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How Qualified Immunity Condones Rogue Behavior by Government Officers

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ARTICLE

HOW QUALIFIED IMMUNITY CONDONES ROGUE BEHAVIOR BY GOVERNMENT OFFICERS

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Abstract: The defense of qualified immunity is justified as protecting a government officer from personal liability when the officer reasonably but mistakenly engaged in official acts that later are determined to have been wrongful. And yet the federal courts have allowed the defense of qualified immunity to be invoked by officers who have engaged in blatant misconduct by breaking the criminal law, disregarding state statutes, or violating agency regulations and department policies. Unless the constitutional prohibition has been clearly established by precedent in cases with nearly identical facts, the officer's violation of other legal norms of behavior is regarded as irrelevant.

Qualified immunity thereby encourages rogue behavior. A lawless officer escapes accountability, and the victim is left without a remedy. A judicial bypass of the merits by a qualified immunity ruling leaves the door open to repeated lawless behavior with impunity.

To ultimately prevail on the civil rights cause of action, the plaintiff must establish that the officer's conduct did indeed cross a constitutional line. But the question of constitutional tort liability should not be sidetracked by a qualified immunity defense granted to a miscreant officer when the most straightforward indicia of legal wrongdoing is state law.

When the officer is a law-breaker rather than a law-enforcer, the very reason for qualified immunity evaporates. By transgressing state law that specifically prescribes the course of action, the officer can no longer plead innocent mistake and consequently should forfeit the qualified immunity defense.

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INTRODUCTION

While testifying before the public safety committee of the Minnesota State House of Representatives in opposition to a state proposal to abolish qualified immunity as a defense in constitutional tort claims, a county sheriff assured the legislators that "qualified immunity does not protect law enforcement who knowingly violate the law."[1] Promoting that statement, a state legislator opposing the bill declared: "As long he's not—the officer's breaking a law, or violating the law, or policy for that matter, he is protected. But if he violates policy, violates the law, qualified immunity does not fall in play. He is liable for what he does."[2]

Alas, the sheriff and legislator were quite mistaken.

The federal courts grant a government officer the benefit of qualified immunity even when the officer has plainly violated the criminal law, disregarded state statutes, ignored agency regulations, or transgressed official policies.[3] Unless the source of the wrongdoing is both constitutional[4] in nature and clearly established in the law through an appellate precedent in a case with nearly identical facts, the officer engaging in rogue behavior may indeed avoid liability through qualified immunity.[5]

For example, in *Jessop v. City of Fresno*,[6] city police officers allegedly pilfered hundreds of thousands of dollars in cash and rare coins during a search pursuant to a warrant.[7] Yet, the court conferred absolution from civil rights liability to the officers, reasoning that "they did not have clear notice that [the theft] violated the Fourth Amendment."[8]

As another example, in *Evans v. Skolnik*,[9] correctional officers eavesdropped on prisoner telephone calls with lawyers through a speaker wired into the prison's secure telephone system.[10] By state statute and agency regulation, prisoner telephone calls to a lawyer were confidential and could

1. *Peace Officer Civil Liability Immunity Prohibited: Hearing on H.F. 1104 Before the H. Comm. on Pub. Safety and Crim. Just. Reform Fin. and Pol'y*, 2021 Leg., 92nd Sess. (Minn. 2021) (testimony at 1:23:19), https://www.house.leg.state.mn.us/hjvid/92/893774. As full disclosure, I also testified at this legislative hearing in favor of the bill to abolish qualified immunity.

2. *Id.* at 1:31:13.

3. *See infra* Part I.B. As explained later, see *infra* note 38, the terms "government officer" and "state law" are given their broadest meaning here as covering any agent of government acting under color of state law, which includes local ordinances and policies.

4. Although federal statutes designed to create a federal right may also be enforced in a civil rights suit under 28 U.S.C. § 1983, see Gonzaga Univ. v. Doe, 536 U.S. 273, 283–84 (2002), Section 1983 claims typically are founded under the United States Constitution.

5. *See infra* Part I.B.

6. Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

7. *Id.* at 939–40.

8. *Id.* at 942.

9. Evans v. Skolnik, 997 F.3d 1060, 1062 (9th Cir. 2021).

10. *See* Plaintiff-Appellant's Petition for Rehearing En Banc at 2–3, *Evans*, 997 F.3d 1060 (No.18-17233).

not be monitored or recorded.[11] Nonetheless, the court granted qualified immunity, concluding that surreptitious listening to attorney-client communications did not violate "any Fourth Amendment right that was clearly established at the time."[12]

As yet another example, in *Frasier v. Evans*,[13] city police officers surrounded a citizen who video-recorded the use of force by police during an arrest and demanded he turn it over to be searched.[14] The city had an official policy affirming the right of citizens to record the police in the discharge of their duties, and the officers had been trained on this policy.[15] Still, the court applied qualified immunity because "a First Amendment right to record [police officers] performing their official duties in public spaces" was not clearly established in judicial decisions.[16]

The animating purpose of the affirmative defense of qualified immunity is to protect an officer from ruinous personal liability when he or she reasonably, but mistakenly, engages in official conduct believed to be legitimate.[17] But an officer who has crossed a clear line set by a state statute, agency regulation, or department policy is hardly someone who has acted reasonably or slipped into an innocent mistake. Even if the clarity of the constitutional norm has not yet been sufficiently cemented by appellate precedent, the obviousness of the wrongdoing on conspicuous grounds of state law should nonetheless preclude any sympathy for the officer resisting legal accountability to the victim of the wrongdoing.[18]

By granting special solicitude to lawless government officers, the courts encourage further rogue behavior.[19] Lawless behavior by officials is too frequently undetected or unchallenged, but poses a danger to fundamental constitutional rights, especially if later condoned by a court decision wrapping the misconduct in the cloak of qualified immunity. Official misconduct that departs from established protocols and disregarding state or local statutory and regulatory rules and policies is likely to be repeated if officials are given a pass. Officials may learn that they can flout state law with impunity, knowing that they may be awarded qualified immunity without so much as an admonition for their behavior.

To prevail on a constitutional civil rights claim under 42 U.S.C. § 1983, the plaintiff will still have to establish that a constitutional right has

11. NEV. REV. STAT. § 209.419(4)(d) (2011); Nev. Dep't of Corr. Admin. Regul. 718.01(3) (June 17, 2012), https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20718%20-%20061712.pdf.

12. *Evans*, 936 F.3d at 1062.

13. Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (2021).

14. *Id.* at 1010–11.

15. *Id.* at 1012.

16. *Id.* at 1023.

17. *See infra* Part II.A.

18. *See infra* Parts II.A, II.B.

19. *See infra* Part I.C.

also been violated.[20] The essential question on the merits of the cause of action remains how the United States Constitution speaks to the official behavior. But the plaintiff should not have to face the higher obstacle of pointing to a past precedent in a nearly identical context to do so. By violating a clear legal directive, even if found in a source other than the United States Constitution, the government officer should be regarded as having forfeited the qualified immunity affirmative defense.

I. The Problem: How Qualified Immunity Excuses Rogue Officers Who Violate State Law

A. Basics of Qualified Immunity Law

Plainly and painfully stated, the application of qualified immunity means that the victim of a constitutional wrong by a government officer exercising official authority is left without a remedy for the harm that results. Indeed, the court may evade the very question whether the conduct in question crossed a constitutional line, thereby perpetuating legal uncertainty. The qualified immunity analysis begins sensibly enough but then is diverted down another path to survey the prior exactitude of the law, which moves the adjudication further and further away from constitutional accountability.

