v. Republican Party, 497 U.S. 62, 73-76 (1990).

Circuit had held that some less onerous employment action could violate the First Amendment.[317]

Similarly, in *Melton v. City of Oklahoma City*, the plaintiff police officer sued law enforcement officials for allegedly firing him in retaliation for testifying in court and communicating with the defense attorney in connection with the trial of a longtime friend.[318] The plaintiff, who was considered a potential defense witness, disclosed information to the federal prosecutor that plaintiff had gained during his work as a police officer, including some exculpatory evidence he believed to be "*Brady*" material.[319] The plaintiff later discussed the content of the interview with defense counsel. After the trial of his friend, at which the plaintiff testified, the police department began an investigation of the plaintiff and ultimately fired him, alleging that plaintiff's disclosures to defense counsel constituted a breach of confidentiality in violation of the Police Code of Ethics.[320]

On the merits the court agreed with the plaintiff.[321] Turning to qualified immunity, however, the inquiry was whether "[a]t the time these events took place . . . the protected nature of [plaintiff's] speech [was] sufficiently clear that defendants should have been reasonably on notice that the City's interest in [regulating plaintiff's speech] would not survive a balancing inquiry."[322] The court cited two lower court cases in concluding that the defendants should have known that plaintiff's trial testimony was protected.[323] As to plaintiff's communications to the defense attorney, however, the court held that although plaintiff's interest *in fact* outweighed the interest of the City, the balancing would not have been so clear to a reasonable offi-

317. *See DiMeglio*, 45 F.3d at 806.

318. 879 F.2d 706, 711 (10th Cir. 1989), *rev'd in part on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc).

319. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that upon request by the defense, the prosecution in a criminal trial may not suppress evidence favorable to the accused).

320. *See Melton*, 879 F.2d at 711-12.

321. The court reasoned that the First Amendment interest in tostifying truthfully at trial was so strong that any disruption of the work environment would have to be "extreme" to justify governmental regulation. *Id.* at 714. The court found plaintiff's communications to defense counsel to be a "closer case" because of their potential impact on cooperative relations between local and federal law enforcement personnel. The court noted, however, that neither plaintiff nor the local police had any role in the federal investigation and the defendants had presented no evidence that this particular alleged breach of confidentiality had caused or posed a serious risk of disruption. *See id.* at 714-16.

322. *Id.* at 729.

323. *See id.* at 729-30.

cial that it constituted "clearly established law" for purposes of qualified immunity.[324]

As the *Melton* court noted, qualified immunity is most likely to provide a defense "where supervisors, in a reasonable and good-faith exercise of their duties, discipline employees without the direction that would come through analogous cases."[325] If, on the other hand, there are cases that have struck the balance under analogous (though not necessarily identical) facts, "government officials will be deemed 'on *notice*' that their actions will be measured according to clearly established law and qualified immunity may not be available to them."[326] For example, in *Marshall v. Allen*, the court rejected the defendant's invocation of qualified immunity, citing cases clearly establishing that the subject of the speech at issue—sex discrimination in a public agency—touched on a matter of public

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324. *Id.* at 730; *see also* Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1322-23 (11th Cir. 1989) (holding the Dade County Manager entitled to qualified immunity for firing the Dade County Consumer Advocate for "rude and insulting" statements questioning County Manager's policy choices because a reasonable person in the employer's position could have thought the firing was constitutionally permissible).

325. *Melton*, 879 F.2d at 729. There are many other examples of this line of thinking. The court in *Gregorich v. Lund* held that a judge who fired an attorney for union-organizing activities was entitled to qualified immunity because "the state of the case law afforded [the defendant] a reasonable basis for concluding that someone with [the plaintiff's] responsibilities to the court had an obligation to refrain from taking such an adversarial role to the court." 54 F.3d 410, 418 (7th Cir. 1994). The court in *Hansen v. Soldenwagner* held that defendants who allegedly investigated and suspended a police officer for critical statements made at a deposition were entitled to qualified immunity because it was not clearly unconstitutional to discipline an officer for "vulgar, insulting, and defiant criticisms" of the police department, citing precedents holding that the manner of the employee's speech is relevant to the *Pickering* balance. 19 F.3d 573, 575 (11th Cir. 1994). In *Rakovich v. Wade*, the court held that defendant police officers who investigated plaintiff for possible illegal activity, suggested a charging conference to the district attorney, and informed a newspaper reporter of the pending charging conference allegedly in retaliation for plaintiff's criticism of the police department were entitled to qualified immunity because "their resolution of the contradictory factors before them showed neither plain incompetence nor total disregard of [plaintiff's] first amendment rights" and there were no factually-similar cases condemning such behavior. 850 F.2d 1180, 1213 (7th Cir. 1988). Finally, the court in *Benson v. Allphin* held that a defendant who fired an employee for critical in-house statements and statements to the press was entitled to qualified immunity because prior to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), handed down after the events in question, it was still an "open question whether on-the-job expressions of public employees" were constitutionally protected and because there were no cases describing the factors relevant to the *Pickering* balance under factually analogous circumstances. 786 F.2d 268, 277 (7th Cir. 1986).

326. *Melton*, 879 F.2d at 729 n.36 (emphasis added). As the court in *Melton* explained, "governmental entities," through their legal counsel, can reasonably be expected to "remain abreast of the decisional law and periodically update responsible government officials so that their actions will be informed by, and will comport with, the law." *Id.*

concern and concluding that the employer had presented no evidence of workplace disruption resulting from plaintiff's speech.[327]

2. Balancing and "Bad" Conduct

In addition to cases in which factually-analogous precedent forecasts the likely illegality of defendant's actions, there may also be situations in which "the defendant's actions are so egregious that the result of the balancing test will be a foregone conclusion, even though prior case law may not address the specific facts at issue."[328] That is another way of saying that some conduct that violates the First Amendment is so far off the mark that it carries indicia of its own wrongfulness. For example, in *Stough v. Gallagher*, the court considered a claim of immunity by a newly-elected sheriff who demoted two ranks, from captain to sergeant, a deputy sheriff who had been with the department for thirteen years allegedly in retaliation for statements in support of defendant's opponent.[329] In analyzing the strength of the plaintiff's interest, the court noted that comments on the qualifications of candidates for public office lie at the very heart of First Amendment protection: Plaintiff's speech was "more than self-expression;" it was the "essence of self-government," occupying the "highest rung of the hierarchy of First Amendment values."[330] In addition, the time (during off-duty hours before the election), place (on a public platform in front of potential voters), and manner (not rude or insulting) of plaintiff's speech weighed heavily in favor of constitutional protection.[331] The employer, on the other hand, had failed to make any showing that the plaintiff's speech had adversely

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327. 984 F.2d 787, 795, 797 (7th Cir. 1993). Similarly, in *Conner v. Reinhard*, the court denied summary judgment te defendants who fired the plaintiff for statements she made at a Board of Ethics meeting of the local comptroller's office. 847 F.2d 384, 393 (7th Cir. 1988). The court reasoned that based on case law illustrating the application of factors relevant te the *Pickering* balance in similar circumstances, the defendants "should have been on notice that their conduct was probably unlawful." *Id.* In making that determination, the court considered whether: the speech affected discipline and harmony in the workplace, the statements breached confidentiality, the speech resulted in disruption of the employee's duties, or the statements undermined the employer's confidence in the employee's loyalty. *See id.* at 389-93. In addition, the court considered the nature of the context in which the statements were made. *See id.*

328. *Benson*, 786 F.2d at 276 n.18; *see Dartland*, 866 F.2d at 1323 ("[B]ecause no bright line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing *would lead to the inevitable conclusion* that the discharge of the employee was unlawful." (emphasis added)).

329. 967 F.2d 1523 (11th Cir. 1992).

330. *Id.* at 1529 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)) (citations omitted).

331. *See id.*

affected the workplace or that plaintiff had acted disloyally after the election. The court concluded that the *Pickering* balance led to the "inevitable conclusion" that the defendant's action was unlawful and that no reasonable public official in the employer's place could have believed otherwise.[332] Similarly, in *Roth v. Veteran's Administration*, the court denied qualified immunity to defendants who allegedly demoted the plaintiff in retaliation for reporting wastefulness, mismanagement, unethical behavior, regulatory violations, and incompetence at the Alcohol Inpatient Unit at the Veterans Administration.[333] The court opined that certain topics, such as charges of racial discrimination or misuse of public funds, have been recognized by courts as "inherently of public concern."[334] The court further concluded that the defendants' showing of disruption was not adequate to merit qualified immunity, given the importance of plaintiff's interest and the fact that whistle blowing, "by its very nature" is likely to produce some hostility and disruption.[335]

3. Qualified Immunity and Due Process

The above-described analysis of qualified immunity in First Amendment cases serves as a paradigm for qualified immunity in other contexts in which the underlying constitutional right is defined as a balancing of interests. Take, for example, procedural due process claims. The fundamental principle of due process—that deprivations of life, liberty, or property be preceded by notice and an opportunity to

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332. *Id.* at 1528-29.

