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Fair Notice, The Rule of Law, and Reforming Qualified Immunity

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Abstract

After a series of highly publicized incidents of police violence, a growing number of courts, scholars, and politicians have demanded the abolition of qualified immunity. The doctrine requires courts to dismiss damages actions against officials for violating the plaintiff's constitutional rights unless a reasonable officer would have known that the right was "clearly established." Scholars argue that the doctrine forecloses compensation and vindication for victims and stands in the way of deterring constitutional violations in the future.

One argument against qualified immunity has relied on empirical evidence to challenge what scholars take to be the main justification for qualified immunity: it prevents the threat of constitutional liability from over-deterring effective law enforcement. Yet the Supreme Court of the United States has always offered another rationale for the doctrine: it would be unfair to hold officers liable without sufficient notice that their conduct was unconstitutional. Unlike the overdeterrence rationale, scholars have almost entirely ignored the fair notice rationale for qualified immunity.

This Article assesses the extent to which the fair notice rationale supports the current doctrine of qualified immunity. It does so by exploring the limits of the jurisprudential principle of prospectivity, which holds that the law must ordinarily apply only prospectively. To approximate the rule of law and to treat subjects with equal dignity, the law must be capable of guiding conduct. The principle of prospectivity obviously applies to retroactive legislation. This Article makes the novel case that unpredictable adjudications also fail to provide such guidance and that they are especially unfair when they impose retroactive moral condemnation. Constitutional liability is often highly unpredictable,

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seemingly at odds with prior legal duties, and, unlike most tort liability, expresses the community's moral censure.

Based on this fresh analysis of retroactive adjudication, this Article argues that concerns about fair notice to officials do support a form of qualified immunity, but one that is much more modest than the current doctrine. It supports immunity where an officer could not have reasonably foreseen constitutional liability or public condemnation, but, importantly, not when an officer acted in bad faith, violated a criminal law, or violated a constitutional rule with an underlying rationale that applies to the officer's conduct. Taking the fair notice rationale seriously provides a principled roadmap for reforming qualified immunity.

INTRODUCTION

After a series of highly publicized acts of police brutality, especially against people of color, during the early stages of the COVID-19 pandemic, the public's attention turned to a relatively obscure legal doctrine.[1] Qualified immunity protects officers from suit for constitutional violations unless a reasonable officer would have known that the conduct violated a "clearly established" right.[2] The Supreme Court of the United States has made it clear that to move forward with a constitutional claim against an official, the plaintiff must usually show that the official's conduct violated established rights "'particularized' to the facts of the case," meaning that a court must have already held that very similar conduct was unconstitutional.[3] As a result, some amount of unconstitutional conduct goes unvindicated,[4] uncompensated,[5] and under-deterred.[6] Scholars, politicians, and judges with different political

1. Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html?searchResultPosition=1 [https://perma.cc/U4T9-37XN]; Matt Bonesteel, *Athletes' Petition Calls for Congress to End Qualified Immunity for Police*, WASH. POST (June 10, 2020, 3:59 PM), https://www.washingtonpost.com/sports/2020/06/10/athletes-petition-calls-congress-end-qualified-immunity-police/ [https://perma.cc/A82L-YNAU]; Jay Schweikert, *Qualified Immunity*, 21 A.B.A. INSIGHTS ON L. & SOC'Y 1 (2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/ [https://perma.cc/47A5-KP55].

2. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

3. White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam).

4. *See, e.g.*, Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ("Wrongs are not righted, and wrongdoers are not reproached."). *See generally* Michael L. Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003 (2012) (arguing that damages awards should vindicate constitutional rights).

5. *See, e.g.*, Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Liability*, 62 WASH. U. L.Q. 221, 222 (1984) (explaining that compensation for constitutional deprivations is part of the balancing of interests in qualified immunity).

6. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that the Supreme Court's qualified immunity cases almost always side with the officials and arguing that "[s]uch a one-sided approach to qualified immunity transforms the doctrine into an

commitments and jurisprudential philosophies, including Justices Clarence Thomas and Sonia Sotomayor,[7] have questioned the doctrine.[8] Many have called for its abolition.[9]

This Article interrogates one of the justifications the Court has offered for qualified immunity: that it would be unfair to hold officers liable without fair notice that their conduct might be held unconstitutional. This Article relies on theories of the rule of law and human dignity to argue that the fairness rationale has some force, but not nearly enough to justify the doctrine's current scope. The doctrine captures something important about constitutional liability: it can be unusually unpredictable, especially as courts articulate new constitutional doctrines or apply existing doctrines to new jurisdictions or groups of officials. Yet, at least as far as the fair notice rationale goes, the doctrine is overbroad—it forecloses suit,

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absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"); Wells, *supra* note 4, at 1007 (explaining that damages awards deter constitutional violations).

7. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Court has improperly expanded qualified immunity beyond its common law basis); Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (arguing that the Court's qualified immunity jurisprudence "renders the protections" of the Constitution "hollow").

8. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 608 (2021) ("The Supreme Court's qualified immunity doctrine has been criticized six ways from Sunday—for bearing no resemblance to common law protections in effect when 42 U.S.C. § 1983 became law, undermining government accountability, and failing to achieve the doctrine's intended policy goals.").

9. *See, e.g.*, Cox v. Wilson, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., dissenting from the denial of rehearing en banc) ("[T]his case is one of many illustrating that the profound issues with qualified immunity are recurring and worsening."); Jamison v. McClendon, 476 F. Supp. 3d 386, 423 (S.D. Miss. 2020) ("Just as the Supreme Court swept away the mistaken doctrine of 'separate but equal,' so too should it eliminate the doctrine of qualified immunity."); Briscoe v. City of Seattle, 483 F. Supp. 3d 999, 1008 (W.D. Wash. 2020) ("[Q]ualified immunity jurisprudence is due for a major overhaul . . . ."); Jeff Powell, *History Tells Us Black Americans Need Better Legal Protection*, LAW360 (July 19, 2020, 8:02 PM), https://www.law360.com/articles/1286709/history-tells-us-black-americans-need-better-legal-protection [https://perma.cc/A2G4-X7M3] (arguing for adoption of the Ending Qualified Immunity Act because the doctrine "effectively gives a green light to [police] misconduct"); James A. Wynn Jr., *As a Judge, I Have to Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST (June 12, 2020, 8:00 AM), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ [https://perma.cc/87QW-QVGF]; David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629 *passim* (2021); *see also* Allison Weiss, *The Unqualified Mess of Qualified Immunity; A Doctrine Worth Overruling*, 76 WASH. & LEE L. REV. ONLINE 113, 121 (2020) (explaining that the Court's flawed qualified immunity jurisprudence is the reason for recent decisions overturning qualified immunity); PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 121 (Lorne Neudorf et al. eds., 2021) ("Qualified immunity is subject to severe criticism from the standpoint of the rule of law to the extent it encourages the arbitrary use of government coercion.").

and, therefore, the avenue for victim compensation and vindication, in many cases where the official could have easily foreseen constitutional or other morally censorious liability.

Scholarly opposition to qualified immunity has mainly taken one of two forms. The first is to question the doctrine's legality. Most recently, Professor William Baude has argued that the text of § 1983[10] and its common law background are insufficient to justify the doctrine as a formal matter.[11] Professor Baude's historical claim has met with some resistance,[12] but it does seem clear that, just as there were no constitutional torts at common law, there were likewise no defenses unique to those torts, including qualified immunity.

The most persuasive response to Professor Baude is that the spare language of § 1983 authorized the federal courts to create an entire class of torts—constitutional torts—that required courts to exercise a massive amount of doctrinal ingenuity.[13] Courts had to define the substantive requirements of many constitutional provisions that courts had rarely, if ever, before applied; create doctrinal rules to implement those requirements; and create adjacent doctrines to regulate their application by courts, doctrines of procedure, evidence, and remedies.[14] The courts have done just that, and qualified immunity is one of those adjacent doctrines. And Congress seems to agree. When it amended the statute after the Court articulated qualified immunity, Congress left the doctrine untouched, acting instead to overturn the effects of a Supreme Court decision that, in Congress's view, provided too *little* immunity.[15] Stare

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10. 42 U.S.C. § 1983.

11. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46–77 (2018); *see also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (arguing that Baude and others have "shown that history does not support the Court's claims about qualified immunity's common-law foundations").

12. *But see* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115 (2022) (responding to Keller's article and reiterating his view that the common law did not recognize qualified immunity). *See generally, e.g.*, Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (arguing that qualified immunity is supported by the common law but noting significant differences between the original and modern conceptions of the doctrine).

13. *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 993 (2019) ("In my view, the interpretive context of the Court's immunity decisions under § 1983 . . . requires a recognition that § 1983 does not pose 'ordinary' questions of statutory interpretation today, even if it once did."); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 51–54, 68 (2018) (arguing that § 1983 is a common law statute that authorizes courts to create and reform defenses like qualified immunity).

14. *See* Levin & Wells, *supra* note 13, at 52.

15. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (amending § 1983 to state that "injunctive relief shall not be granted" against a judicial

decisis justifies leaving qualified immunity as is, but it does not stand in the way of its judicial reformation. Rather than launching a wholesale defense of the doctrine, however, this Article assumes its legality, and likewise assumes the propriety of Congress or the Court reforming it according to its underlying policy rationales.

The second area of scholarly opposition to qualified immunity has focused on one of those rationales. From its initial articulation of the doctrine, the Court said qualified immunity was supported by two policy concerns: the risk of over-deterring law enforcement and the unfairness to officers who lacked notice of liability.[16] The Court continues to cite the overdeterrence[17] and fair notice rationales,[18] if somewhat unevenly,

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officer acting in that capacity "unless a declaratory decree was violated or declaratory relief was unavailable"); *see, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018).

16. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), *abrogated on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

17. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) (arguing that liability entails "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) ("As recognized at common law, public officers require [some kind of immunity] to shield them from undue interference with their duties and from potentially disabling threats of liability."); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (noting that the costs of disruptive litigation are magnified for officials responding to the September 11, 2001, terrorist attacks).

18. *See* Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam) ("[Precedent] did not give fair notice to [the officer]. He is thus entitled to qualified immunity."); White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) ("'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning' to officers . . . ." (quoting United States v. Lanier, 520 U.S. 259, 271 (1997))); Taylor v. Barkes, 575 U.S. 822, 827 (2015) (per curiam) ("Nor would [a prior case] have put petitioners on notice of any possible constitutional violation."); City & County of San Francisco v. Sheehan, 575 U.S. 600, 616 (2015) ("Without that 'fair notice,' an officer is entitled to qualified immunity."); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377–78 (2009) ("[E]ven as to action less than an outrage, 'officials can still be on notice that their conduct violates established law . . . in novel factual circumstances.'" (ellipsis in original) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002))); Pearson v. Callahan, 555 U.S. 223, 245 (2009) ("[I]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." (quoting Wilson v. Layne, 526 U.S. 603, 618 (1999))); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct."); *Hope*, 536 U.S. at 739 ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."); Saucier v. Katz, 533 U.S. 194, 206 (2001) ("Qualified immunity operates in this case . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful."), *abrogated on other grounds by Pearson*, 555 U.S. 223; Crawford-El v. Britton, 523 U.S. 574, 590 (1998) (explaining that qualified immunity "avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal development, nor . . . fairly be said to "know" that the law forbade conduct not previously identified as unlawful'" (ellipsis

but it has never seriously considered how far they might go. "As conventionally understood" by scholars, however, the doctrine "rests on overdeterrence,"[19] not on fair notice. The idea is that the threat of liability and litigation will make officers wary of enforcing the law in ways that would benefit society. A number of scholars have questioned the empirical basis of the overdeterrence rationale,[20] showing, for instance, that most police officers are indemnified, so they do not personally bear the financial costs of liability.[21] Professor Joanna Schwartz has also

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removed) (quoting *Harlow*, 457 U.S. at 818)); *Scheuer*, 416 U.S. at 240 (noting "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").

19. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 265 (2000) [hereinafter Jeffries, *Disaggregating Constitutional Torts*]; *see id.* at 269 ("Current doctrine rests squarely on the overdeterrence rationale."); *see also, e.g.*, Wells, *supra* note 4, at 1037–38 (describing the purpose of qualified immunity as to avoid overdeterrence). The literature on the overdeterrence rationale is vast. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 60–76 (1983) (arguing that liability for police officers may lead them to decline to act and thereby minimize their risk, rather than robustly enforce the law and thereby maximize social welfare); *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–78 (1998) [hereinafter Jeffries, *Eleventh Amendment*] (discussing the costs, risks, and incentives that may contribute to overdeterrence of officer conduct); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638–40 (1982) (arguing that the exclusionary rule has created an "overdeterrence problem"); Ronald A. Cass, *Damages Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1175–79 (1980) (arguing that while individual liability for official conduct would lead to overdeterrence, enterprise liability would result in underdeterrence); Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 29 (1978) (arguing that official liability would create strong incentives for officials to overuse public resources and would negatively "skew" their actions).

20. *See* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 500 (2011) (urging scholars to explore the empirical basis for the overdeterrence rationale).

21. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–37 (2014) (showing that police officers are almost always indemnified and almost never contribute to settlements or judgments for constitutional liability); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1675–76 (2003) (noting the same, but for corrections officers); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (finding no cases in which "an individual official had borne the cost of an adverse constitutional tort judgment"); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–12 (1979) (analyzing defense and indemnification of officers in Connecticut); *see also* Jeffries, *Eleventh Amendment*, *supra* note 19, at 50 n.16 (noting that in the author's nearly twenty years in training state and local law enforcement, officers uniformly denied knowing of any cases involving an officer who was sued under § 1983 and had not defended and been indemnified by their agency); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1524 (2016) (arguing that qualified immunity and indemnification "produce a disincentive for police officers to be careful"). *But see* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 235 (2020) (arguing that government indemnification counts as government reliance that counsels against judicial abrogation of qualified immunity).

shown that many constitutional suits against police officers are resolved on grounds other than qualified immunity,[22] so perhaps the doctrine is not doing much legal work anyhow.