The first prong of qualified immunity forthrightly and unsurprisingly asks whether there has been a constitutional violation.[21] In this way, prong one turns directly to the merits of whether a constitutional cause of action has been rightly stated by the civil rights plaintiff. If the court takes up this logically (but not actually) prerequisite inquiry, the analysis will proceed along familiar lines of constitutional interpretation. This approach to adjudication promises clarification of constitutional law, upholds government accountability by identifying wrongful conduct, and articulates binding precedential guidelines for constitutionally legitimate government conduct.

In sharp contrast, the second prong of qualified immunity—the demand that the officer be shown to have violated "clearly established" constitutional law—introduces a peculiar and attenuated analysis. Bypassing the central question on the merits, the second prong may sweep a constitutional wrong under the rug by asking, not whether there was a violation, but rather whether the asserted constitutional right was "clearly established" at the time of the conduct.[22] This prong introduces a fictional analysis as well, by pretending that the pronouncements of appellate courts would have been

20. *See infra* Part II.D.

21. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

22. *Id.*

communicated to the reasonable government officer so as to control his or her behavior.[23]

Further subverting government accountability for adhering to constitutional parameters, the "clearly established" standard has evolved into a demanding exercise in parsing the specific details of prior appellate precedents. Too often, courts appear to latch upon the slightest of factual distinctions to excuse a defendant government officer from being held to respond to a civil charge of constitutional wrongdoing.

Before allowing liability, the Supreme Court has demanded scrupulous legal precision tightly linked to similar facts in the prior judicial opinion articulating the constitutional rule.[24] The Court expects a civil rights claimant to adduce "existing precedent" that puts "the statutory or constitutional question beyond debate."[25] Regularly reversing lower court decisions that deny qualified immunity, the Supreme Court has "reiterate[d] the longstanding principle that clearly established law should not be defined at a high level of generality" and instead must "particularize[ ] [the law] to the facts of the case."[26] In this way, Joanna Schwartz writes, "[t]he Supreme Court's qualified immunity doctrine sends plaintiffs' attorneys on nearly impossible quests for 'clearly established law.' "[27]

As Jay Schweikert puts it, a civil rights plaintiff can only avoid qualified immunity by "identify[ing] not just a clear legal *rule* but a prior case with functionally identical *facts*."[28] With sadly little exaggeration, John Jeffries says it is "as if the one-bite rule for bad dogs started over with every change in the weather."[29] The Court has left open a narrow exception for "extreme circumstances" where the constitutional wrongdoing is so egregious that qualified immunity may be stripped from the officer notwithstanding a paucity of appellate precedent.[30] But, even with recent hopeful developments,[31] this exception has rarely been applied. As empirical evi-

23. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 611 (2021) (observing that public officials can hardly be trained "about the hundreds—if not thousands—of court cases that could clearly establish the law").

24. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–15 (2018).

25. Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (cleaned up).

26. White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (per curiam) (cleaned up).

27. Schwartz, *supra* note 23, at 683.

28. Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST., Sept. 14, 2020, at 1, https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf; *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting) (criticizing clearly-established-law doctrine as demanding "a factually identical case" precedent).

29. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

30. *See* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020).

31. *Id.*

dence shows, qualified immunity remains "a powerful defense" to derail a civil rights claim.[32]

To make it worse, the Supreme Court has approved front-loading the "clearly established law" second prong. The reviewing court may choose to hold that the constitutional right was not established with sufficient clarity, and thereby grant qualified immunity, without even addressing whether a constitutional right existed or was violated on the facts alleged in the case.[33] Lower courts frequently accept the Supreme Court's "invitation" to bypass the merits question and head for the clearly-established-law exit.[34] As an inevitable consequence, the state of constitutional law is obscured, meaning that the next individual to suffer the same wrong faces the same obstacle to a remedy for official misconduct.

As justified by the Supreme Court, "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."[35] The officer is spared the burdens of personal liability and excused even from responding on the merits, "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution."[36] In the Court's words, only a "plainly incompetent" government official who acts in clear disregard of constitutional expectations (or who "knowingly violate[s] the law") will lose the defense of qualified immunity.[37]

B. Qualified Immunity for Officers Violating State Law

The federal courts have regularly extended qualified immunity to government officers whose state law wrongdoing is manifest but where the constitutional parameters had not previously been declared in sufficiently unambiguous and specific terms in a precedential ruling.[38] Three illustrative cases have been decided in just the past three years.

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32. Alexander A. Reinert, *Qualified Immunity on Appeal: An Empirical Assessment* 7 (Cardozo Sch. L. Faculty Rsch. Paper No. 634, 2021), https://papers.ssrn.com/abstract_id=3798024.

33. Reichle v. Howards, 566 U.S. 658, 664 (2012).

34. Andrea Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79, 95 (2021).

35. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

36. *Id. See* Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 586 (2021) ("[Q]ualified immunity protects both public employers and employees to the extent their legal obligations are uncertain.").

37. Stanton v. Sims, 571 U.S. 3, 6 (2013) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

38. In this article, references to "government officer" and to "state law" track the broad understanding of who constitutes an official actor and what it means to act under "color of state law" under 42 U.S.C. § 1983. For Section 1983, a person acts "under color of [state] law" when that "person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation." Dosset v. First St. Bank, 399 F.3d 940, 948 (8th Cir. 2005) (approvingly quoting model jury instruction for Section 1983 cases). Thus, "government officer" as used here includes any agent of state or local government, regardless of official title.

In *Jessop v. City of Fresno*,[39] city police officers executed a search warrant as part of an investigation into illegal gambling machines.[40] While the officers later provided an inventory stating that approximately $50,000 had been seized pursuant to the warrant, the plaintiffs claimed that the officers had taken $151,380 in cash and $125,000 in rare coins.[41] In other words, the officers had stolen tens of thousands of dollars in currency. And yet, when the plaintiffs brought a civil rights action in federal court, the officers escaped liability for this alleged felony crime by virtue of qualified immunity.

The United States Court of Appeals for the Ninth Circuit acknowledged that the officers "ought to have recognized that the alleged theft of Appellants' money and rare coins was morally wrong."[42] But, the court concluded, "they did not have clear notice that [the theft] violated the Fourth Amendment" which is "a different question."[43] The court observed that it had "never addressed whether the theft of property covered by the terms of a search warrant, and seized pursuant to that warrant, violates the Fourth Amendment."[44] And, furthermore, the court determined not to answer that question here, instead terminating the judicial inquiry with the application of qualified immunity because the Fourth Amendment law was not "clearly established."[45]

In *Evans v. Skolnik*,[46] a prisoner discovered that correctional officers were eavesdropping on confidential telephone calls to his attorneys.[47] The intrusive nature of the prison "monitoring" of these legal telephone calls was much more disturbing than the anodyne description offered by the Ninth Circuit majority of a correctional officer listening to the beginning of the legal call until an attorney answered the phone.[48] As established in the record, for the administrative segregation unit, prison officials had circumvented the prison's secure telephone system and evaded telephone technology that both preserved confidentiality and protected against abuse by prisoners.[49] A loudspeaker was wired directly into a tapped line, allowing

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And "state law" includes not only those statutes adopted by the state legislature and regulations adopted by state agencies, but local sources of law, such as city and county ordinances and department rules.

39. Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

40. *Id.* at 939.

41. *Id.* at 939–40.

42. *Id.* at 942.

43. *Id.*

44. *Id.* at 941.

45. *Id.* at 942.