333. 856 F.2d 1401 (9th Cir. 1988).

334. *Id.* at 1405. Both the content—plaintiff alleged that defendant's behavior put patients at risk—and the context—plaintiff had no personal employment dispute with defendants—supported the conclusion that plaintiff's speech was protected. *See id.* at 1406. The court also noted that its conclusion was supported by a factually-analogous case in which similar speech was found to be protected. *See id.* (citing Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988)).

335. " '[I]t would be absurd,' reasoned the court, 'to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somehow disrupted the office.' " *Id.* at 1407-08 (quoting Czurlanis v. Albanes, 721 F.2d 98, 107 (3d Cir. 1983)); *see also* Gorman v. Robinson, 977 F.2d 350, 356 (7th Cir. 1992) (holding that any reasonable public official would have recognized that plaintiff's interest in disclosing criminal activities of Chicago Housing Authority employees clearly outweighed the agency's interest in maintaining "organizational harmony"); Wulf v. City of Wichita, 883 F.2d 842, 867 (10th Cir. 1989) (opining that the case was "very close" but concluding that "a reasonable police chief should have been on notice that it would be a violation of the First Amendment to terminate a police officer who wrote a letter alleging . . . anti-union animus on the part of the police chief, particularly where the letter caused no significant disruption of police department operations").

be heard—is, at a general level, quite clearly established.[336] But the exact requisites of due process in any particular case vary with the nature of the deprivation: Due process, the Supreme Court has opined, is not like some other legal rules that have a "technical conception with a fixed content unrelated to time, place and circumstances[;]"[337] it is "flexible and calls for such procedural protections as the situation demands."[338] Thus, even when the Supreme Court has held that a predeprivation hearing is constitutionally required in a particular context, the Court has spoken sparingly about the exact requisites of constitutionally adequate process.[339] Instead, the Court has directed that procedures are to be "tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case."[340] As in First Amendment cases, required procedures must be determined by a case-by-case balancing of interests: The "private interest that will be affected by the official action," must be balanced against the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Then this initial balancing must be considered in light of the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[341] This kind of "ad hoc" weighing, of course, means that "[e]very different set of facts will present a new issue on what process was due"[342] and thus the law will rarely be "clearly established" at the particularized level required to defeat qualified immunity.

Consider for example, *Williams v. Kentucky*, in which the court considered a claim by a tenured employee who had been demoted allegedly without due process.[343] The court opined that the law was clearly established in *Cleveland Board of Education v. Loudermill*[344]

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336. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (stating that an essential principle of due process is that these deprivations must be preceded by notice and opportunity for hearing).

337. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

338. *Id.* at 334.

339. *See id.* at 333-34 (listing examples). A rare exception is *Goldberg v. Kelly*, in which the Supreme Court held that a predeprivation hearing approximating a judicial trial is required prior to termination of welfare benefits. 397 U.S. 254 (1970).

340. *Mathews*, 424 U.S. at 349 (quotation marks omitted).

341. *Id.* at 335.

342. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 562-63 (1985) (Rehnquist, J., dissenting).

343. 24 F.3d 1526 (6th Cir. 1994).

344. 470 U.S. 532 (1985).

that a pretermination hearing is required before a tenured employee may be fired.[345] The court reasoned, however, that *Loudermill* cannot be "mechanically applied to demotion cases."[346] The particular requisites of due process prior to terminating a tenured employee were determined by balancing the interests specific to that situation, including the employee's interest in retaining her employment, the obvious value to an employee of the opportunity to present her side of the case, the administrative burden imposed by additional procedures, as well as the employer's interest in immediate termination of the employee.[347] The court reasoned that although *Loudermill*'s analysis applied to the demotion setting, there was no clear law predicting how the "analysis would come out in [that] setting as opposed to the discharge setting."[348] Because there were no cases that had specifically considered the requisites of due process in the demotion context and because the balance of competing interests could compel a different result for demotions, the court concluded that the law was not sufficiently clear to defeat defendant's claim of qualified immunity.[349] By contrast, in cases where existing case law has

345. *See Williams*, 24 F.2d at 1538-39.

346. *Id.* at 1539.

347. *See id.* (citing *Loudermill*, 470 U.S. at 542-46).

348. *Id.* at 1541.

349. *See id.* The court distinguished two Sixth Circuit cases that had not specifically considered whether the requisites of due process were the same in demotion and termination cases. *See id.* at 1539-40. The court also rejected as not dispositive two cases in other circuits indicating, in dicta and without discussion, that they would apply *Loudermill* to demotions. *See id.* at 1541. Finally, the court identified only two district court opinions (from other jurisdictions) that had recognized the right to a pretermination hearing in demotion cases, which the court found insufficient to alert a reasonable officer that failing to provide notice and a hearing prior to a demotion would violate the employee's due process rights. *See id.* For other examples of qualified immunity in due process cases, see, for example, White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1064 (2d Cir. 1993) (extending qualified immunity to state police officers who terminated a towing company's status as the exclusive assignee of state towing rights because it was not clearly established that loss of noncontractual towing rights combined with nonpublic statements between police officers deprived the company of a liberty interest); Collins v. School Bd., 981 F.2d 1203, 1205-06 (11th Cir. 1993) (holding school board members immune in suit by a suspended toacher for 19-month delay in postdeprivation hearing because it was not clearly established at what point a delay in the post-termination hearing would become a constitutional violation); FDIC v. Henderson, 940 F.2d 465, 477 (9th Cir. 1991) (extending qualified immunity te state supervisor of banking for terminating a bank president without a pretermination hearing because it was not clearly established that an "employment contract containing both for-cause and at-will termination provisions created even a limited property interest"); Arcoren v. Peters, 829 F.2d 671, 673 (8th Cir. 1987) (extending qualified immunity to federal officials in a suit alleging that without adequato notice they repossessed and sold plaintiff's cattle, in which the Farmers Home Administration had a security interest, because there is no clearly established right to a predeprivation hearing when the government acts as a commercial lender); Howe v. Baker, 796 F.2d 1355, 1360 (11th Cir. 1986) (extending qualified immunity to state officials who allegedly transferred and suspended a police officer without

identified the requisites of due process under facts sufficiently analogous to provide notice of the likely illegality of the officer's actions, courts have held that qualified immunity is not available.[350]

There are, of course, many other examples of constitutional rights that have been defined in terms of a balancing of interests.[351] In these contexts qualified immunity's requirement of fact-specific precedent may mean that the law will rarely be deemed clearly established for purposes of qualified immunity.

E. Excessive Force—Balancing or "Bad" Conduct?

Fourth Amendment excessive force claims provide a good final example of the intersection between qualified immunity and the underlying constitutional standard. In *Graham v. Connor*, the Supreme Court specifically reserved the question of the proper application of qualified immunity to excessive force cases.[352] A number of courts and commentators, however, have concluded that qualified immunity should not apply to excessive force claims. An implicit assumption underlying this conclusion is that these claims tend to involve conduct that contains indicia of its own wrongfulness. As I argue below, while some applications of force can be deemed inherently wrongful, in other cases the illegality of the force as determined by an ex post balancing of interests will not have been obvious at the time the events occurred. In the latter case, qualified immunity will be necessary to ensure that only blameworthy defendants are subject to liability.

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adequate process because it was not clearly established that the plaintiff had a property right in being transferred or suspended only with cause).

350. *See, e.g.*, Cotnoir v. University of Me. Sys., 35 F.3d 6, 11 (1st Cir. 1994) (denying qualified immunity to state officials who fired a tenured professor without giving him prior notice that they were considering termination for academic misconduct and without providing any explanation of the evidence against him because the "dictates of *Loudermill* squarely control [this] case"); Langley v. Adams County, 987 F.2d 1473, 1480 (10th Cir. 1993) (denying qualified immunity where local officials agreed to reschedule a pretermination hearing and then on the original hearing date rescinded the agreement to reschedule and terminated the plaintiff at close of business the same day); Calhoun v. Gaines, 982 F.2d 1470, 1475-76 (10th Cir. 1992) (denying qualified immunity to college officials who did not advise a professor until after the finalization of his yearly contract renewal that his employment was in jeopardy of termination); Runge v. Dove, 857 F.2d 469, 474 (8th Cir. 1988) (denying qualified immunity to local school officials who fired a janitor without giving him any opportunity to tell his side of the story).