These studies are important windows into how immunity functions at the ground level, but they have their limits. Perhaps most importantly, it is impossible to empirically study the counterfactual of what modern law enforcement would look like *with* the prospect of liability under the expansion of constitutional rights since the 1950s but *without* qualified immunity. It would also be unclear how a lack of qualified immunity would affect the Court's implementation of newly announced rights under, say, the First or Second Amendments.[23] In any case, this Article proceeds under the assumption that qualified immunity does little, if anything, to reduce the chilling effects on law enforcement caused by the risk of constitutional liability.[24] Instead, this Article isolates the fair notice rationale to see whether it supports qualified immunity on its own.

Scholars have of course noticed the rationale before, and some have compared it to the fair notice doctrine in criminal law,[25] but surprisingly, no one has thoroughly explored its conceptual underpinnings.[26] This may

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22. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10. *But see* Nielson & Walker, *supra* note 15, at 1881 (questioning the implications of these findings in light of the role played by the shadow of the law on decisions not to file, settlements, and voluntary dismissals).

23. *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 990 (2019); *see also* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 97–105 (1999) (arguing that qualified immunity facilitates constitutional change by allowing courts to innovate without the oppressive cost of damages for past practice); Jeffries, *Disaggregating Constitutional Torts*, *supra* note 19, at 271 ("By denying damages to persons injured by discarded past practices, qualified immunity reduces the cost of innovation."); Daryl L. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999) (asserting that "drastically increasing the cost of rights" by removing limits on damages such as qualified immunity "would surely result in some curtailment" of those rights).

24. The issues of prospectivity and notice that this Article addresses have important implications for optimal deterrence, but this Article leaves them to the side. For a careful inquiry into the implications of notice for both fairness and deterrence, see Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1061, 1066, 1119 (1997).

25. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998) (making the case for this analogy); Nielson & Walker, *supra* note 15, at 1872–74 (defending the analogy); *see also* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 97–98 (1989) (arguing that it is fair to hold officials liable when they are on notice that their conduct is unconstitutional); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1470 (1989) (arguing that "[t]he relation of risk to injury . . . links the injury for which compensation is sought to the fault that justifies compensation"). *But see* Baude, *supra* note 11, at 69–74 (arguing that the qualified immunity doctrine goes further than the fair notice doctrine).

26. *See, e.g.*, Nielson & Walker, *supra* note 15, at 1873–74 (noting that "qualified immunity may mitigate fair notice concerns" but that "[s]olving the problem of fair notice is a bigger project than we can tackle here").

be because the concept of fair notice is simultaneously intuitively simple and jurisprudentially convoluted. It is easy enough to grasp the value of fair notice—children seem to do so intuitively when they are disciplined for conduct they did not know was out-of-bounds. The norm permeates the law, from civil procedure to criminal statutory interpretation. Yet its theoretical underpinnings are complicated. It is often thought to be intertwined with contested theories of law and judging that, though conceptually important, are well beyond the interest of most judges and legal scholars.

Drawing on discussions of the principle of prospectivity in jurisprudence and legal philosophy, this Article argues that the touchstone of fair notice should be the foreseeability of liability for someone in the defendant's position. As Professors Richard H. Fallon, Jr., and Daniel J. Meltzer have argued, focusing on predictability avoids having to resolve important disputes about the nature of judicial lawmaking.[27] This Article adds that focusing on predictability also erases what some have thought to be a categorical distinction between the application of retroactive statutes and the application of retroactive judicially announced rules. What places either of them in tension with the ideal of the rule of law or a commitment to the dignity of the subject is the extent to which the application is unpredictable *to the subject*. Some scholars have argued that courts can, and sometimes should, alleviate such unfairness on a case-by-case basis by applying an equitable defense or entering a remedy that is purely prospective. No one has yet perceived that qualified immunity itself performs the functions of "equity as meta-law."[28] The problem with qualified immunity, this Article argues, is that its current scope and application go well beyond the demands of fairness.

To bring these jurisprudential ideas to bear on qualified immunity, this Article makes the novel argument that constitutional torts are especially problematic from the standpoint of fairness. First, constitutional changes are more likely and harder for officials to predict than changes to other judge-made areas of law. Second, unpredictable constitutional liability also often conflicts with a contrary legal duty: officers have a duty to act, and they are presumed to have the full range of lawful options available to them. Unpredictable constitutional liability creates an apparent (if not actual) conflict of duties, which raises its own rule-of-law and dignity concerns. Third, constitutional torts entail a measure of public censure that does not accompany most other forms of civil liability, for the official is held to have violated a duty not only to the plaintiff, but to the public

27. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1758 (1991).

28. *Cf.* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1054 (2021) ("[A] major theme of equity was, and is, to solve complex and uncertain problems by going to a new level of law. Equity is law about law, or meta-law.").

at large. These arguments, taken together, constitute a significant contribution to the field of constitutional torts.

This Article applies these arguments to the doctrine of qualified immunity, arguing that some form of immunity is justified when liability depends on an overtly new constitutional doctrine, the application of an existing doctrine to a new jurisdiction, or an unpredictable application of an existing doctrine. Fair notice does not justify applying qualified immunity, however, in many cases to which it currently does. Perhaps most notably, the doctrine should not apply when the conduct was committed in bad faith, violated a criminal law, or was malum in se. In those cases, the official could have foreseen constitutional liability or morally comparable criminal liability.

There will, of course, be hard cases, especially when liability depends on the application of an existing doctrinal rule that is unavoidably vague, such as the reasonableness and excessive force rules under the Fourth Amendment. Currently, courts usually look at whether a prior case has forbidden conduct that is factually identical or very similar to the defendants. This does not capture what is fair to expect officers to predict. Officers, like anyone, understand that there are rationales and purposes underlying the rules that apply to them. When the relevant courts have already articulated a rationale or purpose for a constitutional rule that clearly applies to the defendant's conduct, whether or not the courts have encountered that particular conduct before, it is fair to subject the defendant to suit and, if the conduct violates the Constitution, to liability.

As the closing part of this Article suggests, this account of the fair notice rationale for qualified immunity has implications for other areas of constitutional liability. Municipalities and government contractors currently do not enjoy immunity from constitutional suit or liability, but fairness suggests that they should, at least in some cases. So too private parties whose civil liability depends upon a retroactive constitutional decision. This Article's account of fair notice may have important implications for other legal domains, including procedure, civil and criminal liability, and the demands of due process, but it leaves its application to those fields for another occasion.

This Article's ambitions are necessarily limited. It focuses on the fairness rationale for qualified immunity. Its jurisprudential arguments may well have important implications for other doctrinal domains, especially for the fair notice defense in criminal law, but this Article can only flag those issues for future research. Likewise, this Article cannot fully address the relationship between qualified immunity and "blue-on-black violence."[29] The question is vital, but, as Professor Devon W.

29. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

Carbado has shown, there are a myriad of social and legal factors that contribute to racial inequity in policing, and they are difficult to tear apart.[30] What seems clear, however, is that reducing the scope of qualified immunity, especially in cases involving stable doctrines like those that apply to the use of force, will likewise reduce qualified immunity's influence on police violence.[31]

This introduction has been necessarily abstract. To make the issues more concrete, Part I of this Article explores the application of qualified immunity to six constitutional tort cases; this Article later returns to the cases to illustrate the shortcomings of the current doctrine. Part II explores the rule-of-law and fairness deficits of retroactive law, whether legislation or adjudication. Part III argues that constitutional liability is especially likely to have these deficits. Part IV considers the application of these concerns to qualified immunity, sketching a taxonomy of cases that are—and are not—supported by the notice rationale. Part V briefly considers the implications of this conception of the notice rationale for municipal and private liability for constitutional torts.

I. THE CASE OF THE MISSING RATIONALE

Since its first modern qualified immunity decision,[32] the Supreme Court has persistently claimed that the doctrine is supported by a concern about fairness to officials,[33] yet neither courts nor scholars have fleshed out this concern. The most the Court has said is that qualified immunity is "in effect . . . 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."[34] Scholars have debated the extent to which the doctrine approximates the fair warning standard, but they have never explored the jurisprudential foundations of the rationale or considered how far they go to support the current doctrine of qualified immunity.[35] Others have wrestled with the difficult doctrinal and theoretical questions raised by retroactive constitutional adjudication but have never brought their insights to bear on qualified immunity and

30. *Id.*

31. *See infra* Section IV.E.

32. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (noting "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"), *abrogated on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

33. *See* sources cited *supra* note 18.

34. Hope v. Pelzer, 536 U.S. 730, 740 n.10 (2002) (quoting United States v. Lanier, 520 U.S. 259, 270–71 (1997)).

35. *See* sources cited *supra* note 25.

damages suits against officers.[36] As a result, no one has gotten to the bottom of what, if anything, makes retroactive constitutional liability unfair, and, accordingly, why it might not be unfair in every case.

This gap in the literature is especially surprising because observers are likely to have such powerful intuitions about the right result in officer suits—intuitions that may be based on a pre-theoretical sense of fairness.[37] Consider the following six cases:

> 1. Officers seize property lawfully, but keep about $225,000 of it for themselves.[38] The officers are entitled to qualified immunity because "there was no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant."[39]
>
> 2. An officer stops a vehicle because the temporary tag was folded up.[40] Without probable cause to suspect the driver had committed a crime, the officer lies to him so he will consent to a search, then detains him for nearly two hours and causes $4,000 worth of damage to the vehicle. The officer is entitled to qualified immunity because there was no "established law . . . particularized to the facts of the case" showing that the officer acted "unreasonably."[41]
>
> 3. After making a lawful arrest, a police officer shoots at a barking dog, but accidentally strikes a ten-year-old who is lying prone within the officer's reach.[42] The officer is entitled to qualified immunity because no prior decision held that shooting at a dog and accidentally hitting an arrestee constitutes excessive force in violation of the Fourth Amendment.[43]

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36. *See, e.g.*, Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999); Fisch, *supra* note 24; Fallon & Meltzer, *supra* note 27.

37. *Cf.* Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204, 216 (1976) (relying on a similar notion of intuition as a starting point for deeper moral analysis).

38. Jessop v. City of Fresno, 936 F.3d 937, 939–40 (9th Cir. 2019).

39. *Id.* at 939.

40. Jamison v. McClendon, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020).

41. *Id.* at 418 (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam)).

42. Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019).

43. *Id.* at 1318–23.

4. A principal and school board, in a closed meeting, expel three students for violating a rule against using alcohol at a school event.[44] The board ratifies the decision two weeks later in a meeting with the students, their parents, and counsel. Then the Supreme Court holds that school disciplinary decisions are subject to procedural due process under the Fourteenth Amendment.[45] A federal court holds that the expulsion violated the Fourteenth Amendment because the board did not give the students sufficient notice or a hearing.[46]

5. A state executive official, enforcing a statute authorizing state funds for scholarships to private schools, denies a family's request for a scholarship to a religious school because a nearly 150-year-old state constitutional provision forbids the use of state funds for religious institutions.[47] Five years later, by a vote of 5-4, the Supreme Court holds that denying the request discriminates against religious persons and institutions in violation of the Free Exercise Clause of the First Amendment.[48] Should the official be obliged to pay for the family's damages?[49]

6. A twist: rather than a state officer, an abortion provider is sued under a state law that prohibits abortion but provides a defense where the suit would create an "undue burden" on the constitutional right to an abortion.[50] An abortion provider may not claim the defense if the Supreme Court has overruled the

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44. Wood v. Strickland, 420 U.S. 308, 311–12 (1975), *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

45. *See* Goss v. Lopez, 419 U.S. 565, 581 (1975). *Goss* was decided about a month before *Wood v. Strickland*.

46. Strickland v. Inlow, 519 F.2d 744, 746–47 (1975) (on remand from *Wood*).

47. *See* MONT. CONST. art. X, § 6(1), *held unconstitutional by* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020). The provision was reenacted in the 1970s. *Espinoza*, 140 S. Ct. at 2273 (Alito, J., concurring).

48. *See Espinoza*, 140 S. Ct. at 2262–63. The Supreme Court did not hold until 2017 that the states were obligated to include religious schools when they choose to subsidize private schools, and that case was limited to the funding of outdoor recreation facilities for elementary schools. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2017–18, 2024–25 (2017).

49. *C.f., e.g.*, Pierson v. Ray, 386 U.S. 547, 550, 557 (1967) (holding that police officers who enforced a state law later held to be unconstitutional were entitled to a defense of good faith).

50. *See* Texas Heartbeat Act, § 3, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2022)).

> cases announcing that right.[51] The Court then overturns those cases.[52] Should a defendant be liable for aiding or abetting an abortion that was constitutionally protected when performed?

The officials in the first five of these cases would be entitled to qualified immunity. (The doctrine would not protect an abortion provider who is a private party.) Should they be? Many readers probably have the intuition that the officers in the first three cases should be subject to liability: their conduct was vicious or at least highly unreasonable. The officials (and private parties) in the final three cases were all attempting in good faith to enforce existing law and were subject to liability only after the Supreme Court changed the relevant legal doctrine. Making them pay damages awards for conduct that was not only lawful but obligatory before the Supreme Court changed the law seems unfair. Unfortunately, by neglecting the notice rationale for qualified immunity, courts and scholars have left this sentiment just that: an undertheorized intuition. What exactly makes the last three cases seem unfair, and why does it not apply to the first three? What would be the scope of qualified immunity if it more faithfully reflected the notice rationale? This Article takes a first pass at answering these questions.

Before examining the fair notice rationale in detail, however, it is worth pausing to consider precisely what is, and what is not, at stake in reforming qualified immunity. To do so, consider three features of the legal regime of official accountability.

The first is that many officials are entitled to absolute immunity, not qualified immunity. Qualified immunity applies only to executive officials "performing discretionary functions."[53] Legislators, judges, and prosecutors acting in their capacity as officers of the court are entitled to absolute immunity from suit.[54] Scholars have generally not challenged this doctrine. So, there are many officers who are entitled to far more protection than qualified immunity provides—even when their conduct is patently unconstitutional.

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51. TEX. HEALTH & SAFETY CODE ANN. § 171.209(e) (West 2022); *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion) (announcing the undue burden standard), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Roe v. Wade, 410 U.S. 113, 154 (1973) (announcing the abortion right), *overruled by Dobbs*, 142 S. Ct. 2228.

52. *Dobbs*, 142 S. Ct. at 2242.

53. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

54. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998) (providing an example of absolute immunity for legislators); Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (providing an example of absolute immunity for judges); Bradley v. Fisher, 80 U.S. 335, 347 (1871) (providing an example of absolute immunity for judges); Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (providing an example of absolute immunity for a prosecutor).

Yet second, qualified immunity applies to *all* executive officers acting in their discretionary capacity.[55] The public backlash to qualified immunity usually focuses on excessive uses of force by police officers. But the doctrine applies to executive officials making all manner of discretionary decisions, from schoolteachers weighing student discipline to administrative officials denying a requested welfare benefit.[56] In this sense, the doctrine is broader than many people appreciate.

The third salient feature of the legal regime of official accountability is that most federal officials are not subject to personal liability for unconstitutional conduct—not because of qualified immunity, but because neither Congress nor the Supreme Court has ever created a cause of action against them. A cause of action against state officials arises from a civil rights statute, § 1983, which the Supreme Court has interpreted as incorporating common law defenses, including qualified immunity.[57] A cause of action against federal officials arises from federal common law created by the Court,[58] but the Court has limited the availability of such a cause of action to a handful of doctrinal contexts, including suits for violating the Fourth Amendment's requirement of reasonable searches and seizures.[59] The Court has said that both state and federal officials are equally entitled to qualified immunity,[60] but the vast majority of federal officers don't need it because their jobs do not require them to engage in conduct that would rise to a cause of action under current doctrine.

So, the stakes of qualified immunity are at once somewhat narrower and broader than many people might expect. Narrower because many officials are not subject to personal liability for unconstitutional conduct at all, either because they are entitled to qualified immunity (many state and federal officials) or because they do not do things that give rise to a private cause of action (many federal officials). Yet at the same time, the stakes are somewhat broader than many would expect, for the doctrine protects not only law enforcement and corrections officers, whose

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55. *See Harlow*, 457 U.S. at 807.

56. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 319, 321 (1975) (extending qualified immunity to school officials), *abrogated on other grounds by Harlow*, 457 U.S. 800; Procunier v. Navarette, 434 U.S. 555, 561 (1978) (extending qualified immunity to prison officials); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (extending qualified immunity to a hospital superintendent acting under state law); Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (extending qualified immunity to a governor, among others), *abrogated on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

57. *See* 42 U.S.C. § 1983 (creating liability for "[e]very person" acting under color of state law who deprives another of "any rights, privileges, or immunities secured by the Constitution and laws"); Pierson v. Ray, 386 U.S. 547, 553–57 (1967).

58. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

59. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–57 (2017).

60. *Harlow*, 457 U.S. at 818 n.30.

conduct is often the most visible and violent, but also state bureaucrats and civil servants of all sorts whose work does not directly involve the use of force.

II. WHO'S AFRAID OF RETROACTIVE ADJUDICATION?

Theorists agree that retroactive laws are usually unfair and conflict with the rule of law. Retroactive adjudication, however, "is far more complicated."[61] Getting to the bottom of the notice rationale for qualified immunity requires wrestling with whether, and when, the judicial application of a newly announced rule raises the same problems as retroactive legislation. This Part argues that there are two touchstones. The most important is the predictability of the liability. The less a party could have predicted liability, the more unfair and in tension with the rule of law that liability is. A second, subsidiary concern is whether the liability expresses the community's moral censure. All unpredictable liability is somewhat unfair; liability that expresses moral condemnation is especially so.

A. *Prospectivity and the Rule of Law*

The principle of prospectivity is a linchpin of the rule of law. It holds that the law should ordinarily apply only to events that occur after the law's promulgation. American law incorporates the principle of prospectivity through a variety of rules, from constitutional provisions prohibiting ex post facto criminal punishment[62] to the presumption that statutes apply only prospectively.[63]

Common law theorists traditionally distinguished between legislation, which should be prospective, and adjudication, which should be

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61. Roosevelt, *supra* note 36, at 1076; *see also* Fallon & Meltzer, *supra* note 27, at 1758 ("[T]he question whether a distinction can and should be drawn between 'new' and 'old' law depends on whether judges make law or merely declare the law as it already is.").

62. U.S. CONST. art. I, § 9, cl. 3 (Ex Post Facto Clause against Congress); *id.* § 10, cl. 1 (Ex Post Facto Clause against the states); *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798) (opinion of Chase, J.) (interpreting the Ex Post Facto Clauses to apply only to criminal laws); *id.* at 396–97 (opinion of Paterson, J.) (same); *id.* at 399–400 (opinion of Iredell, J.) (same). The Constitution also prohibits bills of attainder, U.S. CONST. art. I, § 9, cl. 3 (by Congress); *id.* art. I, § 10, cl. 1 (by the states), in part because they operate as retroactive legislative adjudications. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1719 (2012). The principle of prospectivity has also been understood to be reflected in the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1, the Takings Clause, *id.* amend. V, and the Due Process Clauses of the Fifth and Fourteenth Amendments, *id.*; amend. XIV, § 1. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994).

63. *See, e.g.*, *Landgraf*, 511 U.S. at 280; Fisch, *supra* note 24, at 1064 ("The traditional presumption against retroactive legislation suggests that, in the absence of clear statutory language, statutes should be interpreted to apply only to post-enactment transactions.").

retroactive.[64] The distinction relies on the principle of prospectivity, the traditional belief that courts should not make law,[65] and the practical reality that adjudications ordinarily apply a rule to conduct that has occurred in the past.[66] Modern developments in legal theory have called into question the extent to which courts "find," as opposed to "make," law.[67] To the extent a court makes a rule that it then applies to conduct that occurred in the past, how is that different from retroactive legislation from the standpoint of the rule of law? The answer requires a clearer picture of exactly what makes "a retrospective law," as Professor Lon L. Fuller put it, "[t]aken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, . . . truly a monstrosity."[68]

The classic case for the principle of prospectivity is that "the law should be such that people will be able to be guided by it."[69] Laws that do not exist cannot guide behavior. Applying them retroactively interferes with planning, which has negative consequences for society and violates the dignity of humans to make free and rational decisions.[70] These concerns are related, but they may be distinguished.

To approximate the ideal of the rule of law, law must not only be able to "guide people in the conduct of their affairs," it must actually do so, "at least for the most part."[71] Such laws are necessary "to facilitate

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64. Fisch, *supra* note 24, at 1057 (identifying a presumption among courts to view legislation as prospective).

65. *See, e.g.*, ARISTOTLE, POLITICS 163 (Benjamin Jowett trans., Random House 1943).

66. *See* Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 286 (2020).

67. *See* Roosevelt, *supra* note 36, at 1076 (stating that the belief that the common law has a positive source outside judicial decisions "has no modern adherents").

68. LON L. FULLER, THE MORALITY OF LAW 53 (rev. ed. 1969).

69. JOSEPH RAZ, THE AUTHORITY OF LAW 213 (1979).

70. *See id.* at 214–15.

71. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997); *see also* Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 2 (1999) (arguing that law should be prospective because "the law must be capable of guiding the behaviour of its subjects" (quoting RAZ, *supra* note 69, at 214)); MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 119 (2007) (criticizing retroactive laws as being "wholly inefficacious in guiding the conduct of people at the time to which the . . . laws pertain"); FULLER, *supra* note 68, at 49 ("[T]o subject human conduct to the control of rules, there must be rules."); JOHN RAWLS, A THEORY OF JUSTICE 238 (rev. ed. 1999) (discussing the necessity of administering fines and penalties); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1978) ("[I]t would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event . . . ."); WILLIAM BLACKSTONE, COMMENTARIES *46 (discussing the unreasonableness of ex post facto laws); GEOFFREY DE Q. WALKER, THE RULE OF LAW 25–27 (1988) (discussing how retroactive laws undermine the principles of certainty and generality and prevent citizens from orienting their conduct to the law); Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 11 (1993) ("[T]he law should be a matter of rules as norms—as general directives capable of guiding conduct.").

planning and coordinated action over time," promoting societal "stability."[72] Requiring laws to generally apply only prospectively also approximates the "narrower sense" of the rule of law, "that the government shall be ruled by the law and subject to it,"[73] by generally ensuring "the supremacy of legal authority," that is, that "the law should rule officials, including judges, as well as citizens." The principle of prospectivity reduces the chance that officials will enact a law they know applies to others' actions but not to their own. Retroactive laws thus give "opportunities for arbitrary power."[74]

Retroactive laws also demean the dignity of those to whom they apply. Liberal theory maintains that sane adults are capable of "planning and plotting their future."[75] The government must have sufficient reason to justify interfering with their liberty. Deontological ethical theories maintain that morality demands that others should be treated as ends, never as means.[76] Most laws restrict individual liberty, but as Professor Joseph Raz explains, retroactive laws deny subjects the "dignity" entailed in being capable of making and carrying out plans and the liberty of doing so.[77] Retroactive laws change the rules in the middle of the game in a way that treats those affected by them as means rather than agents. Such laws express that the government disrespects subjects' reasonable plan-making, placing their liberty to make and carry out their reasonable plans under constant threat.[78]

One could go further. Such laws treat subjects not only as unworthy of self-governance but also of participating fully in the governance of society. Retroactive laws are therefore inconsistent with citizenship in a liberal democracy, for they treat subjects as irrational and unfree objects to be managed by fiat. It is in this respect, one inimical to liberalism, that retroactive laws treat subjects as means to an end. One need not go as far as Professor Fuller, concluding that retroactive law is no law at all.[79] It is sufficient to note that it departs from virtually every aspect of the rule-of-law ideal: it is unfair, demeaning, and undemocratic, and thereby undermines the government's claim that it exercises force on the basis of reasoned and mutually acceptable law rather than brute force.

The principle of prospectivity has never been understood to be absolute. Like all aspects of the rule of law, it is an ideal to which actual

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72. Fallon, *supra* note 71, at 8.

73. RAZ, *supra* note 69, at 212.

74. *Id.* at 222.

75. *Id.* at 221.

76. *See* Peter Brandon Bayer, *Part I – Originalism and Deontology*, 43 T. MARSHALL L. REV. 1, 79 (2017).

77. RAZ, *supra* note 69, at 222.

78. *Id.*

79. *See* FULLER, *supra* note 68, at 39.

legal regimes can only approximate.[80] Moreover, there may be good reasons for an exception in some cases.[81] The principle is at its strongest against retroactive criminal punishment.[82] This Article later explores what may justify this emphasis. Yet it has never been applied in American law to absolutely prohibit retroactive civil laws.[83] And there are some species of civil law that routinely operate with what courts and scholars call "secondary retroactivity"; changes to real property tax, for example, do not operate directly on past conduct (the purchase of real property) but they change the future effects of those past acts (the amount of tax owed).[84] The sorts of laws that most acutely raise rule-of-law and fairness objections are those that impose what is known as "primary retroactivity"—laws that "alter[] the *past* legal consequences of past actions."[85] When this Article talks about retroactive law, it refers to rules or decisions that operate with primary retroactivity, they "change what was the law in the past."[86]

B. *The Retroactive Application of a Judicially Announced Rule*

The retroactivity of judicially announced rules is another kettle of fish. Whether, and when, such retroactivity raises the same sorts of fairness concerns as retroactive statutes has been one of the most difficult questions in modern jurisprudence, largely because it is often thought to depend on contested theories of the relationship between adjudication and law.[87] Understanding the notice rationale for qualified immunity does not require resolving this contest. It is enough to see that adjudications that

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80. *See* KRAMER, *supra* note 71, at 119.

81. *Id.* at 119–20. *See generally* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982) (proposing a theory for determining when retroactive legislation is justifiable).

82. *See infra* Section II.D.

83. *See* Fisch, *supra* note 24, at 1063–64.

84. *Id.* at 1068 (defining secondary retroactivity as "nominally prospective rules with retroactive effects").

85. *See id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219 (1988) (Scalia, J., concurring); *see also* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1022–23 (2006); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 109–10 (describing the difficulty of defining retroactive laws); John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 58–59 (1967) ("A statute retroactive in th[e] primary sense alters the legal consequences of past events *as of the time of those events*."); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 220 (1960) (describing the most unjust retroactive laws as those that are both primarily and secondarily retroactive).

86. *Bowen*, 488 U.S. at 220 (Scalia, J., concurring).

87. *See, e.g.*, Beswick, *supra* note 66, at 311; Fallon & Meltzer, *supra* note 27, at 1759–63; Roosevelt, *supra* note 36, at 1107.

lead to unpredictable liability raise rule-of-law concerns and are unfair in precisely the same way as retroactive laws.[88]

At the outset, it is important to clarify the question. It is not whether adjudication is retroactive. Judicial decisions apply to conduct that already occurred—in this sense, they are inherently retroactive.[89] (Judicial decisions are in an important sense also prospective—as precedent, they presumptively apply to future conduct.)

Nor is the question whether the Constitution or its legal requirements apply retroactively. The Supreme Court and most constitutional theorists accept that constitutional law flows from the written Constitution. Constitutional liability is premised on prohibitions enacted hundreds of years ago. All modern cases arise from conduct committed after the Constitution's ratification. In this sense, at least, constitutional liability is not retroactive—it enforces a legal provision that was in force when the conduct occurred. Yet formal retroactivity cannot itself resolve the fairness concern. What makes retroactive law unfair is that it cannot guide rational behavior. For any judicial decision, whether it is applying a rule announced at common law or to implement an existing legal instrument, the question is whether the decision, as applied to past conduct, has the same guidance deficit as a retroactive statute.

Framing the question this way makes it possible to avoid resolving one of the defining problems of modern jurisprudence: when, if ever, do courts "make law"? Professors Richard Fallon and Daniel Meltzer have made this argument before, but they neglected to make a crucial point: *every* theory of judging raises concerns about the rule of law and fairness, even those that appear to eliminate them. For our purposes, theories of judging may be roughly sorted into three categories: hard realist; "right answer"; and, as a Goldilocks position between the other two, positive realist.

At one extreme is the view that judges inherently and constantly make new law. What they do is little different, if at all, from what legislatures do. The only real difference is that they are bounded somewhat by institutional norms that discourage them from radical innovation. When they do innovate, though, they are less bounded by the necessity of democratic negotiation: judges simply impose whatever rule they think should apply.[90] The more the law at issue calls for value judgments, as in

88. *See, e.g.*, Fisch, *supra* note 24, at 1057–58; Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261, 265 (1991) ("[W]hen adjudicators overrule precedent, they strip the norm of adjudicative retroactivity of its legitimation based in the mere application of antecedent rules."); *see also* Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1560–61 (1998) (noting that the Supreme Court has formerly refused to give retroactive effect to new rules of law, but has steadily departed from that principle).