46. Evans v. Skolnik, 997 F.3d 1060 (9th Cir. 2021). As full disclosure, the author of this article was court-appointed pro bono counsel for the plaintiff-appellant on this appeal.

47. *See id.* at 1062–64.

48. *See id.*

49. *See* Plaintiff-Appellant's Petition for Rehearing En Banc at 2, *Evans*, 997 F.3d 1060 (No. 18-17233) (citing to the record).

correctional officers to listen to an entire conversation by a prisoner with his lawyer.[50]

Correctional officers admitted that they listened to the substance of these conversations to evaluate its legal content based on "legal terminology that you might hear on television."[51] If a prisoner were to discuss medical issues, which could come up in a deliberate indifference case or mitigation in a capital case, the officer dismissed such medical information as outside of her "definition of legal."[52] The dissent noted that the "monitored" calls involved "civil rights violations by prison officials, including the same officials that monitored his legal calls."[53]

As the dissenting judge recognized, correctional officer monitoring of the content of a prisoner's call to an attorney stood in direct contradiction of Nevada state law.[54] The Nevada State Legislature had declared prisoner communications to a lawyer to be "confidential"[55] and directed the Nevada Department of Corrections to "adopt regulations providing for an alternate method of communication for those communications by offenders which are confidential."[56] When the state statute was enacted, the director of the Department of Corrections assured the state legislature that calls would be placed by a prison employee to verify the attorney and thus "[t]here would be no need to monitor that telephone conversation, because it would be confidential."[57] The Chair of the Senate Judiciary Committee explained that prisoner calls to attorneys "must be made . . . free from interception," the warden "doesn't listen until he determines the call is within the [attorney-client] privilege," and the statutorily-required alternative arrangements mean the call "is not monitored at all."[58] Pursuant to the statute, Department of Corrections regulations clarified that telephone calls "between an inmate and his attorney" are excepted from monitoring and recording.[59]

Nonetheless, the Ninth Circuit majority in *Evans* granted immunity from civil rights liability to the correctional officers, while sidestepping the merits of the constitutional question. The majority "exercised [their] discretion to consider only the second prong of the qualified immunity analy-

50. *Id.* at 2–3.

51. *Id.* at 6 (quoting the record).

52. *Id.*

53. *Evans*, 997 F.3d at 1076 (Berzon, J., concurring in part, dissenting in part, and concurring in the judgment).

54. *Id.*

55. NEV. REV. STAT. § 209.419(4)(d) (2011).

56. *Id.* § 209.419(3).

57. Minutes of Nev. State Legis., S. Comm. on Jud., 62nd Sess. 494 (1983) (statement of Sen. Wagner), at www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1983/SB117,1983.pdf.

58. *Id.* at 493 (statement of Sen. Wilson).

59. Nev. Dep't of Corr. Admin. Regul. 718.01(3) (June 17, 2012), https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20718%20-%20061712.pdf.

sis."[60] The majority concluded that prison monitoring of legal telephone calls did not violate "a Fourth Amendment right that was clearly established at the time."[61] One judge wrote separately, saying that "before addressing the second prong of the qualified immunity inquiry, we should hold that [the officer's] monitoring of [the prisoner's] legal calls did violate his constitutional rights under the Fourth Amendment."[62]

In *Frasier v. Evans*,[63] the plaintiff happened to be in a parking lot near where police officers were arresting a suspect in a drug deal.[64] Indeed, the police briefly requested and received the plaintiff's assistance when the suspect put a sock believed to contain contraband into his mouth and struggled with police officers.[65] After other officers arrived and the plaintiff stepped back, he began video-recording the incident on his tablet computer, showing an officer repeatedly punching the suspect in the face.[66] Believing that he had recorded evidence of police misconduct, the plaintiff put the computer in his car and initially denied to police that he had recorded anything.[67] He was surrounded by the officers who allegedly demanded that he turn over the video.[68] He eventually produced the computer, which was grabbed out of his hands and searched without his consent.[69]

The district court denied qualified immunity on the plaintiff's First Amendment claim of retaliation, after finding that "the municipality had in place, at the time of the events giving rise to this lawsuit, an official policy which clearly affirmed citizens' First Amendment rights to record the police in public discharge of their official duties."[70] Indeed, the police department had trained its officers to follow this policy.[71] Notwithstanding the city policy, the United States Court of Appeals for the Tenth Circuit reversed and granted qualified immunity to the officers because the First Amendment right to record police discharging their duties in a public space was not clearly established.[72] While the Tenth Circuit "assume[d]" such a right existed, the court failed to enter a direct ruling on whether the First Amendment had been violated.[73]

60. Evans v. Skolnik, 997 F.3d 1060, 1067 (9th Cir. 2021).

61. *Id.* at 1062.

62. *Id.* at 1072. (Berzon, J., concurring in part, dissenting in part, and concurring in the judgment).

63. Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (2021).

64. *Id.* at 1009.

65. *Id.*

66. *Id.* at 1010.

67. *Id.*

68. *Id.* at 1010–11.

69. *Id.* at 1011.

70. *Id.* at 1012 (quoting district court) (cleaned up).

71. *Id.*

72. *Id.* at 1023.

73. *Id.*

Now, these three decisions can be criticized as getting it wrong even under existing qualified immunity jurisprudence. In each case, the illegitimacy of the behavior was clearly communicated by legal sources, meaning that red flags were flapping briskly in the wind.

As to *Jessop*, it seems absurd on its face to suggest there is any doubt that theft by police officers of property seized in a search pursuant to a warrant is "unreasonable" within the meaning of the Fourth Amendment to the United States Constitution.[74] And other circuits have regarded it as obvious that theft of private property by police officers during a search is a violation of the Fourth Amendment.[75] Indeed, the Tenth Circuit described theft of "personal property during a search conducted pursuant to a warrant" as "patently unconstitutional."[76]

For *Evans*, the courts have spoken of a prisoner's constitutional "right to privately confer with counsel" as being "nearly sacrosanct."[77] When prison officers surreptitiously listen to a prisoner's telephone calls with his lawyers representing him in suits against prison officers, even to the point of arrogating the judicial power to adjudicate its privileged content, the attorney-client privilege is eviscerated.[78] As another circuit held, jail personnel cannot, consistently with the Constitution, be permitted to make a "'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate'" for attorney correspondence to a prisoner.[79] Another court discussing interception of legal calls by the incarcerated used the most powerful language of censure to "strongly condemn the odious practice of eavesdropping on privileged communication between attorney and client."[80]

With respect to *Frasier*, if freedom of speech serves any purpose, it surely protects the right to document the conduct of public officials engaged in their public duties and in a public space. Indeed, in a qualified immunity case, the First Circuit ruled that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by

74. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

75. *See* Nelson v. Streeter, 16 F.3d 145, 151 (7th Cir. 1994) (stating that it was "obvious" that police violate the Fourth Amendment when "steal[ing] private property"); Lynn v. City of Detroit, 98 F. App'x 381, 385 (6th Cir. 2004) (saying "[i]t seems clear" that police officers violated the plaintiffs' constitutional rights by stealing cash during a search).

76. United States v. Webster, 809 F.3d 1158, 1162, 1170 (10th Cir. 2016) (cleaned up).

77. Nordstrom v. Ryan, 762 F.3d. 903, 910 (9th Cir. 2014).

78. *See In re* Search Warrant, 942 F.3d 159, 164, 176–77 (4th Cir. 2019) (forbidding the government, even with probable cause to conduct a search of a law firm, from conducting its own privilege review of attorney-client documents).