351. *See supra* note 282. For a different view of the relationship between qualified immunity and constitutional balancing, see generally Chen, *supra* note 174, which discusses the interaction between qualified immunity, understood as a standard, and various constitutional rules and standards.

352. 490 U.S. 386, 399 n.12 (1989).

Prior to *Graham*, allegations of excessive force could give rise to both Fourteenth Amendment substantive due process claims, and Fourth Amendment claims of unreasonable seizure. Because excessive force in the Fourteenth Amendment context was understood to require "egregious" conduct,[353] the finding of a constitutional violation arguably negated any claim of reasonableness and qualified immunity was unavailable.[354] Courts that "borrowed" the Fourteenth Amendment analysis and applied it to Fourth Amendment excessive force claims tended to conclude that qualified immunity was not available as a defense to those claims for similar reasons.[355] Even after *Graham* held that the Fourth Amendment standard rather than the Fourteenth Amendment standard governed excessive force claims, a number of courts have held to the view that qualified immunity does not apply. They reason that the constitutional standard is the same as the immunity standard and thus there is no need to consider immunity apart from the merits of the claim. The Fourth Amendment inquiry is whether the force applied was reasonable under the circumstances.[356] Similarly, qualified immunity depends upon the objective legal reasonableness of the governmental official's action. According to this view, if the "scope of qualified immunity [is] evaluated using the same 'objective reasonableness' criteria with which *Graham* directs [the courts] to scrutinize an officer's actions under the [F]ourth [A]mendment,"[357] then that test provides the standard for evaluating both the merits of plaintiff's claim and defendant's qualified immunity defense. Thus, the two issues simply collapse into one another.[358]

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353. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (applying the "shocks the conscience" test from *Rochin v. California*, 342 U.S. 165 (1952)).

354. *See generally* Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61, 90-114 (1989) (discussing pre-*Graham* analysis of qualified immunity in excessive force cases).

355. *See id.* at 97-98.

356. *See Graham*, 490 U.S. at 396-97.

357. Wardlaw v. Pickett, 1 F.3d 1297, 1303 (D.C. Cir. 1993).

358. Some courts have rejected a separate immunity inquiry for excessive force claims. *See, e.g., id.* at 1302-03 (concluding that objective reasonableness is the standard for evaluating both the scope of the officer's qualified immunity and the plaintiff's claim of excessive force); Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (stating that in excessive force cases, the qualified immunity inquiry is the same as the inquiry on the merits); Street v. Parham, 929 F.2d 537, 540-41 & n.2 (10th Cir. 1991) (noting that in excessive force cases, once a factfinder has determined that the force used was unnecessary under the circumstances any question of objective reasonableness has also been foreclosed). *See generally* Urbonya, *supra* note 354 (discussing separate immunity inquiry).

The prevailing view, however, is that qualified immunity may be asserted against Fourth Amendment excessive force claims.[359] There are good reasons for thinking this view is the correct one. First, there is no persuasive reason to distinguish Fourth Amendment excessive force claims from other Fourth Amendment claims to which qualified immunity indisputably does apply.[360] The rationale for rejecting qualified immunity in excessive force cases follows the reasoning of the dissent's argument in *Anderson*: Because the Fourth Amendment standard already involves a reasonableness inquiry, qualified immunity would entail an unnecessary, second reasonableness analysis.[361] That argument can be refuted partly on semantic grounds.[362] But more importantly, qualified immunity—providing some room for error at the constitutional level—is necessary in the excessive force context, as in other contexts, because governmental officials are not blameworthy if their only error was in failing to predict how the courts would view the balance of interests that defines a constitutional use of force.

As the Supreme Court explained in *Graham v. Connor*, the determination of whether a particular application of force by a public official violated the Fourth Amendment "is not capable of precise definition or mechanical application."[363] The inquiry requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," and "its proper application requires careful attention to the facts and circumstances of each particular case."[364] The level of force that is permissible will vary according to such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[365] Moreover, the inquiry is not limited to the particular

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359. *See generally* 1A SCHWARTZ & KIRKLIN, *supra* note 12, § 3.16, at 277 & n.596 (3d ed. 1997) (citing cases).

360. *See supra* notes 177-79 and accompanying text.

361. *Compare Wardlaw*, 1 F.3d at 1303 (rejecting a separate immunity inquiry for excessive force claims), *with* Anderson v. Creighton, 483 U.S. 635, 659-61 (1987) (Stovens, J., dissenting) (arguing that granting qualified immunity to Fourth Amendment violators affords them a "double standard of reasonableness").

362. *See supra* notes 180-82 and accompanying text.

363. 490 U.S. 386, 396 (1989) (internal citations and quotation marks omitted).

364. *Id.* (internal citations and quotation marks omitted).

365. *Id.* The Court also emphasized that:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are

factors identified in *Graham*; courts must "look to whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*, and then must consider 'whether the totality of the circumstances justifies a particular sort of seizure.' "[366] This fact-specific balancing test presents the same kinds of difficulties that are inherent in the balancing tests described in *Pickering*[367] and *Loudermill*.[368] Although it is clearly established that law enforcement officials may not use excessive force when arresting suspects, it is not at all clear what level of force will be justified by the balancing of private and governmental interests in any particular situation. And officials who cannot anticipate when their behavior is likely to lead to liability are not blameworthy.[369]

My thesis would predict, however, that when the underlying conduct *is* egregious—in other words it contains indicia of its own blameworthiness—qualified immunity will be denied regardless of whether there is factually-analogous precedent. This prediction is borne out in the cases. For example, in *McDonald v. Haskins*, suit was brought against a police officer who held a gun to the head of a nine-year-old child and threatened to pull the trigger.[370] The child posed no threat to the safety of the officer or others, was not fleeing or actively resisting arrest, and was not engaged in assaultive behavior.[371] The court denied qualified immunity without requiring "a precisely analogous case," reasoning that "[i]t would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books."[372] Another court expressed a similar sentiment: "The easiest

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often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

Id. at 396-97.

366. Franklin v. Foxworth, 31 F.3d 873, 876 (9th Cir. 1994) (quoting *Graham*, 490 U.S. at 396). For a general discussion of the factors courts consider in analyzing excessive force claims, see Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Privacy*, 22 HASTINGS CONST. L.Q. 623 (1995).

367. *See supra* notes 292-305 and accompanying text.

368. *See supra* notes 339-41 and accompanying text.

369. *See, e.g.*, Slattery v. Rizzo, 939 F.2d 213, 215-16 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim .... [The critical issue is whether] under the undisputed facts a reasonable police officer could have had probable cause to believe that the [plaintiff] posed [an immediate and] deadly threat.").

370. 966 F.2d 292 (7th Cir. 1992).

371. *See id.* at 292-93.

372. *Id.* at 295. One Ninth Circuit judge noted a particularly egregious incident:

"[W]hether or not there is a case on point declaring such actions unconstitutional," ... officers who removed a seriously ill, visibly incapacitated, and semi-naked man from his

cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune because no previous case had found liability in those circumstances."[373]

IV. THE ROLE OF INDIVIDUAL FAULT IN CONSTITUTIONAL DAMAGES LIABILITY

Viewing qualified immunity through a lens derived from criminal law where notice functions as a surrogate for fault explains how the defense has been applied by the courts in section 1983 cases. It leaves unanswered, however, a puzzling feature of constitutional damages liability. On the one hand, section 1983 jurisprudence is animated by a commitment to *individual* liability based on *individual* fault. The Supreme Court has not embraced pure entity liability even though it would enhance the goals of compensation and deterrence and help to mitigate the overdeterrence effects of individual capacity suits.[374] The current legal regime based on individual liability, however, contrasts sharply with the reality that officials are unlikely personally to bear the financial burden of damages and litigation costs even if they lose in court. Unlike in the criminal context where convicted defendants pay their own fines and serve their own sentences, constitutional defendants are ordinarily indemnified by their governmental units.[375] Section 1983 law could be described as a system of de facto entity liability, in which individuals nonetheless remain legally

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bed—a man who was suspected of nothing and presented no threat to the officers—and placed that man on a couch in his living room, uncovered, with his genitals exposed, and then subsequently kept him there for more than two hours, should have known that their conduct was unconstitutional.

Franklin v. Foxworthy, 31 F.3d 873, 879 (9th Cir. 1994) (Reinhardt, J., concurring) (quoting Chew v. Gates, 27 F.3d 1432, 1474 (9th Cir. 1994)).