89. Beswick, *supra* note 66, at 286–90.

90. *See generally id.*

many constitutional cases, the broader the scope of judicial discretion.[91] Such an extreme realist view is unusual among legal scholars, but it is by no means unknown, especially as applied to constitutional law.[92] Under this account, it is hard to see why judicial decisions would not routinely raise the specter of retroactive law, though perhaps one less menacing than that raised by retroactive legislation.

Many theorists believe that judicial decision-making is far more procedurally and substantively restricted, greatly reducing the instances in which it may share the problems of retroactive legislation. There are several versions of this view. The traditional view, called Blackstonian for its namesake, is that judges do not make common law, they find it.[93] Despite Justice Oliver Wendell Holmes's famous mockery of this view,[94] it is best understood as a craft-based understanding of the role of judicial decision-making: lawyers versed in legal reasoning rely on objective indicia of what the law actually is, based on relevant authorities, including community practice. The approach is not limited to identifying the rules of the common law; it can apply equally to the judicial application of open-textured legislatively enacted legal provisions in hard cases.[95] The view shares a great deal with Professor Ronald Dworkin's early account of ideal judging: cases have "right answers" that well-trained, conscientious judges may adduce from the relevant materials, a sense of the law's trajectory, and, for Professor Dworkin, the right application of norms of justice and fairness.[96] Some versions of originalism seem to share these beliefs, emphasizing grasp of the historical meaning of the constitutional text instead of the judge's moral beliefs.[97] Under any "right answers" account, judges do not make new law, they apply "the law."

Right-answer theories of judging coincide with traditional views of the judicial role as applying rather than making law, and, for that reason,

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91. *See generally id.*

92. Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601 (2015).

93. *See* Fallon & Meltzer, *supra* note 27, at 1758–59; *see also id.* ("It would be only a slight exaggeration to say that there are no more Blackstonians."). *But see* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019) (arguing that the Blackstonian view is still plausible for modern legal systems).

94. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ."), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251.

95. *Cf.* Roosevelt, *supra* note 36, at 1077 ("Functionally, constitutional law more closely resembles common law than statutory interpretation.").

96. *See* RONALD DWORKIN, LAW'S EMPIRE 270 (1986); BRIAN BIX, READING DWORKIN CRITICALLY 14 (1992).

97. *See, e.g.*, Steven E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 780 (2022).

they reinforce formalist views of the constitutional separation of judicial power from legislative power.[98] The Supreme Court has always maintained that its role is merely to "say what the law is,"[99] even when articulating the most open-ended constitutional provisions. At the same time, modern justices have often disagreed about the extent to which some constitutional decisions should be retroactive or merely prospective.[100] It is unsurprising that legal formalists and separation-of-powers hawks like Justice Antonin Scalia would insist that all judicial decisions—including constitutional ones—should be fully retroactive.[101] To traditionalists, insisting on judicial retroactivity discourages judicial adventurism, thereby enforcing the separation of powers and popular sovereignty.[102]

Yet supposing a right-answer theory accurately describes what judges do, or should do, the theory cannot entirely resolve the rule of law and fairness problems of retroactive adjudication. Under both the Blackstonian and Dworkinian models, the universe of relevant legal authorities is not closed until the moment of judgment. Some of those authorities—judicial decisions, custom, evolved notions of justice, etc.—may arise *after* the defendant's conduct but *before* judgment. For originalists, the same thing may occur: new evidence of original meaning may arise after the defendant acted. Such authorities could not have guided the conduct to which they are being applied.[103] Moreover, such theories often rely on idealized hypothetical judges: there may be right answers available to Hercules (or his originalist competitor) but judges in the real world will not always find or apply them accurately.[104] They are

98. *See* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 57, 62 (1965).

99. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

100. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534–35 (1991) (opinion of Souter, J.) (treating the determination of whether to make a new rule retroactive as a matter of choice of law); Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 181–83 (1990) (plurality opinion) (exploring the equitable results of making a new rule retroactive); Chevron Oil Co. v. Huson, 404 U.S. 97, 106–07 (1971) (describing three factors to consider for the "nonretroactivity question"—whether a new principle of law was established, the merits and demits of each case, and the inequity that would be caused by retroactivity), *abrogated by* Harper v. Va. Dep't of Tax'n, 509 U.S. 86 (1993). For a survey, see Fisch, *supra* note 24, at 1064–66.

101. *See Am. Trucking Ass'ns*., 496 U.S. at 201 (Scalia, J., concurring in the judgment) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.").

102. *See, e.g.*, *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment) (arguing that limiting courts to retroactive adjudication is "one of the understood checks upon judicial lawmaking").

103. *See* Roosevelt, *supra* note 36, at 1106.

104. Sachs, *supra* note 97, at 799 (acknowledging the impossibility of perfect historical knowledge).

in fact, if not in theory, indeterminate, and legal indeterminacy is one important ingredient in legal unpredictability.[105]

A post-realist view of judging acknowledges some degree of judicial discretion but holds that it is far more bounded by norms of legal reasoning and institutional constraints than a hard realist would admit. Most legal questions have relatively clear answers; most violations are redressed without suit. There will always be hard cases, cases requiring the application of vague rules, the implementation of contested substantive values, the application of a rule to new facts, or, as in some constitutional cases, a combination of all three. In those cases, most judges necessarily rely on a combination of craft norms, institutional concerns, and personal moral views. I take this to state, at a relatively high level of abstraction, the mainstream view of modern jurists in the positivist tradition, from Justice Holmes to Professors Fallon and H. L. A. Hart.

Such theorists admit some degree of novelty in judicial decision-making and therefore must come to terms with the rule of law and fairness concerns raised by the application of newly announced constitutional rules. Professors Richard Fallon and Daniel Meltzer have come the closest to addressing the problem head-on. They propose side-stepping the jurisprudential question of whether judges make new law by focusing instead on the predictability of the judgment for purposes of determining what raises the same problems as retroactive law.[106] Unfortunately, they do not explain why predictability is the relevant issue for the rule of law and fairness, so they miss its proper scope.

Professors Fallon and Meltzer suggest that the relative predictability of a judicial decision should be measured from the standpoint of "competent lawyers."[107] They admit that "the question of predictability is [not] an uncomplicated case,"[108] yet they bind themselves to the lawyer's vantage and suggest, without elaboration, a vague standard for unpredictability—an adjudication raises problems when a competent lawyer would find it to be "relatively unlikely."[109] This is understandable

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105. "Legal theorists say that the law is indeterminate when a question of law, or of how the law applies to facts, has no single right answer." TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 9 (2000). This does not mean there are no wrong answers. Indeterminacy is a matter of degree. *See generally id.* at 7–75. *See also* KRAMER, *supra* note 71, at 15. Theorists disagree about the scope of legal indeterminacy in general and in given cases. This Article takes no position on those questions. To the extent it focuses on indeterminacy, it does so because it is, regardless of its scope, one ingredient in the unpredictability of liability.

106. *See* Fallon & Meltzer, *supra* note 27, at 1758.

107. *Id.* at 1763.

108. *Id.* at n.186.

109. *Id.* at 1763. Other scholars would privilege the views of "[s]ophisticated practitioners and academic lawyers." Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 427 n.6 (1982).

given their apparent view of judicial law-making. They incline toward what I have called the mainstream view of judging as craft-based casuistry that, although not always determinate, has its own intellectual integrity and does place meaningful constraints on decisionmakers.

Granting that this account of common law judging is persuasive, it says nothing about whether the fairness of retroactive adjudication should be evaluated from the standpoint of a "competent lawyer" or the one whose conduct is being judged. To the contrary, the more that legal reasoning depends on special training, practice, and habits of mind, the more unfair it is to impose judgments that are not "relatively unlikely" from a lawyer's standpoint on those who lack the training and practice necessary to predict them. The principle of prospectivity is not for specialists but for those who are subject to the law—to approximate the rule of law and norms of fairness, the law is supposed to be able to guide ordinary folk. Predictability should be measured from the standpoint of the one subject to the law, not the lawyer.

Philosopher Jeremy Bentham clarifies the point. "[T]he way judges make law," he writes, is "just as a man makes laws for his dog"—responsively, to signal post-hoc displeasure, in the hope it will affect future behavior.[110] "What way, then, has any man of coming at this dog-law? Only by watching [courts'] proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth."[111] Only lawyers, he notes, have the time and expertise to play this game, and then only in theory—the notion that even a skilled advocate can "guess what inference the judge or judges will make from all this knowledge in each case" is a fiction.[112] So "[h]ow should plain men know what is law, when judges cannot tell what it is themselves?"[113] When someone in the defendant's position could not have reasonably anticipated liability, imposing it is nothing other than "dog law."[114]

C. *Hard Cases*

Not all judging raises rule of law and fairness concerns, or raises them to the same degree. Before turning to whether and when constitutional torts raise these concerns it is important to see that the predictability of judicial decisions falls on a continuum.[115] Some decisions are plainly

110. 5 JEREMY BENTHAM, *Truth Versus Ashhurst*, *in* The WORKS OF JEREMY BENTHAM 231, 235 (1843).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Frederick Schauer, *The Path-Dependence of Legal Positivism*, 101 VA. L. REV. 957, 961 n.10 (2015).

115. *See* Roosevelt, *supra* note 36, at 1108.

unpredictable from the defendant's standpoint. Professor Jill Fisch has described these as cases that upset the "equilibrium" of settled law.[116] The court reverses a prior decision, expressly announces a new rule, applies an existing rule to a new jurisdiction, or the like. Even these sorts of cases may differ in the degree of their predictability. At the other end of the continuum are cases that are relatively easy: the applicable rule existed when the conduct in question occurred, and courts have already applied it to conduct that is nearly identical to the defendants.

But there are plenty of hard cases. Consider two examples. In the first, a preexisting rule was relatively narrow and did not clearly apply to the conduct, but it can be made to apply with a modest extension of its scope. In the second, the preexisting rule was relatively vague (or standard-like) and the facts are new enough to raise a question as to the rule's applicability. Neither of these kinds of cases categorically comply with the rule of law and norms of fairness, neither do they categorically offend them. The predictability of the outcome must be assessed on a case-by-case basis.

How are courts to separate the predictable-enough from the too-unpredictable decisions? Is there a predictable method of assessing predictability? Very few decisions are entirely unpredictable. With some exceptions, they arise from the arguments made by lawyers, and lawyers make arguments based on what they think judges would be willing to accept. What judges are willing to accept is defined in large part by norms internal to legal reasoning. Yet from the perspective of subjects, indeed, from the perspective of anyone but the lawyers involved in the case or avid court-watchers, many decisions do not obviously follow from existing law.

The ideal of the rule of law suggests a rule of thumb: the predictability of liability in a hard case depends on the extent to which it follows from the previously stated purpose or rationale for the applicable rule.[117] As a matter of traditional common law reasoning, courts ordinarily refine existing rules, either by clarifying their terms or applying them to new facts, by reference to their underlying purpose or rationale. When they do so, the extension is sufficiently predictable to eliminate rule of law and fairness concerns about retroactivity. Ordinary folk, no less than lawyers, can and do understand that rules encompass more than their stated terms and the facts that comprise their paradigmatic applications: rules enforce purposes and reasons that animate their scope.

With respect to the application of existing or slightly new rules to new facts, there is usually some degree of legal indeterminacy. Sometimes indeterminacy is both conceptually unavoidable and a feature, not a bug.

116. Fisch, *supra* note 24, at 1100 (distinguishing between revolutionary and evolutionary legal change).

117. *See* Endicott, *supra* note 71, at 7–8, 18.

Consider, for example, the negligence standard in tort law. As Professor Timothy Endicott has argued, such indeterminacy does not doom the application of such rules from the standpoint of the rule of law *insofar as they follow from the reasons animating them*.[118] When the rule's application follows from its underlying and previously stated purpose or rationale, the adjudication raises no rule-of-law or fairness concerns.[119]

Some theorists maintain that judicial decisions do not raise rule of law problems in civil cases, even when it is uncontestable that a court is applying a newly announced rule. Their arguments are unpersuasive. Consider an argument recently made by Professor Samuel Beswick.[120] He accepts judicial legal change but argues that this does not ordinarily pose a problem because such change is well understood to be a feature of the law and the parties to the suit participate in the process of change as litigants.[121] These arguments overlook the rule of law and the fairness concerns at the root of the objection to the retroactive application of new rules. The issue is not whether the rule is new or if the litigants had a fair chance to participate in its creation—the same may be said for much retroactive legislation. The issue is whether the defendant could have reasonably predicted liability at the time of the conduct.

Professor Matthew Kramer raises a different objection. He argues that the unfairness of unpredictability is unavoidable in civil cases that apply a new rule. Neither party could predict the result beforehand, so a decision for the defendant would be as unfair to the plaintiff as a decision for the plaintiff would be to the defendant.[122] This upends the assumption of the rule of law that parties are free to plan and act in the absence of countervailing legal duties.[123] Without a preexisting legal restriction,

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118. *See id.* at 17. This applies most thoroughly to common law rules that do not rely on contested and contestable moral norms. When those norms—and even the norms embodied in the law—are reasonably contested with incommensurable forms of moral reasoning, there is a greater concern that the changes in the law are not based on reason that is equally available to all people. The problem then is not that the resolution of the question is undirected by reason, but by reason that may not reflect the will of the sovereign.

119. Something to consider in another part: "Authorities can use vagueness to exempt their actions from the reason of the law, or even to make it impossible to conceive of the law as having any reason distinguishable from the will of the officials. Then vagueness is a deficit in the rule of law." *Id.* at 18. The risk of this might call for a form of qualified immunity even in such cases as a prophylactic against such abuse, but this would entail baking distrust, perhaps realistically but not ideally, into the legal regime.

120. *See* Beswick, *supra* note 66, at 281, 321, 353–54.

121. *See id.* at 279–82 (in the author's right of action framework, the creation of novel precedent allows parties to retroactively apply their rights to a given case).