79. ACLU Fund of Mich. v. Livingston Cnty., 796 F.3d 636, 648 (6th Cir. 2015).

80. State v. Fuentes, 318 P.3d 257, 258 (Wash. 2014) (en banc) (cleaned up).

the First Amendment."[81] The *Frasier* case illustrates the direct connection between the First Amendment right to record police conduct and the inspiration of public debate that leads to reform of governmental policy. After local media received and reported on the *Frasier* video, the police department changed its policy to forbid use of force solely to obtain evidence from a suspect's mouth or prevent swallowing a substance.[82]

Moreover, in both *Evans* and *Frasier*, the courts departed from current qualified immunity doctrine by neglecting the impact of state statutes, agency regulations, and municipal policy upon the internal evaluation of whether the constitutional right at issue was sufficiently clear in application to the situation. In *Evans*, the Ninth Circuit majority failed even to mention state law prohibiting listening to prisoner telephone calls to attorneys, which was recognized only by the dissent.[83] In *Frasier*, the Tenth Circuit forthrightly brushed aside the city policy that directed police officers to recognize the right of citizens to video-record police activities in a public space.[84] The Tenth Circuit ruled that the existence of the express policy could be adduced neither to demonstrate that the police officers were knowingly violating First Amendment rights nor as evidence that the First Amendment right was clearly established.[85] "Judicial decisions are the only valid interpretive source of the content of clearly established law," the *Frasier* court insisted, meaning that "whatever training the officers received concerning the First Amendment was irrelevant to the clearly-established-law inquiry."[86]

Through silence in *Evans* and by assertion of judicial supremacy in *Frasier*, those courts refused to consider pertinent and powerful additional evidence arising from state law to show that the government officers had been placed on notice that their actions were constitutionally wrongful. In *Hope v. Pelzer*,[87] the Supreme Court confirmed that state department of corrections regulations were indeed "relevant" and "buttressed" the "fair and clear warning" to prison officials that use of a hitching post transgressed the Constitution.[88]

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81. Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011).

82. Petition for a Writ of Certiorari at 8, Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 427 (2021) (No. 21-57).

83. Evans v. Skolnik, 997 F.3d 1060, 1076 (9th Cir. 2021) (Berzon, J., concurring in part, dissenting in part, and concurring in the judgment).

84. *Frasier*, 992 F.3d at 1015–19.

85. *Id.* at 1012, 1015–19.

86. *Id.* at 1019.

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

88. *Id.* at 744–46. The unsuccessful petition for a writ of certiorari from the Tenth Circuit's decision in *Frasier* and amici supporting the petition presented an appealing argument well-grounded in existing qualified immunity doctrine, but an approach that is somewhat different from that advanced in this article. The *Frasier* petition asked the Supreme Court to confirm that governmental policies are properly considered in the qualified immunity analysis on whether a constitutional right had achieved clearly-established-law status, specifically whether the city policy

But, sadly, the courts in these three decisions were in keeping with longstanding Supreme Court precedent that refuses to treat the unlawful nature of the officers' conduct under state law as disqualifying any invocation of the qualified immunity defense in the first place. Forty years ago, when qualified immunity was still evolving as a newly fashioned doctrine, the Supreme Court in *Davis v. Scherer*[89] ruled that the defense is not forfeited because the officer acted in violation of state law.[90] As the Court stated, "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[91] Only by acting in violation of a clearly established *federal* and *constitutional* right would the officer lose the protection of qualified immunity.

And so the stage has been set for miscreant government officers, acting in blatant violation of state law, even criminal law, to enjoy the special solicitude of the federal courts by generously being accorded the absolution from liability found in qualified immunity.

C. Qualified Immunity Encourages Rogue Officer Behavior

In an unsuccessful petition to the Supreme Court in *Jessop*, counsel painted a disturbing picture of how the qualified immunity ruling in that case condones rogue behavior by government officers:

> Consequently, the law in the Ninth Circuit is that, now and going forward, law enforcement officers lack fair notice that stealing property covered by a search warrant is unconstitutional. Any law enforcement officer in the Ninth Circuit who engages in such conduct—from the cop in Reno to the narcotics agent in San Diego—is entitled to qualified immunity for stealing property listed in a warrant, and will be until this precedent is overturned or the Ninth Circuit resolves the underlying constitutional question. In effect, the decision below has granted prospective immunity to

acknowledging the First Amendment right to record police officers in public spaces provided evidence in addition to case-law that this right had become clearly established. Petition for a Writ of Certiorari, *supra* note 82, at 12–14; Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 5–7, *Frasier*, 992 F.3d 1003 (No. 21-57); Brief of Legal Scholars of Qualified Immunity as Amicus Curiae in Support of Petitioner at 6–18, *Frasier*, 992 F.3d 1003 (No. 21-57). The approach advocated in this article precedes and interrupts the clearly-established qualified immunity analysis. I contend here that a government officer's violation of state law, including department policy, forfeits the invocation of qualified immunity. Thus, as discussed in this article, the illegal conduct under state law knocks out the underpinnings to the qualified immunity defense altogether. With the qualified immunity defense having collapsed, the civil rights adjudication should move directly to the merits of the alleged violation of a constitutional right.

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

90. *Id.* at 193–94.

91. *Id.* at 194. For further discussion of *Davis*, see *infra* notes 108–117 and accompanying text.

> any officers in the Ninth Circuit who wish to steal property listed in a search warrant.[92]

When a person's behavior creates disorder or offends expectations of civil community, society has an array of means by which to communicate disapproval. Community leaders may denounce the immorality of the behavior. The government may withdraw civil privileges or impose civil penalties. And, for superlative delinquency, the perpetrator may be charged with a crime. As Justice Kennedy once wrote, "[C]riminal law defines a discrete category of conduct for which society has reserved its greatest opprobrium and strictest sanctions."[93] Why then would we brush aside a government officer's commission of a crime when that same officer asks to be granted an extraordinary affirmative defense to avoid accountability to the victim of the wrongful conduct?

Similarly, by allowing eavesdropping by correctional officers on prisoner legal calls, the *Evans* decision countenances the kind of rogue behavior by prison officials that frequently is undetected or unchallenged. This impropriety poses a danger to fundamental constitutional rights, especially if winked at by a court decision wrapping the misconduct in the cloak of qualified immunity. Misconduct such as departing from established protocols and disregarding state statutory and regulatory rules is likely to be repeated if officials are given a pass.

And the *Frasier* case poignantly presents the subversion of official accountability that unfolds when officers act in direct violation of departmental policy designed to protect freedom of speech. The rogue officers allegedly told the plaintiff that it would be "in the best interest" of the police department and "everyone involved" in this matter if he surrendered the video.[94] When the plaintiff reluctantly showed the tablet to the police, an officer seized it and began searching, while another officer said that it would be "okay" if "there's no video."[95] The plaintiff believed the officer had deleted the video, but a forensics examination showed that it still was present on the computer.[96] The alleged actions of the police officers convey anything but the impression that a video record of their official conduct in public should be preserved.