373. K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

374. Significantly, in *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980), the Supreme Court declined to extend qualified immunity to governmental entities explicitly on the grounds that preserving broader entity liability would further the goals of compensation and deterrence, and encourage increased monitoring by supervisory officials. What is quite interesting about the policy justifications the Court embraced in *Owen* is that these very arguments were *rejected* in *Monell v. Department of Social Services*, 436 U.S. 658, 693-94 (1978), as arguments for municipal vicarious liability even though such liability would have achieved those policy goals even more completely. *See* Jeffries, *supra* note 8, at 86-90 (discussing *Owen* as discontinuous with other section 1983 cases in elevating the goal of compensation). *See generally* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 263-64 (1986).

375. *See supra* note 12.

vulnerable to damages liability and to the label "constitutional wrongdoer." Significantly, even when the government itself is liable on the ground that the entity authorized the unconstitutional conduct—in other words, the official was carrying out a governmental policy or custom[376]—the individual officer is not necessarily absolved from liability in her individual capacity.[377]

Most scholars have assumed that the Supreme Court has simply gotten it wrong in failing to increase the scope of governmental liability for constitutional harms.[378] Proponents of expanded entity liability have argued that it would be more efficient than the current regime,[379] provide a more reliable source of victim compensation,[380] and better promote the goal of deterring official misbehavior[381] without overdeterring socially useful conduct.[382] Professor Whitman also criticizes the current regime's single-minded concentration on "*personal* behavior and *personal* wrongdoing" for having blinded the Supreme Court to injuries that "cannot be traced to particular behavior, but are attributable to institutions, or to communities or cultures within institutions."[383] She observes that the current regime, even

376. Municipalities are subject to liability only if the constitutional injury resulted from an official "policy or custom" of the entity. *Monell*, 436 U.S. at 695. States and state officials in their official capacities are immune from section 1983 damages liability under the Eleventh Amendment. *See* Quern v. Jordan, 440 U.S. 332 (1979).

377. Authorization by the entity does not automatically immunize the individual from liability. For example, there is a split of authority as to whether a defendant can escape liability on the ground that she was "just following orders" from governmental superiors and many courts have rejected this defense. *See generally* 1B SCHWARTZ & KIRKLIN, *supra* note 12, § 9.19, at 368 & n.666 (citing cases). Some courts have held that advice of government counsel is a relevant—though not dispositive—facter in determining whether the official's action was reasonable for purposes of qualified immunity. *See generally id.* § 9.18, at 363-67 (citing and discussing cases). For the distinction between official-capacity (entity) suits and personal-capacity (individual officer) suits, see generally *Hafer v. Melo*, 502 U.S. 21 (1991) (discussing the significance of this distinction).

378. *See supra* note 15. For a notable exception see Jeffries, *supra* note 8, at 96-103, and Jeffries, *supra* note 12, at 68-82, in which Professor Jeffries describes and defends the current regime as one based on fault rather than on respondeat superior.

379. *See* Kramer & Sykes, *supra* note 15, at 301 (arguing that respondeat superior would be most likely to maximize the net economic value of municipal activity by creating the correct level of deterrence).

380. *See, e.g.*, Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 630-31 (urging a system in which the entity is liable whenever the official is immune); Lewis, Jr. & Blumoff, *supra* note 15, at 761 (arguing for a "modified" respondeat superior liability); Oren, *supra* note 15, at 1000-07 (defending entity liability whenever a citizen is harmed by wrongful government action).

381. *See, e.g.*, Kramer & Sykes, *supra* note 15, at 280.

382. *See generally* SCHUCK, *supra* note 10, at 100-21.

383. Whitman, *supra* note 374, at 228 (emphasis added). Whitman urges consideration of the "institution as a unit distinct from the separate individuals who compose it." *Id.* at 226. She notes that the individually focused system does not address injuries brought about "through the working of institutional structures—through the massing or fragmentation of authority, or

when evaluating suits against governmental entities, is relentlessly focused on "the individual conduct of individual [officials]" and the question of whether the governmental defendant was "at fault."[384] Moreover, she argues, due to the various immunities available to individual officials and the availability of indemnification there are "many cases in which individuals as persons will not be held personally liable" or will not pay the damages "but the discussion is still cast in terms of personal behavior and personal wrongdoing."[385]

There is an air of unreality about both the Court's discussions of its holdings and academic reactions to those holdings. The Court "talks the talk" of individual liability, discussing its benefits and weaknesses, without much considering that indemnification may transform individual liability into a kind of entity liability.[386] There seems to be a disconnection between the Court's focus on fault-based, individual liability and the reality that most of the time the individual probably does not pay. Academic proponents of expanded entity liability, on the other hand, either argue that individual liability is inadequate (often ignoring the effects of indemnification) and urge that it be replaced or augmented by enterprise liability, or recognize the ubiquity of indemnification and implicitly assume that de jure respondeat superior liability is only a small step from there.

Suppose, instead, one were to take seriously *both* the commitment to individual liability based on individual fault, *and* the fact of indemnification. In this Part, I offer a possible explanation for the seeming incongruity between the rhetoric of personal liability and the reality of indemnification: I argue that personal, fault-based liability may serve an important function that is unaffected by who ultimately

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by the creation of a culture in which responses and a sense of responsibility are distorted"—rather than through the actions of individual officials. *Id.* I cite Professor Whitman for her accurate (in my view) description of the system's focus on individual fault. I do not, however, address the important issue she raises about the likely inadequacies of section 1983 jurisprudence in addressing systemic misbehavior.

384. *Id.* at 232, 236, 238.

385. *Id.* at 230.

386. *See, e.g.*, Board of the County Comm'rs v. Brown, 117 S. Ct. 1382, 1404 (1997) (Breyer, J., dissenting) (criticizing the majority for failing to consider that indemnification statutes "appear . . . in effect, [to] mimic respondeat superior by authorizing indemnification of employees" but conceding that "the [actual] pattern of indemnification: how often, and to what extent, States now indemnify their employees, and which of their employees they indemnify" remains unclear); Anderson v. Creighton, 483 U.S. 635, 641-42 n.3 (1987) (opining that the Court is not prepared te conclude that indemnification is "certain or generally available"). I call indemnification, even if widely available, only "a kind" of entity liability because the individual official remains legally liable and governmental entities ordinarily retain the option to reimburse or not depending upon the circnmstances of the case and the particulars of the applicable indemnification statute. *See supra* note 17.

pays the judgment. This argument also provides a normative underpinning for my analysis in Parts II and III.

My argument builds from the parallel between criminal law notice and notice in qualified immunity analysis. The Supreme Court explicitly embraced this connection in the recent case of *United States v. Lanier*,[387] in which a state judge challenged his conviction on multiple counts of sexual assault and rape under 18 U.S.C. § 242, the criminal analogue of section 1983.[388] The government's theory was that Judge Lanier violated the victims' substantive due process rights to "bodily integrity."[389] The Court of Appeals for the Sixth Circuit, sitting en banc, overturned the conviction on the ground that the statute was unconstitutionally vague as applied to the due process claim.[390] According to the court of appeals, the statute foundered on grounds of vagueness and lack of fair notice because the right allegedly violated had not been "made specific" by "fundamentally similar" Supreme Court precedent.[391] The en banc court reasoned that the "made specific" standard demanded by due process in criminal cases was "substantially higher" than the "clearly established law" standard in qualified immunity analysis.[392] A contrary answer, the court opined, would mean that "[c]riminal liability [is] much easier to establish for the same wrong than civil liability."[393]

The Supreme Court disagreed.[394] The Court not only embraced the analogy between "clearly established law" in constitutional damages actions and the requirement of fair notice in criminal cases, but also concluded that the two standards serve precisely the same role in their respective contexts:

> In the civil sphere . . . qualified immunity seeks to ensure that defendants "reasonably can anticipato when their conduct may give rise to liability," by attaching liability only if "[t]he contours of the right [violated are] sufficiently

387. 117 S. Ct. 1219 (1997).

388. For the text of 18 U.S.C. § 242 (1994), see *supra* note 249.

389. The incidents giving rise to the prosecution took place in Judge Lanier's chambers (sometimes while the judge was wearing his judicial robe) and all the victims were either employees, potential employees or individuals with business pending before the judge. *See* United States v. Lanier, 73 F.3d 1380, 1403 (6th Cir. 1996) (Daughtrey, J., dissenting).

390. *See id.* at 1384.

391. *Id.* at 1391-94.

392. *Id.* at 1393.