122. *Id.*; *see also* Fisch, *supra* note 24, at 1085 ("[P]articularly in the context of civil litigation, the choice of which legal rule to apply is often a zero-sum game.").

123. Professor Kramer said that "no general background rule prescribes that a defendant will never incur any compensatory obligations for conduct that was not determinately unlawful at the

both the plaintiff and the defendant were free to venture the risks associated with that freedom. It is only when the government imposes liability after the fact that rule of law concerns arise.

D. *The Expressive Function of the Law and Retroactive Liability*

All retroactive liability raises rule of law and fairness concerns, but those concerns are heightened when the liability expresses the community's moral censure. This intuition is tacitly expressed in the traditional distinction in the law between retroactive criminal and civil liability. The Anglo-American tradition places an outright prohibition on ex post facto criminal punishment and hedges the risk of such punishment with a variety of interpretive doctrines and presumptions that apply only in criminal cases.[124] At the founding, there may have also been a strong presumption against the post-hoc governmental interference in private rights, too, reflected in the Contracts Clause and perhaps the original understanding of the Ex Post Facto Clauses.[125] In any case, the tradition maintains a strong presumption against the retroactive application of legislation that changes private rights, but, unlike the tradition against ex post facto criminal liability, that tradition is not absolute. A similar distinction between the retroactivity of criminal and civil liability may be seen in other modern legal systems. What may account for this distinction?

Professor Harold Krent has offered an explanation that sounds in public choice. Those subject to civil liability have a better opportunity to affect the terms of that liability, so it is less unfair to apply it retroactively to them.[126] This seems to be an empirical claim, and it is not clear whether it is accurate. Criminal and civil liability often overlap; they apply to the same conduct. Theft and conversion, for instance. And they often apply

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time of its occurrence." *Id.* at 121. This is a non sequitur. The general background rule, acknowledged by Professor Kramer elsewhere in his discussion, *see id.* at 119, is that the law leaves people free to plan and to act. He gave no reason why post hoc compensation should be an exception.

124. Consider not only the Ex Post Facto Clauses, *see supra* note 62 and accompanying text, but the rule of lenity, the "fair notice" standard, and the due process-enforcing doctrine of vagueness. *See, e.g.*, Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 455–56 (2001); John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985). *See generally* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005).

125. *See, e.g.*, John Mikhail, *James Wilson, American Land Companies, and the Original Meaning of "Ex Post Facto Law*," 17 GEO. J.L. & PUB. POL'Y 79 (2019); Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489 (2003); William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947).

126. *See* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2174–80 (1996).

equally whether many people are likely to commit the conduct or not, and whether the prohibited conduct is more likely to be committed by individuals, who have comparatively little influence over criminal legislation, or corporations that may have a great deal of influence over the scope of, say, environmental crimes.

Another possible explanation is the relative expressive functions of criminal and civil liability.[127] Modern theories of criminal punishment are all over the map, but they overlap in maintaining that punishment expresses the community's moral censure for violating a duty owed to the community as a whole.[128] Civil liability, to the extent it expresses wrongdoing at all, focuses on the wrong done to the plaintiff, not to the community.

The distinction does not arise from the difference between conduct that is considered to be morally wrong, or the moral basis for such a conclusion. The same conduct may be punished both as murder and as a battery with an intent to kill. The conduct has the same moral quality either way. Nor is the difference explained by the basis for the moral approbation. Murder and battery with intent to kill violates both utilitarian and deontological norms.[129] What distinguishes them is the traditional and ongoing difference between a duty owed to society at large and a duty owed to private persons. Criminal punishment expresses the community's moral censure for harm done to the public, while tort liability expresses that community's censure for harm done to the individual. Both may seek to deter similar harm in the future, but the harm they seek to deter is, or should be, different: one is harm to the public, the other to private parties.

This distinction may account for the different application of the principle of prospectivity to criminal and civil liability. The moral condemnation expressed by criminal punishment reflects a greater harm to more people, and indeed to the polity itself. In the terms of one theorist, criminal judgment reflects a breach in the social fabric, and ideally represents a first step in repairing that breach.[130] It reflects the community's sense of threat not only to its members but to itself, and, at

127. *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) (explaining that expressivist theories "tell actors—whether individuals, associations, or the State—how to act in ways that express appropriate attitudes toward various substantive values").

128. *See, e.g.*, Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 138–39 (2009) ("[T]he defining characteristic of the criminal law is moral condemnation.").

129. *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, 223, 238 (1991).

130. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1489–90 (2016). For another theory of judgment as an act of community restoration, see OLIVER O'DONOVAN, THE WAYS OF JUDGMENT (2008).

its best, the community's commitment to reincorporating errant members.[131]

This enriches the public choice account of the principle of prospectivity's different application to criminal and civil liability. It is not only that criminal defendants are more likely to be left out of the lawmaking process. It is that they are more likely to be laggards of shifting moral norms and the polity's new conceptions of itself. Norms against retroactive criminal liability not only enforce fairness and the ideal of the rule of law; they also operate as a check on the majority's hunger for moral and political redefinition. Such redefinition, insofar as it is expressed in the criminal law, must begin today, not yesterday.

If this is the best explanation for why the law treats retrospective criminal and civil liability differently, then the traditional division between the two species of liability, at least as to the application of the prospectivity principle, is imperfect. The same temptations for political redefinition exist when the government cancels its own financial obligations or interferes in private affairs that directly affect the public fisc. Similarly, the same expression of censure for violating a duty to the public attends the tort of public nuisance, but not the tort of private nuisance. The question for present purposes is the extent to which constitutional liability reflects the community's censure for violating a duty to an individual, to the public at large, or perhaps to both.

III. THE CASE FOR A QUALIFIED FORM OF QUALIFIED IMMUNITY

Unpredictable liability raises rule of law and fairness concerns whether it arises from a newly enacted statute or the application of a newly announced judicial rule. Yet the strong traditional presumption of adjudicative retroactivity remains entrenched in American law. There are good reasons for this. Most liability is reasonably predictable insofar as it follows from the purpose or rationale underlying the applicable rule. Additionally, courts have a number of devices available to them to avoid imposing unfairly unpredictable liability, for instance by granting an equitable defense or imposing a remedy that operates only prospectively.[132] And many cases of unpredictable liability involve only a duty to a private party, so while they bear the financial cost of compensation and the community's moral censure for violating that private duty, they do not bear the further burden of censure for violating a duty to the community at large.

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131. *See* Kleinfeld, *supra* note 130, at 1495–96; *see also* Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1456 (2017) (arguing that "criminal justice's distinctive social function is to protect and repair the social norms on which community solidarity depends in the wake of acts that attack those norms").

132. *See infra* Sections III.D.1–2.

This Article turns now to constitutional liability in particular. The question is the extent to which that liability is exceptional, such that the notice rationale for qualified immunity justifies the extraordinary defense of qualified immunity. This Part argues that the notice rationale does apply, in many cases, enough to support the defense's general availability. Indeed, in the absence of available equitable defenses or prospective remedies, the doctrine functions to implement the equitable norms of fairness by considering the exceptional features of many constitutional cases. Importantly, however, the notice rationale has limits, and as the next Part argues, those limits are far narrower than the current doctrine of qualified immunity.

A. *The Indeterminacy of Constitutional Law*

The touchstone of the rule of law and fairness concerns is the predictability of liability. Constitutional judgments are sometimes based on indeterminate legal materials, unpredictable, and liable to upset a "stable equilibrium" in the law.[133] "The Court's decisions create legal rights, responsibilities, powers, and disabilities that did not exist previously."[134]

Recall the school expulsion case discussed in Part I.[135] About five years after the holding that the Due Process Clause of the Fourteenth Amendment applies to the deprivation of "new property" such as "public assistance payments,"[136] the Supreme Court decided to apply the same rule to public school disciplinary decisions.[137] The decision to do so extended the application of the Due Process Clause of the Fourteenth Amendment by newly interpreting "liberty" to apply to disciplinary decisions because "those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education."[138] This definition of liberty and extension of procedural due process made good sense in light of prior decisions,[139] but it was far from predictable from the standpoint of school

133. *See* Fisch, *supra* note 24, at 1108 ("Because constitutional change frequently disrupts a stable equilibrium and because the magnitude of many constitutional changes is high, constitutional change can create substantial transaction costs. If the Court overrules itself, these costs are even greater due to the reliance engendered by the prior precedent.").

134. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20 (2018).

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

136. Goldberg v. Kelly, 397 U.S. 254, 255, 262 (1970)*; see* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

137. Goss v. Lopez, 419 U.S. 565, 574 (1975).

138. *Id.* at 575.

139. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (holding that a statute authorizing state officials to forbid the sale of alcohol to specific persons through a public "posting" without notice or a hearing violated due process under the Fourteenth Amendment); *see*

officials: public schools had been making disciplinary decisions without federal constitutional procedural requirements since well before, and well after, the enactment of the Fourteenth Amendment in 1868.[140]

The prospect of subjecting officials to liability for decisions made *before* the extension of procedural due process to school discipline prompted Justice Lewis F. Powell to question the "clearly established law" standard for qualified immunity.[141] As applied, he feared the standard "appear[ed] to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights."[142] He pointed out that "[o]ne need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'"[143] Justice Powell cited *Goss v. Lopez*,[144] decided the same term, which was the first to extend procedural due process to high school students.[145] "I suggest that most lawyers and judges would have thought, prior to [*Goss*], that the law to the contrary was settled, indisputable, and unquestioned."[146] In private, Justice Powell went even further.[147] He worried that reading the "clearly established law" standard too laxly would require officials to have "a higher level of knowledge of [constitutional law] than could be expected of Supreme Court Justices."[148] Justice Powell was explaining that retroactive constitutional liability, in some cases, is no better than dog-law.[149]

The reasons constitutional questions are often especially indeterminate are so obvious to anyone familiar with the history of

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also Henry Paul Monaghan, *Of "Liberty" and "Property*," 62 CORNELL L. REV. 405, 436–38 (1977) (discussing cases in which the Court found that due process applied to new forms of property based on the "implicit premise that they were substantial enough to qualify as 'property' for due process purposes").

140. *Cf. Goss*, 419 U.S. at 599 (Powell, J., dissenting) ("If . . . the Court will now require due process procedures whenever such routine school decisions are challenged, . . . [t]he discretion and judgment of federal courts . . . will be substituted for that of the 50 state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system." (footnotes omitted)).

141. Wood v. Strickland, 420 U.S. 308, 327–29 (Powell, J., concurring in part and dissenting in part), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

142. *Id.*

143. *Id.* at 329; *see id.* at n.3 (providing examples).

144. 419 U.S. 565 (1975).

145. *See Wood*, 420 U.S. at 329 (Powell, J., concurring in part and dissenting in part).

146. *Id.*

147. *See* Conference Memorandum from J. Powell on *Wood v. Strickland* (Dec. 9, 1974) (on file with Washington & Lee).

148. *Id.* at 33 ("I can't join the immunity formulation of this memo which holds s/board members responsible for knowing const. law to a greater extent than we do."); *id.* at 45 ("This says a Board member must know more than Justices of this Court.").

149. *See supra* notes 110–14 and accompanying text.

constitutional decision-making as to be banal. Many of the most important, publicly contested, and often-litigated rights provisions are vague. What makes a punishment "cruel and unusual"?[150] What sort of process is "due" when a school board suspends a student?[151] What, exactly, *is* "the freedom of speech" or "the free exercise" of religion?[152] Laws by definition discriminate between people or conduct[153]—what could the requirement of the "equal protection of the laws" possibly mean?[154] Judicial implementation of these calls for the exercise of discretion.[155]

Courts use two sorts of methods to implement indeterminate constitutional requirements with minimal arbitrariness. The first is a theory of how courts should *interpret* constitutional provisions. These run the gamut from various forms of originalism and textualism to avowedly non-originalist approaches such as common law constitutionalism. All of them privilege different modalities of constitutional interpretation.[156] Some of them promise less judicial discretion than others, but none of them can eliminate it. Even supposing "we are all originalists now," this only renames the indeterminacy, for there are as many originalist methodologies as there are originalists and most of them acknowledge the indeterminacy of their method for some, if not many, cases.[157]

The indeterminacy caused by interpretive pluralism is not a theoretical abstraction. Justices Scalia and Thomas, both avowed originalists, sometimes reached different conclusions in cases involving the rights of criminal defendants.[158] Justices Sotomayor and Elena Kagan, both

150. *See* U.S. CONST. amend. VIII.

151. *See id.* amend. XIV, § 1.

152. *See id.* amend. I.

153. *See generally*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

154. *See* U.S. CONST. amend. XIV, § 1.

155. *See* FALLON, *supra* note 134, at 10 ("A difficulty, of course, is that prior authorities—centrally including the Constitution—do not always speak clearly or determinately. As a result, the Supreme Court must sometimes establish law for the future.").

156. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (exploring different argumentative modalities); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1750 (2015).

157. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2215–17 (2018).

158. *See, e.g.*, Alleyne v. United States, 570 U.S. 99, 132 (2013) (Roberts, C.J., dissenting) (stating, in an opinion joined by Justice Scalia, that the majority position (which includes Justice Thomas) "finds no support in the history or purpose of the Sixth Amendment"); Davis v. Washington, 547 U.S. 813, 842 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (finding that the standard adopted by the Court [in an opinion by Justice Scalia] is neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause"); Williams v. Illinois, 567 U.S. 50, 120 (2012) (Kagan, J., dissenting) (stating, in an opinion joined by Justice Scalia, that "Justice Thomas's concurrence . . . suffers in the end from . . . flaws"); *see also* William H. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J.F. 173, 174 (2017).

apparently inclined toward a liberal form of living constitutionalism, often reach different conclusions in cases involving religious liberty.[159] Interpretive methods reduce arbitrariness, but they do not eliminate discretion.