The message that lawless behavior is condoned is especially pernicious when the court's decision sidesteps a ruling on the merits.[97] From a decision like *Evans*, prison officials may learn the lesson that they can flout

92. Petition for a Writ of Certiorari at 31, Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020) (No. 19-1021).

93. Foucha v. Louisiana, 504 U.S. 71, 95 (1992) (Kennedy, J., dissenting).

94. Frasier v. Evans, 992 F.3d 1003, 1011 (10th Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 427 (2021).

95. *Id.*

96. *Id.*

97. *See* Evans v. Skolnik, 997 F.3d 1060, 1072 (9th Cir. 2021) (Berzon, J., concurring in part, dissenting in part, and concurring in the judgment) (saying that avoiding the constitutional

state statutes and regulations. They can circumvent technological protections designed to avoid abuse and protect attorney-client confidentiality. They can intercept privileged attorney-client communications. And they can do all of this surreptitiously, knowing that even if they are caught, they will be awarded qualified immunity without so much as an admonition for their behavior. From a decision like *Frasier*, the takeaway for police officers may be that there is little downside to flouting department policy and attempting to suppress recorded evidence of possible police misconduct. The court remained willing to sweep away any personal liability for the incident and refrain from condemning the behavior as crossing a constitutional line.

The encouragement of rogue behavior is aggravated when the court ducks the merits of the constitutional right by moving directly to the "clearly-established-law" prong. In this way, the court forces future victims of such misconduct to start at the very bottom and again climb the hill of clearly established law. Because success likely remains out of reach, bad actors can forecast that they bear little risk of accountability, even for repeated rogue misconduct. Joanna Schwartz warns that, by allowing a court to confer qualified immunity without reaching the central constitutional question on the merits, the federal courts "perpetuate[ ] uncertainty about the contours of the Constitution and send[ ] the message to officers that they may be shielded from damages liability even when they act in bad faith."[98]

D. Time for Modest Reform of Qualified Immunity

At this moment in jurisprudential time, qualified immunity is in an uncomfortable holding position. Transition may or may not be underway, and abolition or general reform by the Supreme Court or Congress may or may not be on the table in the near term.

No fewer than four members of the Supreme Court "have authored or joined opinions expressing sympathy" with the theoretical and practical criticisms of a doctrine that allows a constitutional violation to be left unremedied because of supposed uncertainties in the law.[99] A renewed attention to the text and history of 28 U.S.C. § 1983 undermines qualified immunity as a legitimate doctrine. As the Supreme Court itself acknowledged early on, Section 1983 authorizes claims for denial of constitutional

issue on the first prong of qualified immunity reinforces "the lack of incentive to avoid violations of constitutional rights").

98. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1818 (2018).

99. *Id.* at 1801–02; *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute.").

rights with "no mention" of qualified immunity as a defense.[100] As confirmed by William Baude, "[T]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."[101]

The fear that public officials would be left with ruinous personal liability for innocent mistakes is now understood to be without empirical support. Defendant officers in constitutional tort suits are invariably reimbursed by the government for any damages awarded. As Joanna Schwartz, James Pfander, and Alexander Reinert have empirically confirmed, officers who are personally sued for constitutional harms almost certainly will be indemnified by the government.[102]

Legislative bodies are also considering whether to retire qualified immunity as an available defense in official wrongdoing cases.[103] While such a proposal has stagnated in Congress, the issue is not going away. As Andrew Coan and DeLorean Forbes write, while optimism should be restrained, "[I]t is still eminently possible to imagine a future in which qualified immunity is seriously reformed or abolished."[104]

Yes, the very survival of qualified immunity has been placed directly in question today and more general reforms may be on the horizon. But the specific problem addressed in this article focuses on a peculiar application of the immunity defense.

While we wait for something more, a modest pullback should be pursued, when the doctrine fails even under current doctrinal justifications. When a government officer's behavior is plainly wrongful as a matter of state law, should that officer be able to bypass the constitutional claim by raising an affirmative defense of qualified immunity? As illustrated at the beginning of this article, chief law enforcement officers and state legislators sensibly conclude that law-breakers should fall outside of that protection

100. Owen v. City of Independence, 445 U.S. 622, 635 (1980).

101. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018). *But see* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1345 (2021) (asserting that the common law did recognize qualified immunity to protect officers with discretionary duties, which could be overcome by showing a subjective improper motive, although this was "quite different" from the modern qualified immunity test based on clearly established constitutional law).

102. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014); *see also* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 566 (2020) (finding that federal officers held liable in *Bivens* claims were indemnified in 95% of cases and covering 99% of damages); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2058–59 (2018) ("[T]here is reason to believe that personal liability is just as mythical in prison cases as it is in police cases.").

103. *See* Wes Jackson, *The Future of Qualified Immunity: An Examination of Federal and State Proposals*, 63(4) FOR THE DEFENSE, Apr. 2021, at 6.

104. Andrew Coan & DeLorean Forbes, *Qualified Immunity: Round Two*, 78 WASH. & LEE L. REV. 1433, 1437 (2021).

and, indeed, mistakenly believe the law already bars such a perverse result as contrary to the very premise of qualified immunity.[105]

II. The Modest Answer: Removing Qualified Immunity from Government Officers Who Violate State Law

When a clear line for official conduct has been set by a state statute, agency regulation, or department policy, the officer who deliberately steps over the line has forfeited any legitimate claim for qualified immunity. If a constitutional norm has also been violated, even if that norm has not been painstakingly articulated by prior court precedent, liability should follow. The obviousness of the wrongdoing on conspicuous grounds of state law should preclude any sympathy for the officer resisting legal accountability to the victim of the wrongdoing.

A. The Animating Purpose of Qualified Immunity Evaporates for Miscreant Officers

When the government officer is a law-breaker rather than a law-enforcer, the very reason for qualified immunity evaporates. The modest solution proposed here is to remove the cloak of qualified immunity when a miscreant government officer has failed to follow specific prescriptions of official conduct set forth by state law, regardless of whether the underlying constitutional misconduct has been clearly denounced in prior appellate precedents.[106] Officers who have acted in compliance with state law will retain the protections of qualified immunity. And even the officer who breaks state law will be held liable only if a constitutional violation is also demonstrated on the merits.

As civil rights scholars will recognize, this modest proposal is not wholly original (although it is refined in this article and bolstered by painful recent history).[107] Forty years ago, a similar argument was presented to—

105. *See supra* notes 1–2 and accompanying text.

106. This article addresses qualified immunity as a defense to a Section 1983 suit alleging a constitutional transgression by a state or local officer acting under color of state law. The same argument logically extends to a federal officer who has transgressed a federal statute or regulation and who invokes qualified immunity to defend against a *Bivens* suit under the judicially implied constitutional remedy. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The occasions under which this issue would arise for a federal officer appear to be diminishing. The Supreme Court has "brought the [*Bivens*] experiment to a near end" in recent rulings. Gregory C. Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 Notre Dame L. Rev. 1789, 1802 (2021) (citing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)). While the *Bivens* remedy remains in place for limited specific contexts, such as a search in violation of the Fourth Amendment, the nail appears to have been hammered into the "coffin of *Bivens*" for any new context. Steve Vladeck, *On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies*, Just Sec. (June 19, 2017), https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies.