393. *Id.*

394. The Supreme Court rejected the Sixth Circuit's conclusion that only Supreme Court cases can provide the required warning. *Lanier*, 117 S. Ct. at 1226-27. The Court also disagreed with the lower court's view that only "fundamentally similar" precedent—a standard the Sixth Circuit suggested was more stringent than the qualified immunity standard—satisfies the requisites of fair notice. *Id.*

> clear that a reasonable official would understand that what [she] is doing violates that right." So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying [section] 242. The fact that one has a civil and the other a criminal law role is of no significance; both *serve the same objective*, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) *the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.* To require something clearer than "clearly established" would, then, call for something beyond "fair warning."[395]

The question at issue in *Lanier* was whether the constitutional right that gave rise to the criminal conviction was sufficiently clear that a defendant would have had fair warning that her conduct could lead to criminal sanctions.[396] Because *Lanier* involved a criminal prosecution for violation of constitutional rights, it illustrates the connection between fair notice in criminal law and clearly established law in qualified immunity analysis. *Lanier* is both *Anderson v. Creighton*[397] and *Lambert v. California*,[398] cases from two very different contexts that are joined by the commonality that notice or knowledge of illegality was determinative for the imposition of liability. The *Lanier* Court concluded that the requirement of "clearly established law" provides the "same protection" from civil damages liability that the requisite of fair notice guarantees to criminal defendants. Fair notice, explained the Court, ensures that an official will not be labeled a "criminal [under section 242] though his motive was pure and . . . his purpose was unrelated to any disregard of any constitutional guarantee."[399] Similarly, qualified immunity ensures that an official will not be mulcted in damages unless the existing case law "made it reasonably clear at the relevant time that the defendant's conduct was [unconstitutional.]"[400]

The *Lanier* Court's reasoning supports my thesis that notice functions as a surrogate for fault in both criminal law and the law of qualified immunity. The explicit parallel between penal law and section 1983 law also suggests that looking to the role of fault in the criminal context may provide clues to understanding the persistence of fault-based liability in constitutional damages actions. Why is

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395. *Id.* at 1227 (internal citations omitted) (emphasis added).
396. *See id.* at 1225.
397. 483 U.S. 635 (1987); *see supra* notes 154-60 and accompanying text.
398. 355 U.S. 225 (1957); *see supra* notes 56-64 and accompanying text.
399. *Lanier*, 117 S. Ct. at 1227.
400. *Id.* at 1225.

blameworthiness considered essential to the imposition of criminal liability? The answer that is ordinarily given is that a criminal conviction signals moral condemnation of the offender and, therefore, it would be "unjust" to subject to the "stigma of a criminal conviction [one who is not] morally blameworthy."[401] Indeed, one of the most important distinctions between civil and criminal law is precisely that "[c]riminal liability signals moral condemnation of the offender, while civil liability does not."[402]

The moral condemnation entailed by a criminal conviction is one reason why public welfare offenses have engendered so much controversy and debate.[403] Recall that criminal regulation often targets conduct that is not inherently "wrongful" in the sense that common law crimes such as homicide or rape are wrongful and, in addition, such statutes may lack sufficient mens rea to provide a signal of the likelihood of criminal sanctions. Thus, a defendant who is convicted of violating a criminal regulatory statute—at least without actual or constructive notice of its content[404]—may not be sufficiently blameworthy to justify the moral condemnation signaled by criminal liability. The tendency of courts at all levels to find ways to avoid regulatory convictions under such circumstances is testament to the

401. Packer, *supra* note 42, at 109. The thesis that punishment is justified only when defendants deserve it is a retributive (deontological) rationale for the requirement of fault in criminal law. As criminal law scholars have framed it, retributive theory holds that "moral culpability" is a necessary—and according to some scholars, a sufficient—condition of liability for criminal sanctions. *See* Moore, *supra* note 34, at 180-82. Utilitarian arguments have also been offered to explain fault-based limitations on criminal liability. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 18-20 (1968) (discussing and rejecting Jeremy Bentham's argument that punishment of defendants who are without fault is ineffective because such liability cannot deter crime). The debate between retributive and utilitarian justifications for criminal liability is obviously beyond the scope of this paper. At the end of the day, moreover, the best conclusion is that our system of criminal liability is a "mixed" regime in which courts and legislatures draw on both retributive and utilitarian principles to justify criminal punishment. *See* BONNIE ET AL., *supra* note 40, at 30. For purposes of this Article, I observe that fault *has* generally been deemed a prerequisite for criminal liability. *See supra* notes 40-54 and accompanying text. To my mind, retributive arguments provide the primary explanation for the requirement of blameworthiness in criminal law. Thus, I begin with the retributive rationale in seeking to understand what fault in criminal law has to teach us about fault in constitutional damages law. As will become apparent, however, I also draw on related utilitarian arguments for limiting liability to blameworthy defendants. *See infra* notes 449-50.

402. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996). While breaking a contract or making a defective product may be conduct society wishes to discourage by allowing the victims to recover damages, civil liability does not carry the moral stigma that is implicit in a criminal conviction. *See id.*

403. *See supra* notes 71-83 and accompanying text.

404. *See supra* notes 102-32 and accompanying text.

strength of the principle that only blameworthy defendants should be subject to criminal liability.[405]

To turn the point around, the stigma of a criminal conviction is also an important part of the power of the criminal law to shape behavior. Citizens avoid criminal conduct not only—and perhaps not primarily—because of the threat of official sanctions. They are also motivated by a desire to avoid conduct that would disrupt important interpersonal relationships or violate the dictates of their own internalized norms of acceptable behavior.[406] Conversely, criminal law plays an essential role in creating and maintaining societal consensus on what constitutes appropriate conduct.[407] As one scholar has argued, "criminal law's most important real world effect can be its ability to assist in building norms and thereby harness the compliance power of interpersonal relationships and interpersonal morality."[408] From this perspective, public welfare offenses are also objectionable to the extent they criminalize conduct that most people would consider innocent because such "overcriminalization" undermines the moral authority of the penal law.[409]

Turning to section 1983 law, I contend that individual damages liability for constitutional violations serves a role that is analogous to the moral blaming function of criminal law.[410] Recall that

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405. *See supra* notes 82-83, 102-32 and accompanying text.

406. *See* Robinson, *supra* note 402, at 212-13; Kahan, *supra* note 38, at 128-30 (arguing that law is "suffused with morality and, as a result, can't ultimately be identified or applied [ ] without the making of moral judgments").

407. *See id.* at 212.

408. *Id.*

409. *See generally* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 68-69, 273 (1968) (arguing that "[t]he more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime" and noting that the power of the criminal law to shape conduct resides in its being seen as "fair" in the sense of making culpability a necessary precondition for criminal liability); Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L. REV. 1, 11 (1984) (noting ways in which overcriminalization can undermine the utilitarian goal of preventing crime); Robinson, *supra* note 402, at 212-13 (arguing that a utilitarian calculus would take into account the power of criminal stigma in deterring crime and find greater utility in a "desert distribution of criminal liability"); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984) (arguing that the power of moral condemnation entailed in a criminal penalty is weakened when the "rhetoric of blame" is used to justify distributional goals).

410. An award of injunctive relief does not entail the same level of stigma as an award of damages. First of all, most suits for equitable relief are filed against the governmental entity rather than against the individual official. Moreover, even when injunctive relief is technically sought against individual officials—for example in a suit naming state officials in their official capacities in order to avoid Eleventh Amendment immunity—everyone understands that such a suit is functionally against the governmental entity. *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908). A suit that is only nominally against individual officials and that orders those officials to "act constitutionally" has neither the personal nor the stigmatizing quality of a damages suit.

qualified immunity protects from liability all but the "plainly incompetent" official[411] or the official who could not reasonably have believed that her actions were lawful.[412] This means an official who is found personally liable in a section 1983 suit is, by definition, a "wrongdoer." I propose that there is significant independent value—apart from who actually pays the damages award—in attaching the label "wrongdoer" to an individual official rather than to a faceless governmental entity. Were constitutional damages liability, with its implication of fault and blameworthiness, to attach in the first instance to the governmental body rather than to an individual, the meaning and power of the designation "wrongdoer" would be significantly reduced. Entities don't engage in malfeasance, the people who run them do. Something would be lost in a regime in which impersonal entities were the identified perpetrators of the constitutional harm rather than the blameworthy individuals.[413] The label "wrongdoer" simply does not have the same moral significance as applied to governmental entities or institutions as it does when applied to individuals. Notions of fault and blameworthiness are understood to be personal, and individual liability attaches the label "malefactor" to officials with names and faces. Thus, important moral and societal interests are vindicated by a regime that makes blameworthy officials personally liable for their unconstitutional behavior,[414] even if they do not ultimately pay the judgment.

Not surprisingly, qualified immunity does not apply to suits for injunctive relief. *See* Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well."). *See generally* 1B SCHWARTZ & KIRKLIN, *supra* note 12, at 342 (listing cases).

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

412. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) (stating that qualified immunity obtains "as long as [the officials'] actions could reasonably have been thought consistent with the rights they [were] alleged to have violated").

413. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 235 (1996) (decrying the deficiency of a theory of constitutional liability that "speaks to the state in its corporate capacity" and "takes no account of the morality of freedom").

414. Scholars have made similar arguments about the special value of individual liability as compared to entity liability in connection with criminal enforcement against corporations. Under certain circumstances, such as when a crime apparently on the corporation's behalf is committed or approved at the level of management or the board of directors, the corporation may be held criminally liable. *See generally* LAFAVE & SCOTT, JR., *supra* note 91, § 3.10, at 360-69 (discussing corporate criminal liability). Although corporate liability does not shield officials from individual criminal liability, "often . . . the corporation is convicted while individual [officials] are acquitted, even where proof of individual guilt is strong." PACKER, *supra* note 409, at 361. A number of scholars have questioned, however, whether corporato criminality—especially if unaccompanied by individual criminal liability—can serve the ordinary functions of the penal law. Corporate criminality raises difficult conceptual questions because it conflicts with traditional, common law notions of the "personal nature of guilt." Metzger, *supra* note 409, at 53. While "[l]abeling something criminal [ordinarily] send[s] a message to society

There are good reasons for thinking that the label "constitutional violator" carries with it a level of societal condemnation that is more akin to criminal liability than to ordinary, private civil liability.[415] One piece of evidence supporting this view is that constitutional violations are often described as "different" from or "worse" than other kinds of civil law-breaking. Consider, for example, Justice Harlan's concurring opinion in *Monroe v. Pape*,[416] the case that essentially created the constitutional damages remedy.[417] The issue in *Monroe* was whether unauthorized actions—actions that violate state law—satisfy the "under color of law" requirement of section 1983.[418] The *Monroe* Court held that unauthorized actions by individual governmental officials can give rise to section 1983 liability

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that the activity is undesirable . . . citizens might find imposing criminal liability on fictional entities farcical." V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1531 (1996). Thus, because the average person has difficulty "[c]onceiving of corporations as 'criminals' " convicting the corporation is unlikely to effectuate the moral blaming function ordinarily associated with a criminal conviction. Metzger, *supra* note 409, at 64. Moreover, if society fails to ascribe stigma to corporato criminality, this response may decrease the power of the criminal label for other types of crime. *See* Khanna, *supra*, at 1531. Important retributive values are also compromised to the extent that corporate criminality tends to displace criminal liability against identified individuals. Corporations only act through their officers, and corporate criminality suggests that one or more officials involved in the corporation acted wrongfully. Yet "[w]hen a corporation is convicted there is no 'specific, visible defendant to stand shamefacedly before the awesome judge who is issuing a verdict on his character and fitness to live in society.' " Metzger, *supra* note 409, at 64 n.453 (quoting Leo Davids, *Penology and Corporate Crime*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 529 (1967)). These arguments have led some scholars to question the ability of corporate criminal liability either to stigmatize or to detor misbehavior. *See, e.g.*, PACKER, *supra* note 409, at 360-61 (doubting whether corporate criminality has much effect on the reputation or economic position of a corporation).

415. John Garvey has made a similar (though narrower) argument for the moral dimension of constitutional law. Professor Garvey notos that the very language we use to describe constitutional illegality—"violation," "responsibility," "disrespect," "infringe," and "wrong"—reflects the idea that unconstitutional conduct bespeaks a moral judgment. Garvey, *supra* note 413, at 160. He argues that constitutional freedoms protect citizens' rights to engage in certain activities that are deemed valuable or "good," for example, speech or religious expression. Just as these freedoms have a moral dimension, they impose a correlative moral obligation on the government not to interfere. Thus, governmental officials are "subject to criticism and condemnation for imposing constraints," *id.* at 198, and injured citizens are entitled to money damages "to right the wrong" and to punish the offending official. *Id.* at 160, 198.

416. 365 U.S. 167, 192 (1961) (Harlan, J., concurring), *overruled on other grounds by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

417. In 1961, the year *Monroe* was decided, fewer than 300 suits were brought under section 1983 and all the other civil rights statutes combined. By 1981 some 32,000 suits were brought under the civil rights acts, the vast majority under section 1983. *See* LOW & JEFFRIES, JR., *supra* note 145, at 16. This virtual explosion has been explained by *Monroe*'s liberal construction of "under color of law" to include unauthorized acts just at a time when a panoply of new rights were being made available against state officials by the incorporation of the Bill of Rights into the Fourteenth Amendment.

418. For the full text of 42 U.S.C. § 1983, see *supra* note 7.

even if there is a remedy under state law, reasoning that the federal remedy is "supplementary."[419] While Justice Harlan, like the majority, found no evidence that the enacting legislature intended to treat authorized and unauthorized actions differently, he defended the new supplemental federal remedy on the ground that federal *constitutional rights* should be treated differently from violations of *other kinds of rights*:

> [Section 1983] becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.... There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right.... It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.[420]

In accord with the idea expressed in Justice Harlan's concurrence that constitutional rights are especially important, the *Monroe* Court took the view that adequate protection of constitutional rights requires a *federal* remedy in *federal* court. According to the majority, whatever remedies the state already provided were irrelevant; the plaintiff could go directly to federal court with the constitutional claim. This view that federal courts are the preeminent protectors of federal constitutional rights has been reiterated many times in post-*Monroe* section 1983 opinions.[421]

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419. 365 U.S. at 183. The Court supported its conclusion by noting that one reason section 1983 was passed was to ensure a federal remedy in federal court when "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the [constitutional] claims of citizens . . . might be denied by the state agencies." *Id.* at 180. The Court did not explain why that reasoning requires a federal remedy in cases where state law is both adequate *and* available to injured plaintiffs through state enforcement. Justice Frankfurter, in dissent, argued for a distinction between unconstitutional actions taken without state authority, which in his view only the state should remedy, and unconstitutional actions authorized by state law or custom, which would give rise to a federal remedy. *See id.* at 224-26 (Frankfurter, J., dissenting).

420. *Id.* at 196 & n.5 (Harlan, J., concurring).

421. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 285 (1994) (Keunedy, J., concurring) (recognizing the "important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action"); Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989) (noting that the "principal purpose behind the enactment of section 1983 was to provide a federal forum for civil rights claims"); Patsy v. Board of Regents, 457 U.S. 496, 500 (1982) (noting the " 'paramount role [of the federal courts] in protecting constitutional

The idea that constitutional rights are different or special is also evident in the Court's handling of a class of due process claims. In a series of cases beginning with *Paul v. Davis*, the Court considered section 1983 claims alleging deprivations of liberty or property under the Due Process Clause.[422] The claims in this line of cases involved tort-like injuries such as loss of a $23.50 hobby kit,[423] destruction of a pillowcase,[424] injury to a prisoner who tripped over a pillow left on the floor by a guard,[425] and failure to prevent the assault of a prisoner by a fellow inmate.[426] An important objective in the

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rights' " (quoting Steffel v. Thompson, 415 U.S. 452, 472-73 (1974))); Mitchum v. Foster, 407 U.S. 225, 242 (1972) (stating that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people as guardians of the people's federal [constitutional] rights"); McNeese v. Board of Educ., 373 U.S. 668, 672 (1963) (holding that requiring litigants to exhaust administrative remedies before asserting a claim in federal court would conflict with the notions that section 1983 is a supplementary remedy and that the federal courts are the "chief . . . tribunals for enforcement of federal rights"). In particular contexts, the Court has exhibited a willingness to trust state courts with the enforcement of federal constitutional rights. For example, the Court has held that normal rules of res judicata apply to section 1983 cases even when, as in the Fourth Amendment context, other avenues of federal review are foreclosed and the section 1983 claim would offer the only possibility of a federal forum. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding res judicata applicable to section 1983 claims and rejecting the view that state courts cannot be trusted to "render correct decisions on constitutional issues"); Stone v. Powell, 428 U.S. 465, 493-94 & n.35 & 494 (1976) (barring habeas re-litigation of a Fourth Amendment claim if the state has provided an opportunity for "full and fair litigation" of the claim). In addition, although the Supreme Court has affirmed the "no-exhaustion" rule implicit in *Monroe*, see *Patsy*, 457 U.S. at 516, certain tort-like, procedural due process claims never reach federal court if existing state postdeprivation remedies are available and adequate. *See* Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Although as a formal matter *Parratt* announced a constitutional rather than a statutory rule—holding that there was no constitutional violation if postdeprivation process was adequate—it has the functional effect of circumventing *Monroe*'s no-exhaustion rule in a category of procedural due process claims. *But see Albright*, 510 U.S. at 285 (Kennedy, J., dissenting) (noting that the Court has been cautious in invoking the rule of *Parratt* in recognition of the federal courts' "important role" in protecting constitutional rights); Zinermon v. Burch, 494 U.S. 113, 136-38 (1990) (holding that *Parratt* is not applicable where deprivation was predictable, predeprivation process was possible, and defendant's conduct was not unauthorized); Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982) (holding that *Parratt* does not apply when the state procedure itself destroys the plaintiff's entitlement without procedural safeguards). I argue that the Court's refusal to recognize tort-like claims in constitutional damages suits actually preserves the special status of constitutional rights. *See infra* notes 451-54 and accompanying text.