In addition, many constitutional questions require the imposition of extra-textual substantive values.[160] If there were only one reasonable set of substantive values on which to draw, this would not lead to indeterminacy, but modern America is morally pluralistic.[161] Some forms of originalism seek to avoid contemporary value-imposition by appealing to an objective original meaning of the Constitution.[162] Even this, however, would require sifting through and prioritizing competing original values. Those who believe the Constitution's text, democracy, or political theory require the imposition of contemporary values place constitutional judgment at the center of a tempest of contemporary value pluralism. Many issues, such as affirmative action and abortion, may be rationally resolved in opposite directions by people of good faith relying on reasonable but incommensurable moral starting points.[163] Professor Dworkin may have been right that judges must rely on their own sense of political morality in deciding constitutional cases,[164] but he was manifestly wrong in maintaining that this could lead, in hard cases in a morally pluralistic society, to one "right" answer. Value pluralism need not lead to value cynicism, but it certainly contributes to constitutional indeterminacy.[165]

Stare decisis reduces indeterminacy in theory but it also requires the exercise of discretion.[166] The Court recently held that the Sixth

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159. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2071–82 (2020) (Sotomayor, J., dissenting) (dissenting from the majority position, which included Justice Kagan); Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2027–41 (2017) (Sotomayor, J., dissenting) (same). *But see* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 273 (arguing that such siding is the result of "judicial appeasement").

160. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 11–41 (1980).

161. *See, e.g.*, FALLON, *supra* note 134, at 8 (implying that the Supreme Court operates under "conditions of relatively widespread reasonable disagreement" about judicial philosophies); JEFFREY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS 3 (Princeton Press 2001) (1988).

162. This was especially true of first-generation theorists like Professor Robert Bork and Justice Scalia. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

163. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 6–22 (2d ed. 1984).

164. *See* DWORKIN, *supra* note 96, at 397–99.

165. *See* FALLON, *supra* note 134, at 1 ("All but the most uninformed or naïve among us accept that the Justices' moral or political views influence their votes in some cases . . .").

166. *See, e.g.*, Antonin Scalia, *Response*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 138–39 (Amy Gutmann ed., 1997).

Amendment's unanimous jury requirement applies to the states.[167] To do so, it overturned a decades-old decision in spite of the stare decisis concerns of several justices.[168] The same dynamic was most notoriously on display with the right of abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[169] and, more recently, in *Dobbs v. Jackson Women's Health Organization*.[170] The most settled constitutional doctrines can become unsettled in light of changed judicial personnel, social norms, or background facts.[171]

The vagueness of constitutional rights provisions also contributes to indeterminacy at the level of implementation. Whatever legal principle a provision may embody, implementing it with doctrine may call for weighing the relative costs and benefits of rules, standards, balancing tests, multi-factor tests, and the like.[172] It may also raise questions of judicial administration involving procedure, burdens of proof, and the availability of legal and equitable defenses. Implementing the constitution's legal requirements thus entails another layer of value-imposition, sounding in the rule of law, fairness, and efficiency, quite apart from the substantive values that inform the legal requirements of the underlying provision.

This account of constitutional indeterminacy is subject to two objections. The most important is that most constitutional adjudication does not involve the announcement of a new rule. The vast majority of cases involve the application of a previously announced rule, whether a claim for excessive force under the Fourth Amendment,[173] deliberate

167. Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

168. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); *see also* Johnson v. Louisiana, 406 U.S. 356 (1972) (companion case).

169. 505 U.S. 833, 854–69 (1992) (upholding Roe v. Wade, 410 U.S. 113 (1973), after considering a variety of stare decisis factors), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

170. 142 S. Ct. 2228 (overruling *Roe* and *Casey* despite stare decisis arguments from the dissent).

171. *See* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (explaining that "stare decisis is 'not an inexorable command'" (italics removed) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009))). *See generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 3–5 (2017) (discussing the factors that contribute to overturning constitutional precedents, including changing personnel on the Supreme Court and their normative commitments).

172. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (explaining that the Court must formulate legal doctrine when implementing broadly worded constitutional provisions).

173. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388, 395–97 (1989) (applying a reasonableness standard to claims of excessive force under the Fourth Amendment).

indifference under the Eighth Amendment,[174] or retaliatory discharge under the First Amendment.[175] The Court has implemented most rights provisions through provision-specific rules, standards, and exceptions that take shape gradually through common law decision-making. As the next Section of this Article argues, the application of preexisting rules may be so unpredictable as to raise rule of law and fairness problems in some cases, but not in nearly as many as the current doctrine of qualified immunity covers.

The second objection is that perhaps constitutional law is indeterminate and unpredictable in theory, but the Supreme Court is no longer in the business of expressly announcing new constitutional rights. The Warren and Burger Courts self-consciously expanded individual rights in a variety of doctrinal contexts,[176] but the Rehnquist and Roberts Courts abandoned that enterprise.[177] Maybe qualified immunity was an appropriate response to rapid doctrinal change, but it has now outlived its rationale.

This is myopic. The Rehnquist and Roberts Courts have stopped expanding some rights but have apparently taken a shine to others. The current Court seems poised to continue expanding First[178] and Second

174. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 828–29 (1994) (determining the deliberate indifference standard requires subjective awareness of an officer); *see also* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (applying the deliberate indifference standard to the medical needs of prisoners violates the Eighth Amendment).

175. *See* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006); Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Bd. of Educ. Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968). The author is unaware of a comprehensive empirical study of the sorts of constitutional claims filed against state and federal officers. For limited (and dated) studies see, for example, Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 536–37 (1982) (explaining that a substantial number of non-prisoner § 1983 suits claim Fourth Amendment violations of false arrest, assault, or unlawful search or seizure); Jared Rigby, *Section 1983 Actions in North Dakota: An Empirical Study of Agency Policies and Law Enforcement and Correctional Officers*, 84 N.D. L. REV. 419, 434–441 (2008) (analyzing the types and frequency of § 1983 lawsuits against government officials in North Dakota); Project, *supra* note 21, at 793 (finding that most § 1983 cases in the sample arose from excessive force, false arrests, or illegal searches).

176. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 478–79 (1966); Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

177. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (limiting a woman's right to an abortion by allowing for more state regulation so long as it does not impose an undue burden on the woman), *overruled by Dobbs*, 142 S. Ct. 2228; *see also Dobbs*, 142 S. Ct. at 2248, 2265 (holding that *Roe* was egregiously wrong and that the Fourteenth Amendment does not protect a woman's right to an abortion).

178. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (effectively invalidating dozens of state constitutional provisions); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), in finding a right of public employees to not pay mandatory union dues); Texas v. Johnson, 491 U.S. 397, 418 (1989) (finding that a defendant could not be criminally punished for burning a flag as a political protest).

Amendment[179] rights while looking askance at some substantive due process[180] and criminal procedure rights.[181] And, of course, the Court is not a static institution; personnel change and personal judicial philosophies change, sometimes surprisingly. A more accurate appraisal is that doctrinal change has slowed on some fronts and accelerated on others, while the constitutional norms articulated in the 1960s and 70s have largely become well-settled. This might reduce unpredictability overall, but it has no bearing on the fairness of liability in cases that are as unpredictable today as *Miranda v. Arizona*[182] was in 1966. The Court's centrality to constitutional politics ensures its continued dynamic engagement with the articulation and evolution of newly conceived rights.[183]

B. *Apparently Contradictory Duties*

In offering the notice rationale for the modern version of qualified immunity, the Supreme Court put it this way: there is "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."[184] The unfairness of unpredictable liability is compounded when it punishes someone for an action they had an apparent duty to perform.

It appears, at the time of this writing, that no legal theorist has expressly addressed the problem created by a retroactive law that punishes conduct that was previously not only permitted, but legally required. The concerns it raises for the rule of law and fairness are

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179. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (holding that the Second Amendment protects the right to bear arms in public without the need to prove a "special need" for it) (2022); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the state cannot prohibit citizens from keeping and bearing arms in their home for self-defense); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (plurality opinion) (incorporating the Second Amendment, as understood in *Heller*, against the states).

180. *Dobbs*, 142 S. Ct. at 2283–84 (2022). *But see* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (announcing a fundamental right to same-sex marriage).

181. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010) (holding that the government may rely on voluntary statements of suspects who are aware of their right to remain silent, even if they have not expressly invoked it). *But see* Arizona v. Gant, 556 U.S. 332, 346 (2009) (limiting the search-incident-to-arrest doctrine so that it applies only when the arrestee is within ready reach of the area to be searched or officers reasonably believe they will find evidence relating to the offense of arrest).

182. 384 U.S. 436 (1966).

183. *See, e.g.*, Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110–11 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1341–42, 1348 (2006).

184. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), *abrogated on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

however apparent from those raised by laws that create simultaneous conflicting duties. According to Professor Kramer, conflicting duties are those that "can never be jointly fulfilled."[185] As with retroactive laws, conflicting legal duties frustrate the law's purpose to guide reasonable planning,[186] threatening the rule of law[187] and undermining the dignity of subjects.[188]

Some constitutional liability creates apparent conflicts of duties. At the time of the conduct, it appeared that the officer had a legal duty to act because a contrary constitutional decision was unpredictable—then, a court holds that the Constitution prohibited the conduct. This was the situation of the official in Part I who declined to extend a scholarship to parents of religious school students on the basis of the state constitution.[189] From the official's standpoint, she had a legal duty to deny the request. It was only after the Supreme Court's decision to hold that the Free Exercise Clause of the Constitution prohibits such discrimination[190] that the official could have known she was subject to a conflicting (and overriding) duty. Such suits are unheard of; plaintiffs seeking to invalidate a law sue for an injunction or declaratory judgment, not for a damages award. The reason is obvious. Qualified immunity would preclude such a claim because the plaintiff is seeking to enforce a right that has not been clearly established.

The official in the scholarship case was exercising a ministerial duty, but many official duties entail the exercise of discretion. These cases still raise a problem of potentially contradictory duties—although not quite as starkly—because the official has some freedom of choice about how to discharge the existing duty to act. In hindsight, at least, it may appear that the officer could have simply avoided the conflicting duties by choosing another course. This hindsight evaluation, though, obscures the rule of law and fairness concerns raised by retroactive adjudication: From the official's view at the time of the conduct, she had a legal duty to act, she had the authority to choose among lawful options, and there was no legal prohibition against the option she chose.

C. *The Moral Censure of Constitutional Liability*

Neither a degree of unpredictability nor the apparent contradiction between current and retroactive duties is unique to constitutional torts.

185. KRAMER, *supra* note 71, at 125; *see also* FULLER, *supra* note 68, at 36 (describing a hypothetical that illustrates how a system of legal rules can miscarry by imposing contradictory rules).

186. KRAMER, *supra* note 71, at 127.

187. *Id.*

188. *Id.* at 158–59.

189. *See supra* notes 47–49 and accompanying text.

190. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020).

Constitutional liability, on the whole, is probably more unpredictable than most tort liability, and it always entails a conflict of duties. This makes constitutional torts distinctive but not unique. An aspect of constitutional liability that sets it apart from garden-variety civil liability is that it expresses society's moral censure not only for violating a duty to an individual, like all other torts, but also for breaching the duties of loyalty and trust owed uniquely by an official to the political community at large.

Torts theorists have recently begun to reconceive torts as wrongs.[191] Most have ignored the ways that constitutional torts are different from other torts. Some have argued that courts should redress constitutional violations themselves (perhaps with nominal damages) even when the violation does not cause additional harm because constitutional torts are "more vital and the defendants from whom redress is sought are more powerful and more dangerous."[192] This asserts a difference between constitutional and other torts, but does not provide a persuasive reason for that difference: Some nonconstitutional torts protect interests that are just as "vital" as those protected by constitutional torts, and against defendants who are, if not just as dangerous as the government, dangerous enough. One can die from battery only once.

The key distinction between constitutional torts and other torts is that constitutional torts arise from conduct that violates a duty not only to the plaintiff but to society at large.[193] Constitutional tortfeasors operate "under color of [law]"[194] as governmental agents owing duties of loyalty and trust to the public.

This is so in two ways. An official's duty is extraordinary: To enforce the law. There are myriad ways an official may fail to live up to the ideals of this duty without violating a constitutional right. But violating a right is a perversely ironic act by someone tasked with not only following but enforcing the law. And a constitutional right is not an ordinary right. Its origin, its source of authority, is a supermajority whose aim is not to merely protect members from one another, but to shape the metes and bounds of the government itself. A judgment that an officer violated a constitutional right vindicates not only the victim's right but the

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191. *See generally* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020) (describing tort law as a law of wrongs); JOHN GARDNER, TORTS AND OTHER WRONGS (2020) (same); *see also* 1 NICHOLAS MCBRIDE, THE HUMANITY OF PRIVATE LAW (2019) (defining torts as legal wrongs against particular people).

192. Wells, *supra* note 4, at 1012; *see also* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1000 (1990) ("[W]rongdoing is inherent in unconstitutional conduct, not in qualified immunity.").

193. Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV., 617, 618–19 (recognizing that "constitutional tort reaches all the interests protected by the common law").

194. 42 U.S.C. § 1983.

community's commitments to equal citizenship and the rule of law reflected in the governmental limitation that supplies that right. Liability for official torts thus uniquely expresses public censure not for wrong committed by one person to another but for the wrong committed against the public goods of popular sovereignty, governmental accountability, and rights-protection.

The fact that the government pays for the enforcement of constitutional torts supports this theory. All torts are distinguished from criminal law by the identity of the person with enforcement authority: for torts, the victim; for crimes, the government.[195] Ordinarily the cost of enforcing torts likewise falls entirely on the plaintiff. Under the "American rule," plaintiffs, by default, pay their way regardless of the merits of their claim.[196] By contrast, the official—ordinarily indemnified by the government[197]—pays for the enforcement of meritorious constitutional tort claims,[198] symbolizing and implementing society's unique interest in vindicating constitutional violations.[199]

It is important to note that it is judgment against past conduct itself—the declaration or admission of liability for a past act—that carries this moral censure. The nature of the award, and who pays it, is irrelevant. Nominal, compensatory, and punitive damages all express this censure.[200] Punitive damages imposed by a jury may do so in an especially forceful, democratic way,[201] but in any case, the defendant bears the community's blame for breaching a duty to the public. The defendant may be financially indemnified by an employer or insurer, but indemnification does not outsource moral blameworthiness or censure. An insurer may pay a financial but not a moral debt.

This sketch of a theory of public law torts is tentative, but if its contours are persuasive, it suggests that constitutional liability is not only less predictable, on average, than other forms of tort liability, but also different in kind from garden-variety torts: it entails an especially weighty

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195. *See* Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1011–12 (2012).

196. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245, 247 (1975); *see* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

197. *See supra* note 21 and accompanying text.

198. *See* 42 U.S.C. § 1988(b) (allowing a court to award attorney's fees for the prevailing party in actions under § 1983); *see also* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 240–41 (1984).

199. Thank you to Joe Miller for pointing this out.

200. *See, e.g.*, Wells, *supra* note 4, at 1040.

201. *See, e.g.*, Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 237 (2015) (explaining that the jury "lends democratic legitimacy, both descriptively and normatively, to the application of constitutional law").

form of moral censure, one that in some ways mirrors the censure of criminal punishment.[202] That censure makes unpredictable constitutional liability especially unfair.

D. *Addressing Counterarguments*

Unpredictable constitutional liability raises special problems for the rule of law and fairness, but is qualified immunity the right response to them?

1. Other Possible Doctrinal Responses

Scholars who acknowledge that unpredictable adjudications raise some of the same problems as retroactive laws usually argue that courts should address those concerns on a case-by-case basis with legal doctrines that would spare the defendant, such as an equitable defense.[203] For constitutional decisions, in particular, scholars have argued that courts can avoid the problem by issuing a prospective remedy only.[204]

Neither traditional equitable defenses nor prospective remedies for constitutional violations can resolve the problems raised by official liability. The problem of retroactivity is not the plaintiff's fault, so equitable defenses like laches and unclean hands are inapplicable. Prospective relief is already available to plaintiffs in the form of declaratory judgments and injunctions.[205] The main goal of a damages

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202. This analysis might apply to other kinds of civil liability that uniquely signify, or that should uniquely signify, the community's moral censure. If so, there may be reason to be concerned about unpredictable liability in those cases, too. Consider especially liability on the basis of novel interpretations of a non-discrimination statute. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (noting that liability for employment discrimination against someone who is homosexual or transgender is an "unexpected consequence[]" of outlawing discrimination on the basis of "sex"). Note that the fairness rationale is not an argument against the judicial expansion of a legal norm that signifies legal censure; it is an argument against a retroactive remedy against the defendant. *See infra* Sections III.D.1.–2.

For the same reasons, it is possible that the foregoing analysis would support a broader fair notice doctrine defense to criminal liability. *Cf.* Baude, *supra* note 11, at 69–74 (suggesting that the fair notice rationale cannot simply be translated into civil law). The theory of fair notice articulated in this Article certainly supports reducing the scope of qualified immunity, bringing it closer into line with the fair notice doctrine. *See infra* Part IV. It might also support increasing the scope of the fair notice doctrine itself, but a full consideration of that prospect is beyond this Article's ambit.

203. *See, e.g.*, Beswick, *supra* note 66, at 362–65.

204. *See, e.g.*, Fallon & Meltzer, *supra* note 27, at 1796–97; Roosevelt, *supra* note 36, at 1134. Fisch rejects this approach as "unsatisfying" for "the litigant" whose victory is ephemeral. Fisch, *supra* note 24, at 1083.

205. At least, this is so when plaintiffs are likely to be subject to the same conduct again. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95, 102–05 (1983) (rejecting equitable relief on standing grounds when the injured party could not prove a likelihood of being subject to same conduct again).

award is to vindicate a past violation of a constitutional right and to compensate the plaintiff for any resulting harm.[206] Restricting the remedies available to plaintiffs who have been harmed to those that are purely prospective would effectively eliminate the § 1983 and *Bivens*[207] regimes altogether. For those who are unlikely to face the same treatment again, it is "damages or nothing."[208]

What has been largely overlooked by constitutional tort scholars is that qualified immunity itself serves the role played by equitable defenses in other kinds of cases as a solution to the problem of unfairly retroactive constitutional liability.[209] The doctrine applies on a case-by-case basis when it would be unfair to hold an official liable for conduct the official could not have reasonably foreseen would be declared unlawful. In this way, qualified immunity, though not originally articulated as an equitable doctrine, performs the functions demanded by "equity as meta-law."[210]

2. The Utility of Purely Prospective Constitutional Adjudication

A roundabout objection to qualified immunity is that it encourages purely prospective judgments. Such judgments have costs as well as benefits.

When qualified immunity forecloses liability, a court may nevertheless announce that the conduct violated a constitutional right, with that ruling having only prospective effect.[211] Assuming one agrees with the court's articulation of the right, this approach offers several valuable benefits: it resolves constitutional indeterminacy; deters the conduct in the future; and, by clearly establishing the right, provides the basis for liability in future cases. And it provides all of these values without unfairness to the defendant or to the plaintiff (remember, the right was not clearly established when the conduct occurred).

Purely prospective judgments have several drawbacks, however, that the Supreme Court has explored extensively in cases involving other types of constitutional remedies, including retrial,[212] habeas corpus,[213]

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206. *See, e.g.*, Wells, supra note 4, at 1011.

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

208. *Id.* at 410 (Harlan, J., concurring in the judgment).

209. For a survey of other equitable doctrines, *see* Beswick, *supra* note 66, at 345–63.

210. *See* Smith, *supra* note 28, at 1058–59.

211. *See* Pearson v. Callahan, 555 U.S. 223, 239 (2009); *cf.* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 177–78 (1990) (plurality opinion) (explaining that the court will determine whether to make retroactive its holding that certain tax liability was unconstitutional).

212. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that newly announced rules of criminal procedure apply to all cases pending on direct review).

213. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that newly announced rules of criminal procedure do not apply to cases that have been finally decided).

and tax liability.[214] Perhaps the most glaring drawback of purely prospective adjudications is that they depart from the common law tradition and are therefore in tension with the ideal of the judicial role. For these reasons, some jurists believe they conflict with the Constitution's allocation of judicial power—and not legislative power—to the federal courts.[215]

For those who believe such decisions are unconstitutional, there is an easy fix: courts should not enter them and other courts should treat them as advisory opinions or dicta without legal effect. This would forfeit all of the values of prospective judgments, but the separation of powers is a recipe for law-bound governance, not for "all good things." There are other mechanisms for the judicial announcement of rights.

For those who do not believe purely prospective announcements of rights in suits for damages claims are constitutionally problematic, the solution is obvious: announce rights consistent with constitutional requirements, even if the announcement has legal effect only prospectively. Adjudicative prospectivity would be a departure from tradition in most cases,[216] but not in constitutional decisions. Since the 1960s, the Court has wrestled with the propriety of prospective remedies in constitutional cases.[217] Under current doctrine, newly announced rights of criminal procedure apply only prospectively.[218]

Criminal procedure cases are not the only sort in which the Court is sensitive to the retroactive effects of unpredictable constitutional decisions. In 2020, the Court held that a federal law that prohibited robocalls to collect debts, with an exception for those collecting debts for

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214. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536–37 (1991) (opinion of Souter, J.); *see also Am. Trucking Ass'ns*, 496 U.S. at 171 (plurality opinion).

215. *See, e.g.*, *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment) (describing "selective prospectivity" and "pure prospectivity" as beyond judicial power as understood at common law); *Am. Trucking Ass'ns*, 496 U.S. at 201 (Scalia, J., concurring in the judgment) (describing "prospective decisionmaking [as] incompatible with the judicial role"). *See generally* Bradley Scott Shannon, *The Retroactivity and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811 (2003).

216. Shannon, *supra* note 215, at 812.

217. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 108–09 (1993) (Scalia, J., concurring) ("Whether cause or effect, there is no doubt that the era which gave birth to the prospectivity principle was marked by a newfound disregard for stare decisis. As one commentator calculated, '[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions.' It was an era when this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious 'heave-ho.'" (italics removed) (quoting Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467)).

218. Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021) (eliminating the *Teague* exception for "watershed rules").

the federal government, violated the Free Speech Clause.[219] The Court invalidated the exception but said in a footnote that no one who had made a robocall in reliance on the provision could be held liable.[220] Without invoking the notice rationale, the Court implemented the same concerns that support the doctrine of qualified immunity. The Court may rarely say it is creating a new constitutional rule, but it regularly accounts for the unpredictability of its decisions with doctrinal devices that meliorate the potential unfairness of their retroactive application.

3. Incentives to Sue

There remains one more objection to the lack of retroactive liability for constitutional violations. As many theorists have noted, without the prospect of a remedy for the harm they suffered, many plaintiffs will have little to no incentive to bring suit in the first place,[221] reducing the opportunities for courts to resolve constitutional indeterminacy and develop (or change) doctrine.

To this there are several responses, but admittedly none of them completely address the concern. One is that courts have opportunities to address constitutional questions in cases seeking prospective remedies, when a criminal defendant asserts the right as a defense, in habeas proceedings, or when a civil litigant seeks declaratory or injunctive relief.[222] None of these is a perfect substitute for damages actions; as the Court acknowledged in *Harlow*, "[i]n situations of abuse of office, an action for damages may be the only realistic avenue for vindication of constitutional guarantees."[223]

Another response is that doctrinal indeterminacy, even stagnancy, is neither inherently good nor bad; it depends on the eye of the beholder. Scholars frequently argue that there is an inherent connection between qualified immunity and the development of rights. Some say that qualified immunity facilitates rights expansion because courts can announce new rights without holding the defendant liable.[224] Similarly, some argue that allowing courts to dismiss a case on qualified immunity without deciding whether the official's conduct violated the plaintiff's

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219. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2347 (2020) (plurality opinion).

220. *Id.* at 2355; *id.* at n.12 ("[N]o one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception and before the entry of final judgment by the District Court on remand in this case, or such date that the lower courts determine is appropriate.").

221. DWORKIN, *supra* note 96, at 156–57; FULLER, *supra* note 68, at 57; *see also* KRAMER, *supra* note 71, at 120–21 (explaining that a plaintiff suffers a detriment if a court applies its decision only prospectively).

222. *See supra* Part III.D.2.

223. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

224. *See, e.g.*, *supra* note 23 and accompanying text.

rights, as courts may do under *Pearson v. Callahan*,[225] will result in fewer rights.[226] Both of these views are speculative. Empirical studies suggest the relationship between the doctrine and rights is more complicated.[227] Unsurprisingly, what appears to matter most is the judges' understanding of the rights at issue.[228] Because constitutional decisions are especially indeterminate and call for highly subjective views of constitutional interpretation and substantive values, those decisions, and the trajectory of the doctrine, will depend on the views of the judges, not the view of advocates. Less constitutional rights adjudication may result in more constitutional rights.[229]

IV. QUALIFYING QUALIFIED IMMUNITY

The notice rationale supports qualified immunity in some cases. The rationale is strongest when constitutional liability is unpredictable, when it would contradict an existing legal duty, and to the extent it reflects unusually heavy moral censure. Yet this does not apply to most cases currently covered by qualified immunity. This Part maps out when this conception of the notice rationale supports qualified immunity—and when it does not.

A. *The Current Scope of Qualified Immunity*

The doctrine of qualified immunity provides not only a defense to liability but also a bar to suit for damages arising from allegedly unconstitutional conduct.[230] A plaintiff may overcome it with "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[231]

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225. 555 U.S. 223, 236 (2009).

226. *See, e.g.*, Karen Blum et al., *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 647–49 (2013).

227. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6–7 (2015).

228. *See id.* at 6.

229. *See id.* at 6–7.

230. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982). The doctrine's effect on constitutional litigation is difficult to assess. Based on a dataset of 1,183 suits filed against police officers over a two-year period across five federal districts, Professor Joanna Schwartz has shown that the courts disposed of only 3.9% of applicable suits on the basis of qualified immunity. Schwartz, *supra* note 21, at 9–10. She acknowledges, however, that "[the] data do not capture how frequently qualified immunity influences plaintiffs' decisions to settle," *id.* at 47, nor, for that matter, the doctrine's role in a plaintiff's decision to file suit in the first place, *id.* at 50. Relying on Professor Schwartz's dataset, Professors Aaron L. Nielson and Christopher J. Walker argue that "if you consider all of the decisions that granted qualified immunity in full or in part or in the alternative, it totals 29.3% of the qualified immunity motions filed." Nielson & Walker, *supra* note 15, at 1880.

231. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting *Harlow*, 457 U.S. at 818).

The standard is objective. As originally articulated by the Court, officials could be held liable for acting in bad faith, when the official "knew or reasonably should have known that the action . . . would violate" federal law, or when the officer acted "with the malicious intention to cause a deprivation of constitutional rights or other injury."[232] The Court abandoned a subjective good faith defense, however, on the ground that establishing bad faith required fact-intensive inquiries that were "peculiarly disruptive of effective government" and harder to resolve on summary judgment.[233] Now, "[e]vidence concerning the defendant's subjective intent is simply irrelevant" to qualified immunity;[234] all that matters is whether a reasonable person would have known the conduct violated a clearly established right.[235]

Showing that the officer's conduct violated a previously announced *rule* is not enough to overcome qualified immunity. The plaintiff must show that the official's conduct violated a right that was already "'clearly established' in a more particularized" sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[236] The plaintiff must show not only that the applicable rule was clearly established, and that it forbade the official's conduct, but that a reasonable official would have known that the rule forbade that conduct. This requires an inquiry into the facts: Was there a case on point that would have made the "unlawfulness" of the official's conduct "apparent"?[237]

The Court has said that this does not require a plaintiff to show that "the very action in question has previously been held unlawful,"[238] but it has never elaborated on how close a prior decision must be to make the unlawfulness of an officer's conduct "apparent." With some exceptions,[239] the Court has held that officials are entitled to qualified immunity unless there is a prior Supreme Court decision holding that fairly similar facts violated the Constitution.[240] In recent years, the Court has "repeatedly told courts . . . not to define clearly established law at a

232. Wood v. Strickland, 420 U.S. 308, 322 (1975) *abrogated by Harlow*, 457 U.S. 800; *see also* Pierson v. Ray, 386 U.S. 547, 556–57 (1967) ("Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.").

233. *Harlow*, 457 U.S. at 816–17.

234. Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

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

236. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

237. *Id.*

238. *Id.*

239. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 742–44 (2002) (finding that circuit court case law clearly established the law).