107. John Preis recently revived this approach as being "attractive" in the sense of extending liability to officers who have engaged in blameworthy wrongful conduct, but ultimately rejects it

and rejected by—the Supreme Court in *Davis v. Scherer*.[108] In *Davis*, a state trooper claimed that his right to constitutional due process was violated when he was dismissed without a hearing because he held a second job.[109] Because the department's rules required a full investigation and an opportunity to be heard, the plaintiff contended that defendants, by failing to comply with a clear state regulation, "forfeited their qualified immunity from suit for violation of federal constitutional rights."[110]

A five-justice majority in *Davis* "declin[ed] . . . to adopt" the position that "official conduct that contravenes a statute or regulation is not 'objectively reasonable' because officials fairly may be expected to conform their conduct to such legal norms."[111] The Court did acknowledge the "reasoning is not without some force."[112] The Court nonetheless decided that introducing the question whether a state statute or regulation had been violated would "disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."[113] The Court was reluctant to make what it feared would become the additional and difficult evaluation of whether state law was also violated.[114] Although the plaintiff insisted the state law inquiry would focus on the clarity of the violation and the connection of the state law to important interests, the Court responded that "once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner."[115] The Court worried that officers subject to state law rules that might be "ambiguous" or even "contradictory" would fail to diligently perform official duties for fear of personal liability.[116]

Properly articulated and applied, however, removal of qualified immunity for illegality that is patent in nature—including illegality that is defined by state law—does not introduce undue ambiguity into the adjudication or

as interfering with state interests and as "difficult to administer in many instances." John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1980 (2018). Concerns about state interests and application do not overcome the considerable "attractive" qualities of this proposal, as discussed below.

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

109. *Id.* at 185–87.

110. *Id.* at 193.

111. *Id.* at 193–94. Because the dissenting four justices concluded that the due process violation was indeed clearly established, the dissent explained that it "need not consider whether, as appellee contends, violation of the department regulation would defeat immunity." *Id.* at 204 (Brennan, J., concurring in part and dissenting in part). However, the dissent suggested that "the presence of a clear-cut regulation obviously intended to safeguard public employees' constitutional rights certainly suggests that appellants had reason to believe they were depriving appellee of due process." *Id.*

112. *Id.* at 194.

113. *Id.* at 195.

114. *Id.*

115. *Id.*

116. *Id.* at 196 (quoting PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 66 (1983)).

foster unfairness. Nor does it "disrupt the balance" between vindicating constitutional rights and encouraging diligent performance of official duties. Rather, the true disruption flows from the *Davis* approach that drives the balance toward encouraging officers to act "swiftly and firmly"[117]—*even* when state law explicitly tells them to cease and desist.

Indeed, it is perverse for a federal court to refuse to address the merits of a person's claim of denial of a constitutional right when the government officer involved has so departed from the path of legitimacy as to transgress clear prohibitions or affirmative directives set forth in explicit rules of state law. If qualified immunity is to be retained in any form, the Court should reconsider and remove the extension in *Davis* of absolution to an officer who engages in blatantly illegal conduct under state law.

When the officer acts unlawfully, the very rationale behind qualified immunity dematerializes. By disobeying state law that prescribes the course of action, the officer cannot assert innocent mistake and consequently should forfeit the qualified immunity defense. The Supreme Court cannot credibly speak of "the need to hold public officials accountable when they exercise power irresponsibly"[118] when the officer goes rogue under express terms of state law.

The Supreme Court has justified the current qualified immunity doctrine as an "attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority."[119] But when state law directs the officer not to act or to act only in a specific manner, officials do not have discretion to do otherwise. And the genuine public interest is to encourage faithful adherence to legal constraints on the exercise of official authority.

When a state or locality establishes clear legal boundaries and forbids officers to act or prescribes the course of action that must be followed, then the values raised in a civil rights case are no longer in competition. As discussed further below,[120] the victim of that official wrongdoing still must establish that the wrong was a constitutional wrong to prevail in a constitutional tort action. But the merits of that claim should not be obscured by a qualified immunity defense. That defense—designed to protect the "inno-

117. *Id.* (quoting Scheuer v. Rhodes, 416 U.S. 232, 246 (1974)).

118. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

119. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (cleaned up). *But see* Schwartz, *supra* note 98, at 1811–13 (finding no evidence that officers refrain from diligent behavior because of fear of lawsuits, given that interviews with police officers show that they "do not themselves think about the threat of civil liability when performing their duties").

120. *See infra* Part II.D.

cent"[121] officer—should not be perversely afforded to an officer who is anything but "innocent."

In offering a scholarly defense of qualified immunity, Aaron Nielson and Christopher Walker ground the doctrine on "the theory that the prospect of liability for making a mistake about what the law requires may dissuade officers from faithfully executing state and local laws and policies that do *not* violate the U.S. Constitution."[122] Taking that thesis as a given under current qualified immunity doctrine, the opposite should also be true. The federal courts have no justifiable basis for excusing the officer who was hardly "faithfully executing state and local laws and policies," but rather was *betraying* those "state and local laws and policies."

The Supreme Court has declared that qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[123] By granting this exemption from constitutional accountability to an officer who blatantly transgresses state law, "the plainly incompetent or those who knowingly violate the law" become the very ones who are protected.

B. To Remove Qualified Immunity, the Officer Must Have Violated State Law That Specifically Prescribes the Course of Action

The defense of qualified immunity would be forfeited under the approach suggested in this article only if the state statute, agency regulation, or departmental policy constraining officer conduct was clear in its textual charge and causally linked to the harm that was allegedly visited upon the civil rights claimant.

This approach does not introduce a non-legal exercise in moralizing, nor does it entail a return to the days when the courts would inquire into the subjective "good faith" or conscious knowledge of wrongdoing by the officer.[124] The question presented here asks, not whether the government officer is a sinner, but whether that officer is a law-breaker.

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121. *See Harlow*, 457 U.S. at 814 (justifying qualified immunity on the basis that civil rights "claims frequently run against the innocent as well as the guilty").

122. Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity's 51 Imperfect Solutions*, 17 DUKE J. CONST. L. & PUB. POL'Y 321, 327 (2022); *see also* Rosenthal, *supra* note 36, at 586 (arguing that, without qualified immunity to protect against liability when the law is uncertain, "state and local governments could minimize liability only by directing their employees to resolve every debatable judgment in favor of avoiding liability-creating conduct").

123. District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (cleaned up).

124. *See Harlow*, 457 U.S. at 814–15 (explaining the rejection of a "good faith" standard as necessary so that insubstantial lawsuits could be quickly terminated by qualified immunity). *Cf.* Schwartz, *supra* note 98, at 1834 (arguing that civil rights "[p]laintiffs should be able to defeat a qualified immunity motion by pointing to evidence of the officer's bad faith"); Schwartz, *supra* note 23, at 680 (arguing the "reasonableness of officers' behavior" in the qualified immunity analysis should turn on proof about "what they were actually taught about the scope of their behavior").

In *Jessop v. City of Fresno*,[125] which was discussed earlier,[126] the court agreed that police officers "ought to have recognized that the alleged theft of [the plaintiff's] money and rare coins was morally wrong," but "they did not have clear notice that it violated the Fourth Amendment."[127] The officers had notice not only of a moral trespass, but of a criminal prohibition.[128] The question is not whether the officer's conduct was morally reprehensible, except to the extent that the public has translated that moral disapprobation into a legal constraint. Stealing private property is criminal, end of story.

In *Evans v. Skolnik*,[129] the prison's "monitoring" of legal telephone calls offended a legislative declaration that prisoner communications to a lawyer are "confidential"[130] and violated a state corrections department regulation prohibiting monitoring and recording of calls between an inmate and a lawyer.[131] Rightly labeling eavesdropping on privileged attorney-client communications as an "odious practice"[132] is ultimately a legal and not merely a moral characterization.

Even more indefensible is what happened in *Frasier v. Evans*,[133] where the police officers allegedly acted in direct contradiction to municipal policy designed to protect citizen recording of police activity in public places, a policy that was reinforced by specific training.[134] Breaches of state law that rule out qualified immunity should extend to state and local agency department policies. And official rules should be understood to include government employee handbooks and manuals, which hold an official status and, if made part of the employment contract agreed to by the government employee, take on an additional legal imprimatur.