422. 424 U.S. 693 (1976). In *Paul*, the plaintiff claimed that he had been deprived of a protected interest in his reputation when the local police department posted his name on a list of "active shoplifters." *Id.* at 695. The plaintiff had been arrested but never prosecuted for shoplifting, and the charge against him was ultimately dismissed. *See id.* at 696. The Court held that the right to reputation was not a protected interest within the meaning of the Due Process Clause. *See id.* at 711-12.

423. *See Parratt*, 451 U.S. at 529.

424. *See* Hudson v. Palmer, 468 U.S. 517, 533 (1984).

425. *See* Daniels v. Williams, 474 U.S. 327, 342 (1986).

426. *See* Davidson v. Cannon, 474 U.S. 344, 353 (1986). Although *Paul v. Davis* arguably looked less "tort-like" and more like an abuse of governmental power than other claims in this

Court's handling of these cases was to prevent the Due Process Clause from being invoked to turn every simple tort in which the government happened to be the tortfeasor into a federal constitutional claim. The Court was troubled not only by a federalism concern that the Fourteenth Amendment not be construed to create a "body of general federal tort law."[427] The Court also wished to avoid "trivializing" constitutional rights by equating them to ordinary state law rights.[428] As the Court stated in *Daniels v. Williams*, "[o]ur Constitution deals with the large concerns of the governors and the governed;"[429] when governmental officials cause injuries "in ways that are equally available to private citizens, constitutional issues are not raised."[430] These statements reflect the view that constitutional damages actions should be reserved for certain kinds of harms, specifically harms that involve "real *abuses* by [governmental] officials in the exercise of governmental powers."[431]

If constitutional rights are especially valued in comparison with other kinds of rights, it follows that constitutional violations would be viewed by society as especially serious and deserving of opprobrium. There is reason to think this is so. Constitutional violations, especially those that are likely to give rise to section 1983 suits, involve abuses of power by governmental actors. The implications of official misconduct go far beyond the concrete harm to persons or property suffered by any one individual. Public officials are, after all, charged with upholding and enforcing the law and acting for the public good. When officials use their public offices to engage in lawbreaking, there is a betrayal of trust that is experienced not only by the individual, but by the entire community.[432] Consider, for example,

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line of cases, the Court's analysis in *Paul* has been attributed to judicial concern that allowing the defamation claim would *invite* tort-like claims, transforming section 1983 into a "font of tort law." *Paul*, 424 U.S. at 701. *See generally* Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977) (arguing that the Court's purpose was te limit the reach of the section 1983 remedy hut the Court did so hy narrowing the scope of the underlying right). I do not suggest, however, that the Court's holding in *Paul* was the only way, or indeed the hest way, to address the Court's concerns about tort-like claims. *See generally id.*, at 423-29 (analyzing the difficulties inherent in the Court's approach to liberty in *Paul*).

427. *Paul*, 424 U.S. at 701.

428. *Parratt*, 451 U.S. at 549 (Powell, J., concurring in the result).

429. 474 U.S. at 332.

430. *Parratt*, 451 U.S. at 552 n.10 (Powell, J., concurring in the result).

431. *Id.* at 549 (Powell, J., concurring in the result); *see* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 650 (1997) (arguing that "[c]onstitutional protection should be available only when the state's acts impinge on a value of constitutional dimension").

432. I do not mean to suggest that the *kind* of stigma attached to liability for constitutional violations is precisely the same kind of stigma that is associated with a criminal conviction. I do argue that when officials are found liable in damages for governmental misbehavior that

the public outcry that was engendered by the beating of Rodney King by Los Angeles police officers. The image of a circle of uniformed law enforcement officials beating an unarmed man lying crumpled on the ground is troubling in a way that a private beating is not. Similar reactions accompanied recent allegations that New York City police officers openly beat and sodomized (with a toilet plunger) a young Haitian immigrant in the bathroom *at the police station*.[433] When the malefactor is a governmental official whose injurious conduct was made possible by her official authority and position, "ordinary injury is augmented by the abuse of governmental power."[434] In such cases wrongdoing that could "be described as trespass, assault and battery, false imprisonment, or defamation take[s] on new urgency."[435] If the law-enforcers cannot be trusted to conduct themselves according to the law, then who can? Governmental abuse of power creates a sense of indignation on the part of the governed, and special opprobrium is reserved for abusers of the public trust.[436]

If individual liability for constitutional violations entails wrongdoing and signals societal condemnation, then it would make sense to retain such liability even if the financial burden is ultimately borne by the governmental employer rather than by the individual official.[437] Indeed, in the criminal context it has been argued that the

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reaches constitutional dimensions, such liability has a moral component that does not inhere in ordinary civil liability.

433. *See, e.g.*, Eleanor Randolph, *Brutality Focus Now on NYPD*, L.A. TIMES, Aug. 30, 1997, at A1 ("More than six years after a grainy videotape showed Los Angeles police beating Rodney G. King, the focus on how a city deals with police brutality has shifted east to New York.").

434. Whitman, *supra* note 374, at 250; *see* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 229 (1984) (arguing that torts by governmental officials are different from private torts because of the "special role of government as the keeper of public order"); *see also* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) ("When 'the state' is unfaithful, when the actors who embody it do not conform to the law, the harm is greater [than a private harm] because it is experienced as the most basic form of betrayal.").

435. Whitman, *supra* note 374, at 250 (citations omitted). Ms. Whitman notes that the "inclination, found in some early lower court opinions . . . to resolve section 1983 disputes solely by reference to the elements of common-law causes of action has virtually disappeared." *Id.* at 250 n.114. For a discussion and critique of the influence of tort law on section 1983 jurisprudence, see *Symposium on Section 1983*, 72 CHI.-KENT L. REV. 613 (1997).

436. *See* Olmstead v. Unitod States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (stating that when the "[g]overnment becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy").

437. The aim of this section is to provide an explanation for the persistence of fault-based, individual liability in section 1983 jurisprudence. I do not purport to explain the existence of indemnification or to suggest that entity liability has no role to play. The puzzle I confront is not why has the law gone *part of the way* toward entity liability—by embracing indemnification—but why has the law gone *only* part of the way, by retaining individual liability with indemnification rather than moving to respondeat superior liability. It is quite likely that section 1983 law reflects a trade-off between policies that argue for individual liability—such as

moral blame entailed by a criminal conviction is more important in discouraging antisocial conduct than the threat of official sanctions.[438] One need not go that far to accept that the human desire to avoid societal opprobrium plays an important role in gaining compliance with the criminal law.[439] Similarly, the societal condemnation accompanying damages liability for constitutional violations enhances the law's power to reduce unconstitutional conduct and reinforce constitutional norms. Moreover, the stigma entailed in such liability plays an important role in communicating those norms, not only through final verdicts in courts but through public reaction to reported allegations of clear constitutional impropriety.

V. CONCLUSION

This Article has argued that there is much to be learned from the comparison of qualified immunity analysis in section 1983 law with the fair notice inquiry in criminal law. The recognition that qualified immunity is about notice and that notice functions as a surrogate for fault—in much the same way that fair notice in criminal law acts as a proxy for fault—helps to explain the courts' analyses in constitutional damages cases. The fault/notice connection explains why knowledge of illegality is sometimes required in constitutional damages suits in order to ensure against liability without fault, specifically when governmental officials would have received no signal that their actions could be unconstitutional. Conversely, it explains why qualified immunity essentially drops out of the analysis when the underlying conduct is inherently blameworthy. Finally, seeing notice as a proxy for fault provides a way of thinking, more generally, about the interaction between qualified immunity and the underlying intent standards of the various constitutional rights that give rise to constitutional damages claims.

Important *differences* between the regimes of criminal law and constitutional damages law also suggest fruitful lines of inquiry that

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the moral blaming function I have identified in this Article—and those—such as compensation, avoiding overdeterrence, encouraging entity monitoring, and addressing systemic harms—that would argue for imposing some level of liability on governmental units.

438. *See generally* Robinson, *supra* note 402, at 212-13 (arguing that the "real power" of the criminal law derives from its role in creating and enforcing social norms rather than from the threat of sanctions).