Importantly, as demonstrated in *Frasier*, a government officer is far more likely to be on actual notice of restrictions in department policies or an employee handbook than those found by reading appellate opinions on constitutional law. In reviewing police department policies and training materials, Joanna Schwartz found no evidence that police officers are

125. Jessop v. City of Fresno, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

126. *See supra* notes 39–45 and accompanying text.

127. *Jessop*, 936 F.3d at 942.

128. *See* Petition for a Writ of Certiorari, *supra* note 92, at 19 ("Theft is a foundational crime in human society, barred by Hammurabi's Code and the Ten Commandments as well as the laws of every State.").

129. Evans v. Skolnik, 997 F.3d 1060 (9th Cir. 2021). *See supra* notes 46–62 and accompanying text.

130. NEV. REV. STAT. § 209.419(4)(d) (2011).

131. Nev. Dep't of Corr. Admin. Regul. 718.01(3) (June 17, 2012), https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20718%20-%20061712.pdf.

132. State v. Fuentes, 318 P.3d 257, 258 (Wash. 2014) (cleaned up).

133. Fraiser v. Evans, 992 F.3d 1003 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (2021). *See supra* notes 63–73 and accompanying text.

134. *Id.* at 1012.

trained "about the facts and holdings of court decisions that clearly establish the law"[135] and, indeed, found that specific examples used in training materials "do not appear to resemble particular cases."[136]

The approach in this article of elevating state law is comfortably in keeping with the common understanding of qualified immunity as being available only to the officer acting reasonably in legal compliance. As confirmed at the very beginning of this article,[137] chief law enforcement officers and state and local leaders with the power to adopt policies already have the sensible, but sadly mistaken, impression that qualified immunity is withdrawn from government officers who violate department policy.

Before qualified immunity would be removed, under this approach, the state statute, agency regulation, or department policy that the officer is alleged to have violated must have left little ambiguity in its application. This is not a question of good faith or even of actual knowledge, but would be an objective inquiry by the judge into the clarity of the law. Nor is this a question of fact that could not be addressed earlier than the summary judgment stage. The focus is on declarative texts of law, perhaps with clarity further sharpened by state court rulings interpreting that text. Written rules are commonly adopted, frequently included in government employee manuals, and often referred to in training programs. Accordingly, the issues of lucidity and fair notice by state law to the government officer are far less attenuated and fictional than the current qualified immunity inquiry into the constitutional anthology of appellate decisions that no government officers will have read.

An attractive and parallel standard may be found in the Supreme Court's rulings on when the federal government's defense to tort liability for discretionary functions is lost because of a legal constraint on discretion. In justifying qualified immunity, the Supreme Court has spoken of the need "to protect officials who are required to exercise their discretion"[138] and has worried about "inhibition of discretionary action."[139] In a similar way, when waiving federal sovereign immunity for tort liability in the Federal Tort Claims Act (FTCA),[140] Congress imposed an exception to protect policymaking discretionary functions.[141] As the Supreme Court has explained,

135. Schwartz, *supra* note 23, at 611.

136. Schwartz, *supra* note 23, at 642.

137. *See supra* notes 1–2 and accompanying text.

138. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (cleaned up).

139. *Id.* at 816.

140. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

141. 28 U.S.C. § 2680(a) (excepting "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). On the discretionary function exception, see generally GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, § 3.6(b), at 153–64 (2016).

this statutory discretionary function exception avoids "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[142] Thus, an interest in encouraging vigorous official exercises of legitimate discretion upholds both qualified immunity as an affirmative defense for a government officer to a constitutional civil rights claim and the discretionary function exception as an affirmative defense for the United States to a common-law tort claim.[143]

Because the FTCA's discretionary function exception to tort liability cannot logically be invoked when the federal government lacks discretion, the Supreme Court has ruled that it falls out of the case if the government actor had no discretion to exercise because a statute, regulation, or policy directed the course of action. As the Supreme Court articulated in *Berkovitz v. United States*,[144] when "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," then no discretion remains and "the employee has no rightful option but to adhere to the directive."[145]

In the same way, then, the qualified immunity protection of the diligent government officer executing official discretion terminates when the state or locality has removed discretion through a state statute, local ordinance, agency regulation, or departmental policy that specifically prescribes a course of action for a government employee to follow. Of course, specific *prescription* includes any specific *prohibition*, thus encompassing illegitimate actions of commission as well as omission.

Finally, before characterizing the officer as a law-breaker, the state law must bear a reasonably direct causal nexus with the harm alleged by the civil rights plaintiff. A failure of an officer to follow formalities or other

142. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

143. In protecting official discretion, qualified immunity implied as a defense to an individual government officer in a Section 1983 or *Bivens* suit and the discretionary function exception to government liability do share significant parallels. However, a Section 1983 or *Bivens* civil rights claim is different from an FTCA claim in important and distinctive ways. First, the Section 1983 suit is founded on a claim of constitutional right, which, if justified, quite rightly cuts off a state officer's discretion to pursue an unconstitutional course. By contrast, the FTCA waives federal sovereign immunity for state common-law torts, which ordinarily should not interrupt federal policymaking discretion. Indeed, true policy-oriented decisions are not appropriately evaluated by the rubric of negligence. Second, Section 1983 and *Bivens* claims are brought against an individual government officer who, in theory, is subject to personal liability. By contrast, the FTCA is an action against the federal government collectively, with any award of damages being paid out of the federally appropriated judgment fund. Qualified immunity is not available as a defense under the FTCA, which instead directs that the defenses available to the federal government "are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person under the relevant state law." Vidro v. United States, 720 F.3d 148, 151 (2d Cir. 2013); *see generally* Sisk, *supra* note 106, at 1811.

144. Berkovitz v. United States, 486 U.S. 531 (1988).

145. *Id.* at 536.

protocols during the incident, even if required by legal text, would be relevant only if that violation led causally to the harm that the plaintiff contends was also occasioned by the violation of a constitutional right. For example, if a police officer executing a search warrant were to violate a regulation requiring presentation to the target of an inventory within a fixed time period, such a breach of agency rules would be disconnected from the separate conduct of stealing private property seized during the search. Likewise, if a correctional officer failed to make a duty log notation of having listened to a prisoner telephone call, as required by a prison rule, that mistake would not have a tight nexus with the wrong of eavesdropping on a privileged attorney-client communication.

Although finding this approach "attractive" and superior to the current qualified immunity doctrine, John Preis predicts that it would run aground on the murky shoals of "determining whether a given state law is aimed at preventing the particular constitutional violation alleged."[146] But we need not inquire into the often-unknowable intent behind the state law. Rather, the crucial question is the causal nexus between the law broken and the harm suffered by the victim of the alleged official wrongdoing. It is a question not of intent but of effect.[147]

Preis poses the example of the police officer accused of using excessive force in an arrest who violated a state law directive that he wear and activate a body camera while on duty.[148] While the state law duty to activate the body camera might motivate the police officer to avoid excessive force for fear of being detected by the resulting video evidence, the harm suffered by the hypothetical victim of excessive force was not due to the inactive body camera. By contrast, if a state or local law prohibited use of a taser when arresting a suspect on a misdemeanor, the victim's allegation of injuries from the use of the taser directly connects the breached state law to the harm of the alleged constitutional wrong.

In sum, the state-law-directive inquiry should not become a distracting investigation into the myriad of administrative rules that might attend official activities. Rather, the narrower question would focus on those state law texts that, if obeyed, would directly and concretely have prevented the constitutional wrong alleged by the civil rights plaintiff.

146. Preis, *supra* note 107, at 1985.

147. Preis and I are not far apart, as we each conclude that fault should play a more substantial role in the qualified immunity analysis. I focus on blameworthy conduct in terms of its patent inconsistency with state law, which leads directly to the alleged harm. Preis contemplates fault in terms of traditional tort concepts, where negligence per se focuses more directly on whether the offended state law was designed to protect the class of persons into which the plaintiff falls.

148. Preis, *supra* note 107, at 1985.

C. Revoking Qualified Immunity for Lawless Officers Ensures Accountability and Assists States and Localities in Upholding Standards of Official Conduct

When qualified immunity is granted to a government officer who has crossed the constitutional line, even if that officer complains that the line was not previously well-marked, the victims of constitutional wrongdoing are left without a remedy. While that result may be justified by the supposedly greater weight given to protecting the reasonably-mistaken government officer in discharging duties, the constitutionally wronged claimant nonetheless is abandoned by the legal system.

Surely, then, the balance of competing values shifts hard toward the claimant when that government officer acts in patent violation of state law. When the officer cannot justify his or her conduct as the faithful if mistaken enforcement of state law—because state law actually bars that conduct—the right to a remedy by the victim of a constitutional wrong should ascend.

In addition, public trust in government and law enforcement takes a blow whenever an officer is excused on reasonable-mistake grounds for what is or would have been determined to be a violation of a victim's constitutional right. Public cynicism is especially likely to be bred when the government officer's conduct was plainly wrongful on state law grounds, even if the constitutional right was not perfectly clarified. Law enforcement falls in reputation when the public learns that police officers who were accused of stealing money during a search are then granted dismissal from suit on the technicality of qualified immunity. Prison officials suffer a decline in respect from lawyers, prisoners, and families and friends of prisoners when they learn that the courts have condoned eavesdropping on telephone calls to lawyers, especially about lawsuits accusing those very same prison officials of misconduct.

The more egregious the wrongdoing—even if the basis for that sense of lawlessness flows more directly from state law than constitutional norms—the greater the loss of public trust in governmental institutions and officials. In sum, accountability for official wrongdoing matters.

Finally, revoking qualified immunity from state or local officers who violate express state law would bring higher regard to the directives and prohibitions of state and local government. When a court sweeps aside manifest wrongdoing under state law through an edict of qualified immunity for the lawless officer, the federal judiciary gives the cold shoulder to state law. Qualified immunity for miscreant officers effectively treats the legal canon of state and local government as unworthy of respect.

By restoring rightful estimation of the state law obligations of state and local officers in federal civil rights actions, the courts will also facilitate efforts by state and local government to adopt restrictions on official conduct that will be taken seriously. State statues, local ordinances, agency

regulations, and department policies adopted for the very purpose of constraining the powers of government officers will be reinforced when the federal courts hold an officer accountable for transgressions that also cross a constitutional line.

Removal of qualified immunity in the distinctive context of abject law-breaking by an officer need not lead to the transfer of excessive liability to states, counties, and cities. If it were otherwise, governments might be discouraged from codifying standards of official behavior for fear of thereby losing the immunity protection and being forced to reimburse officers from the public treasury. Instead, a government should declare that indemnification will be denied to employees who violate specific rules of conduct that result in harm to members of the public. A rule withdrawing indemnification from law-breakers is easily understandable by employees, justifiable to both government employees and the public, and easy to administer.

D. The Burden Remains on the Plaintiff to Establish a Constitutional Violation as Part of the Cause of Action

Lifting the affirmative defense of qualified immunity from the government officer who plainly violates state law does not create a new cause of action under those state laws. While the law-breaking officer rightly should be regarded as forfeiting the special solicitude of qualified immunity, the civil rights plaintiff still must establish the constitutional violation on the merits.

Remembering the essential constitutional source of the cause of action for the federal civil rights lawsuit, removal of qualified immunity is not the equivalent of grafting a missing private cause of action onto a state or local government law specifying rules of official conduct. John Preis argues that "[i]f the Supreme Court were to declare that state law violations could be used to overcome qualified immunity, the Court would be, in effect, overruling the [local government's] enforcement decision," that is, the choice to enforce the rules by disciplinary action rather than by a cause of action for liability.[149] Not at all. The express private right of action remains that of federal Section 1983, and the cause of action on the merits still hinges on the alleged constitutional right.

Victims of official wrongdoing that is grounded solely on violations of state law must look elsewhere than Section 1983 for a possible remedy. And if the court determines that the United States Constitution was not offended by the officer's conduct, then the plaintiff in the Section 1983 fails on the merits, regardless of whether non-constitutional state laws were also broken.

Again, this article proposes a modest recalibration of the parameters of a qualified immunity defense as an exception to the federal cause of action.

149. *See id.* at 1984.

An affirmative defense granted by federal courts as a matter of federal law would be withdrawn because of an officer's state law infraction. The purpose of the federal qualified immunity defense—to encourage official vigor in enforcing state law—disappears when the officer's conduct instead undermines that state law. Fears of cascading liability for government officers (or indemnifying state or local governments) are overstated. Only those officers who are also found to have actually violated a federal constitutional right will be subject to liability.

In other words, a federal constitutional evaluation of the behavior remains an essential element of the cause of action itself. If the modest reform proposed here is adopted, the constitutional tort analysis in miscreant officer cases would no longer be attenuated or sidetracked into the fiction of whether state officials have been placed on notice by prior judicial opinions. Rather, in such cases, the court would employ the familiar judicial tools of constitutional interpretation. When the most straightforward indicia of illegality by the government officer is found in state law, the plaintiff should not have to face the higher obstacles of pointing to a past constitutional precedent in a nearly identical context to hold that officer accountable for wrongdoing.

Conclusion

When formulating a doctrine of qualified immunity for government officers accused of constitutional wrongs, the Supreme Court insisted that it was not thereby granting any "license to lawless conduct."[150] Isn't that assurance hard to take seriously when qualified immunity is enlarged to protect police officers accused of the felony criminal act of stealing tens of thousands of dollars during a search?[151] And what of correctional officers who betray the directive of the state legislature and corrections department not to monitor confidential calls by prisoners to their attorneys?[152] Should immunity from accountability be contemplated when police officers retaliate against a citizen who exercises the right to film official conduct in public, a right that is expressly protected by municipal policy?[153] The "license to lawless conduct" by over-extension of qualified immunity to officers flouting state law should now be revoked.

The fulsome elimination of qualified immunity may be overdue. The judicially fashioned defense overrides the plain text of the civil rights statute, ignores history which did not afford comparable immunity for official conduct, stagnates the development of constitutional law by pretermitting the merits inquiry, and undermines trust in the law.

150. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).
151. *See supra* notes 39–45 and accompanying text.
152. *See supra* notes 46–62 and accompanying text.
153. *See supra* notes 63–73 and accompanying text.

But the difficulty in accomplishing the arguable perfection of outright abolition of qualified immunity should not deter us from achieving the good of discarding it under the circumstances where it is least defensible. One does not wish to interrupt the movement toward abolition or broad reform, but we also do not want to wait forever without any interim adjustments that could advance the cause of justice, even if slightly.

When a government officer violates the specific prescriptions or prohibitions of state law, that officer no longer deserves the special solicitude of the federal courts afforded by the affirmative defense of qualified immunity. Taking that step is meaningful, even if it is not the end of the journey.