439. *See, e.g.*, Hart, *supra* note 37, at 404-05 (arguing that the "judgment of community condemnation which accompanies [a criminal sanction]" is the "essence of punishment for moral delinquency").

could provide additional insights into the role of qualified immunity in section 1983 suits. For example, the knowledge of illegality question is decided by a jury in criminal cases,[440] while qualified immunity is a question of law decided by a judge preferably on summary judgment.[441] Moreover, unlike qualified immunity, the ignorance of law defense in criminal law involves a subjective inquiry: The question for the jury is whether the defendant actually knew that her actions were illegal; even honest but unreasonable mistakes as to illegality will exonerate the defendant.[442] The qualified immunity inquiry, by contrast, is an objective one: Was the law governing the official's actions sufficiently clear that a reasonable official would have known that what she was doing was unconstitutional? The clarity of the law is a proxy for the official's subjective state of mind. If the law was clear, a reasonable official would have known and obeyed it; conversely, if the law provided inadequate guidance, an official cannot be charged with bad faith for failing to comply. Another important difference is in the kinds of cases that will come to the point of a notice inquiry: In the criminal context prosecutors tend to weed out "weak" cases in which the defendant was truly ignorant of the law, sending cases to trial when circumstantial evidence suggests the defendant *knew* she was acting illegally.[443] There is no comparable weeding out process for constitutional damages actions, which are brought by private parties.[444] The ignorance of law inquiry

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440. The question of whether in any particular case the prosecution is required to demonstrate knowledge of illegality or the defendant is permitted to raise a defense of ignorance of law is, of course, a legal question. *But see generally* Pilcher, *supra* note 37 (proposing that juries be allowed broad discretion to consider claims of "apparent innocence" where a defendant can put forth sufficient evidence to support the claim).

441. *See* Hunter v. Bryant, 502 U.S. 224, 228 (1991) (holding "immunity ordinarily should be decided by the court").

442. *See* Cheek v. United States, 498 U.S. 192, 202 (1991); *see also supra* notes 107-13 and accompanying text (discussing the *Cheek* case). It should be noted, however, that in responding to a "knowledge of illegality"—mistake of law—instruction in a criminal case, the jury may infer actual knowledge of the law from circumstantial evidence suggesting that the defendant knew her conduct was illegal. *See supra* note 113. Thus, although the criminal law analysis is formally a subjective one, in practice it may be more similar to the objective, "clearly established law" inquiry of qualified immunity than it first appears. Moreover, in contexts involving criminal regulation of dangerous activities and instrumentalities—where ignorance of law is not a defense—defendants are deemed on notice if they knew *or should have known* that they were likely to be subject te criminal regulation. *See supra* notes 92-101 and accompanying text. This standard for "knowledge of illegality" is quite similar to the objective standard of qualified immunity. *See supra* notes 153-58 and accompanying text.

443. Dan Richman, an Associate Professor of Law at Fordham University School of Law, provided this insight from his experience as an Assistant United States Attorney.

444. There may, of course, be some screening of cases by plaintiffs' attorneys in deciding whether or not to bring a particular case. As qualified immunity does not apply to governmental entities, however, evidence of a strong immunity defense will not deter the bringing of an

itself—in the guise of qualified immunity—acts as the primary screening mechanism at the summary judgment stage.[445] These differences of substance and procedure surely affect the functional scope of the ignorance of law defense in these two contexts.

The *Lanier* Court's equating of qualified immunity in section 1983 cases with fair notice in criminal constitutional cases raises an additional, potentially troubling procedural issue in the criminal context. Recall that qualified immunity was recast in *Harlow* as a purely legal question in order to spare officials the burden and inconvenience of defending themselves in a full-blown trial. Importantly, when there are factual disputes on issues material to the qualified immunity question, courts will permit limited discovery, again with the goal of disposing of non-meritorious cases at the earliest possible stage.[446] When a constitutional claim could give rise to *criminal* liability, it would seem even more important to dispose of non-meritorious cases quickly.[447] Yet, it is unclear exactly how the clearly established law inquiry, designed for the civil context, would function in the criminal context if the unavailability of discovery means that most criminal constitutional cases end up going to trial. Thus, even if the substantive analysis is the same, as the *Lanier* Court suggested, differences in the way civil and criminal cases are handled may create significant differences in the way the ignorance of law defense actually plays out.[448]

Finally, understanding the connection between notice and fault tells us something important about constitutional rights. I have argued that section 1983 liability brings with it a level of societal oppro-

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entity-liability suit and, if so, the plaintiff will likely name the individual officials even if that claim is vulnerable on immunity grounds.

445. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982) (opining that an important purpose of qualified immunity is to weed out insubstantial suits on summary judgment and concluding that the objective, "clearly established law" inquiry furthers that purpose).

446. *See id.* Limited discovery may be necessary prior to summary disposition on qualified immunity grounds if plaintiff's and defendant's steries differ on material issues, and defendant's story, if true, describes conduct that a reasonable official could have believed lawful. *See* Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (remanding the case and directing the lower court to determine if the actions the Creightons alleged are ones a reasonable officer could have believed were lawful). If limited discovery still leaves unresolved issues of material fact, the case would go to trial, and qualified immunity could then be invoked again in a motion for directed verdict.

447. If civil litigation against governmental officials raises serious fairness and overdeterrence concerns, a criminal prosecution against those officials would be even more troubling. *See* United States v. Lamer, 73 F.3d 1380, 1393 (6th Cir. 1986) (suggesting that it should not be "easier" to establish criminal liability than civil liability for the same wrong).

448. I am indebted to The Honorable Jerome Turner for a series of fruitful conversations about the procedural issues that may be raised by equating fair notice in constitutional criminal cases with qualified immunity in section 1983 cases.

brium that correlates with the notion that constitutional rights are "special." This explains why section 1983 liability, like criminal liability, will be imposed only on defendants who were at fault; only such defendants merit the stigma that accompanies the designation "constitutional violator." The notion that section 1983 liability entails some level of moral stigma also suggests an argument against the conventional view that more constitutional damages liability is necessarily better: As a number of scholars have argued in the criminal context, the fact that a criminal conviction is accompanied by societal opprobrium argues for restricting liability to conduct that the community actually perceives as condemnable. Criminal law, in other words, will be most effective in enhancing compliance with its commands if it "gains a reputation as a reliable statement" of the community's expected norms of behavior.[449] This argues for less rather than more criminal liability; it argues, for example, against extending criminal liability to cover regulatory and other minor offenses.[450]

Similar considerations would argue for sensible limitations on liability in constitutional damages actions. The Supreme Court seemed to have something like that in mind when the Court opined that accepting due process claims premised on merely negligent deprivations would "trivializ[e] the right of action provided in [section] 1983."[451] The Court's immediate concern was to prevent section 1983 from becoming what it called a "font of tort law."[452] But a deeper, implicit concern was to avoid devaluing the constitutional currency: to avoid federal damages liability for harms that do not clearly reach constitutional dimensions. For similar reasons, the Court's qualified immunity jurisprudence eschews liability except when an official's conduct violates well-established constitutional law. Just as "the criminal law's unique power derives from its ability to marshal the moral condemnation of the community" and avoiding

449. Robinson, *supra* note 402, at 212; *see also supra* note 409.

450. *See, e.g.*, PACKER, *supra* note 409, at 359 ("If we make criminal that which people regard as acceptable, either nullification occurs or, more subtly, people's attitude toward the meaning of criminality undergoes a change."); Hart, *supra* note 37, at 421 (arguing that criminalizing conduct that is not blameworthy by community standards "dilutes the force of the threat of community condemnation as a means of influencing conduct in other situations where the basis of moral condemnation is clear"); Pilcher, *supra* note 37, at 34 (arguing that "[l]egally authorizing government coercion in areas beyond those delineated by commonly understood social responsibilities leads the governed to question the moral authority of the legal system and diminishes their respect for the power of criminal law in general, thus diluting its distinctive force as a mechanism of social control"); Robinson, *supra* note 402, at 214 (arguing that extending criminal liability to regulatory violations "may undercut moral credibility").

451. Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in the result).

452. Daniels v. Williams, 451 U.S. 327, 332 (1986).

overcriminalization preserves the "moral authority for visiting community condemnation on . . . violators,"[453] so too limiting constitutional damages liability to cases involving truly blameworthy conduct may best preserve the moral force of such liability. In short, limiting rather than expanding the scope of liability for constitutional violations—by authorizing its use only against clearly and "genuinely threatening"[454] conduct—may be the best way to reinforce the special place of constitutional rights in our jurisprudence and maintain the special status of constitutional rights in the public consciousness.

453. Pilcher, *supra* note 37, at 35.

454. *Id.* at 35 (quoting Sanford Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1957)).