240. SHELDON H. NAHMOD, MICHAEL L. WELLS, & FRED SMITH, JR., CONSTITUTIONAL TORTS 536 (5th ed. 2020).

high level of generality," especially—but not only—in cases alleging police misconduct.[241]

In practice, courts grant qualified immunity unless there is a prior decision condemning conduct very similar to the defendant's. Because the vast majority of damages suits claim that an official violated an existing rule, most claims fail because a court has never held that the conduct is unlawful.

The notice rationale does not support the full reach of the current doctrine. It supports qualified immunity when someone in the defendant's position could not have reasonably predicted the conduct would be subject to constitutional liability or some comparable moral censure. This suggests a rule of thumb for determining whether an official is entitled to qualified immunity. Predictability will never track formal categories perfectly. Even within categories that generally capture the relative predictability of constitutional decisions, there will be a spectrum of predictability. Nevertheless, it is possible to venture an outline of when qualified immunity is usually, rarely, or sometimes supported by the rationale.

B. *Easy Cases for Qualified Immunity*

The notice rationale usually supports the application of qualified immunity in cases of express or obvious doctrinal change. Where liability depends on reversing precedent,[242] the application of precedent to a new jurisdiction,[243] the articulation of a previously unknown rule,[244] or the extension of a general rule to invalidate a longstanding and widespread practice,[245] the notice rationale is at its strongest.[246] The "clearly established" requirement of the current doctrine appeals to this intuition,

241. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting City and Cnty. of San Francisco v. Sheehan, 575 U.S. 600, 613 (2015)); *see also* District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018); White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam).

242. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)); Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) (overruling Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972)).

243. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment exclusionary rule to state prosecutions); *see also* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (finding a Sixth Amendment right to government-appointed counsel and applying it to the states).

244. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (adhering to the "principles" announced in Escobedo v. Illinois, 378 U.S. 478 (1964)).

245. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020) (applying the Free Exercise Clause to prohibit states from discriminating against private religious schools in expending funds for education); Roe v. Wade, 410 U.S. 113, 153 (1973) (extending the Fourteenth Amendment right to privacy to include the decision to abort), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

246. *See also* Fisch, *supra* note 24, at 1111–17 (discussing decisions that upset a stable equilibrium of law).

and it has been remarkably successful at shielding officers from liability that depends on doctrinal change.

One of the most far-reaching results of qualified immunity in such cases is that constitutional tort claims are rarely, if ever, a vehicle for doctrinal change. Litigants have become so accustomed to this limit on damages liability that the hypothetical in Part I involving the state official who denies scholarship funds for religious schools is all but unimaginable.[247] In the case that actually reached the Supreme Court, *Espinoza v. Montana Department of Revenue*,[248] the plaintiffs sought an *injunction* against a state administrative rule prohibiting the use of scholarship funds for religious schools—rather than a damages award against the officials who declined their requests[249]—for good reason. The officials could not possibly have predicted that the Supreme Court would extend current doctrine to forbid states from doing something that nearly two-thirds of them had been doing for more than a century. The doctrine was not new, but its application to longstanding practices was.[250] Such hypotheticals are fantastical because qualified immunity has been so successful at accomplishing the core purpose of the notice rationale: protecting officials who otherwise have a duty to enforce the law from unpredictable and morally censorious liability.

C. *Easy Cases Against Qualified Immunity*

The notice rationale also shows why the current doctrine of qualified immunity is overbroad. When an officer acted without good faith, her conduct violated an existing criminal law, or her conduct was malum in se, the notice rationale does not support immunity. Requiring good faith for a qualified immunity defense would work a sea change in constitutional tort litigation and probably greatly expand liability.

1. Good Faith

Whatever the over-deterrence rationale may support, the notice rationale does not support immunity when an officer acted with the "malicious intention" to violate a constitutional right or cause other injury.[251] The exact definition of official good faith may have been inconsistent across jurisdictions, but one court said "[m]alice for constitutional purposes includes 'callous' or 'wanton neglect,' and

247. *See supra* notes 47–49 and accompanying text.

248. 140 S. Ct. 2246 (2020).

249. *See id.* at 2252.

250. *See* Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2024 (2017) (invalidating a playground construction refund that discriminated against religious institutions).

251. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also id.* at 321 ("The official himself must be acting sincerely and with a belief that he is doing right . . . .").

'reckless indifference to the rights of the individual citizen.'"[252] The reason such conduct should not earn qualified immunity is obvious: an official who intends to violate the law, or who acts with "reckless indifference to the rights of an individual citizen," should be able to predict morally censorious liability. It is not unfair to hold him liable for actually violating the law.

Reintroducing a good faith requirement would bring the doctrine more closely into line with common law tort liability for officers. The good faith defense was a staple of suits at common law against officers in the period preceding the enactment of § 1983 and the Court's creation of constitutional torts.[253] Police officers must still ordinarily demonstrate that they acted in good faith to avoid common law tort liability.[254] This would blunt the charge that qualified immunity is unlawful.[255]

At the same time, eliminating qualified immunity for officials who acted in bad faith could significantly raise the costs of constitutional litigation for defendants and courts. As the Court noted when it nixed the good faith component of qualified immunity, "questions of subjective intent . . . rarely can be decided by summary judgment" and "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[256] All of these costs can be precipitated by the plaintiff's "bare allegations of malice."[257] A fact-sensitive inquiry into the defendant's state of mind especially hands settlement leverage to plaintiffs. This can be unfair to officials who acted in good faith and did not violate a clearly established right. Perhaps eliminating the good faith requirement was an understandable prophylactic rule that over-enforces the notice rationale. Over-protection, however, shifts the unfairness to *plaintiffs* and flaunts the rule of law ideal: It protects the worst of the worst—those officers who not only violated the plaintiff's constitutional rights or otherwise harmed the plaintiffs, but meant to do so. Besides the obvious injustice to plaintiffs, protecting officials who acted in bad faith breeds contempt for the law and distrust of law enforcement officials.

Courts could establish doctrinal mechanisms for calibrating the costs of litigating good faith. Plaintiffs would have a strong reason to include an allegation of bad faith in the complaint to overcome a motion to dismiss on the ground of qualified immunity. Courts could reduce that

252. Downs v. Sawtell, 574 F.2d 1, 12–13 (1st Cir. 1978) (first quoting Harper v. Cserr, 544 F.2d 1121, 1124, 1125 (1st Cir. 1976); and then quoting Kelley v. Dunne, 344 F.2d 129, 133 (1st Cir. 1965)).

253. *See generally* Keller, *supra* note 12.

254. *See* Pierson v. Ray, 386 U.S. 547, 555–57 (1967).

255. *See generally* Baude, *supra* note 11.

256. *Harlow*, 457 U.S. at 816–17.

257. *Id.* at 817.

incentive by requiring plaintiffs to allege the facts constituting an official's bad faith with a higher degree of particularity than they must ordinarily plead "conditions of a person's mind."[258] This would be consistent with the requirement for alleging fraud—another allegation that can damage a defendant's reputation and that is based on a mental state (knowing falsehood) that is hard to prove.[259]

Courts could also require plaintiffs to establish a prima facie case of bad faith before the official is obligated to come forward with contrary evidence. Rather than requiring a defendant to overcome the mere allegation of bad faith, the plaintiff would have to show that, based on the uncontested facts, a reasonable official would not have done what the defendant did unless he was motivated by malice. Only then would the defendant have the burden of establishing another basis for his conduct.

Consider the case, discussed in Part I, where the police officer stopped and searched a vehicle because its temporary tags were folded up.[260] After a background check that raised no red flags, and without evidence of probable cause, the officer falsely told the driver that he had received a phone call "reporting that there were [ten] kilos of cocaine" in the car.[261] The officer badgered the driver into "consenting" to a search that took nearly two hours and caused more than $4,000 of damage.[262] Under current doctrine, the officer was entitled to qualified immunity because a reasonable officer could have believed that the consent, under the circumstances, provided legal authority for the search.[263] An officer does not necessarily violate the Constitution by procuring consent with lies, but all of the alleged facts, including the lies, should be relevant to showing that the officer acted with malice. In light of the alleged facts, it would be fair to require the officer to produce evidence showing good faith to be eligible for qualified immunity.[264]

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258. FED. R. CIV. P. 9(b).

259. *See id.*

260. Jamison v. McClendon, 476 F. Supp. 3d 386, 392–94 (S.D. Miss. 2020).

261. *Id.* at 393.

262. *Id.* at 391, 393–94.

263. *See id.* at 417–18.

264. The officer was white and the driver was Black. *Id.* at 391–92. The district court entered judgment on the driver's claim that the officer violated the Fourteenth Amendment because the stop was racially motivated on the ground that there was no evidence that the officer treated white drivers differently. *Id.* at 396 & n.35. The respective races of the plaintiff and defendant alone do not imply that the officer acted in bad faith or with unconstitutional motives. As Judge Carlton W. Reeves makes clear, there is a long—and sadly recent—history of white police officers unlawfully harming Black suspects, especially Black men. *Id.* at 390–91. Yet white officers may of course lawfully arrest and search Black suspects. The officer's alleged conduct in *Jamison* justified requiring him to show good faith regardless of the parties' respective races.

2. Criminal Prohibition

Courts rightly distinguish between the legal rules an official's conduct may have violated. The same conduct may amount to criminal theft, the tort of conversion, a deprivation of property without due process or an unreasonable seizure in violation of the Fourth Amendment—or to a subset of those norms.[265] The rules and underlying rationales for each of them are different, and conduct that violates one may not violate another. For this reason, at least one federal circuit court has said that "a clearly established violation of state law cannot put an official on notice that his conduct would also violate the Constitution."[266] This is quite true, but it is the right answer to the wrong question.

From the standpoint of the ideal of the rule of law and fairness, the question is whether the law was sufficient to guide the official's conduct. State law that threatens a penalty at least as significant as constitutional liability would be sufficient to guide the official's conduct. As explained above, constitutional liability is distinctive—it carries unique moral censure that ordinary tort law does not.[267] Yet the censure is not the same, and arguably not as severe as criminal liability. It follows, therefore, that state criminal law, which threatens similar or greater liability than constitutional liability, would be sufficient to guide an official's conduct, such that it would not be unfair to subject the official to constitutional litigation and liability.

Consider the officers who allegedly stole a suspect's property.[268] The court held that the officers were entitled to qualified immunity because it was not clearly established that it would violate the Fourth Amendment to steal property that the officer had lawfully seized.[269] But criminal law prohibits theft and does not exempt officials. Also consider the Floyd family's suit against police officer Derek Chauvin.[270] Chauvin was separately convicted of murder.[271] In such cases, the notice rationale does not support immunity from constitutional litigation or liability. It is important to note, however, that evidence that the conduct violated a criminal prohibition does not prove that it violated the Constitution, only

265. *See, e.g.*, Jessop v. City of Fresno, 936 F.3d 937, 941–42 (9th Cir. 2019) (analyzing whether police officers' alleged misconduct constituted theft violative of the Fourth and Fourteenth Amendments).

266. Echols v. Lawton, 913 F.3d 1313, 1324 (11th Cir. 2019).

267. *See supra* Section III.C.

268. *See Jessop*, 936 F.3d at 940.

269. *Id.* at 942.

270. Nicholas Bogel-Burroughs & John Eligon, *George Floyd's Family Settles Suit Against Minneapolis for $27 Million*, N.Y. TIMES (Mar. 30, 2021), https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html [https://perma.cc/5NNZ-4PVS].

271. Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years for the Murder of George Floyd*, NBC NEWS (June 25, 2021, 10:04 AM), https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332 [https://perma.cc/L6CS-2Z74].

that the defendant was on notice of comparable liability. For instance, it may well be an open question whether the Fourth Amendment prohibits officials from stealing from suspects (or anyone else for that matter). Evidence that the conduct would constitute a crime only undermines the fair notice rationale for qualified immunity. Whether it also violates the Constitution is a separate legal question.

By contrast to criminal liability, the prospect of predictable common law liability or departmental discipline, though sufficient to put the official on notice that the conduct is in some sense unlawful, is probably insufficient to satisfy the notice rationale. Retroactive criminal liability is more problematic from a rule of law standpoint than garden-variety civil liability or departmental discipline. In particular, departmental discipline is ordinarily non-public and, therefore, far less likely to express the community's moral stigma.[272] Criminal liability's moral affinity to constitutional liability makes its predictability a better proxy for the fairness concerns addressed by qualified immunity.

3. Malum in Se

For similar reasons, qualified immunity should not apply when the official's conduct is malum in se.[273] The concept of malum in se rests on a deontological ethic, the notion that some conduct is categorically wrong because it fails to treat people with equal dignity.[274] Just as with criminal violations, an official is already on notice that conduct that is malum in se will be subject to the public's moral censure.[275]

This exception, though conceptually important, would in practice add little to the good faith requirement and criminal violation exception to qualified immunity. Perhaps what counts as malum in se may be obvious in a society that widely believes that norms about what is "naturally and intrinsically right and wrong" are derived from "the great law-giver."[276] In a morally and religiously pluralistic society, however, such norms—

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272. *See* Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 843–44 (2019) (noting that politicians and police departments are pushing for more transparency of disciplinary proceedings).

273. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("In my view, truly appalling unconstitutional conduct should not be protected by qualified immunity."); Nielson & Walker, *supra* note 15, at 1874.

274. *See Malum In Se*, BLACK'S LAW DICTIONARY (11th ed. 2019). The origin of the distinction between crimes that are malum in se and crimes that are malum prohibitum is the idea that there are some crimes the Crown may not pardon before commission because they are against the law of nature or the common good. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 389 (5th ed. 1771).

275. Nielson & Walker, *supra* note 15, at 1873.

276. 1 BLACKSTONE, COMMENTARIES *54.

indeed, whether they exist at all—are subject to interminable dispute.[277] Assuming there is conduct that is malum in se, who, or which modern American institution, has the authority to define it?

Some scholars argue that judges are uniquely able to identify conduct that is malum in se that is not already prohibited by the criminal law.[278] This is dubious. Judges' expertise is modern law, which incorporates all manner of conflicting and sometimes incoherent norms, not the law of nature or deontological ethics. Given the judicial role of applying rather than making law, especially criminal law, they should be reluctant to extend criminal liability beyond a fair interpretation of statutory language on the ground that the conduct is malum in se. For the same reason, courts should be reluctant to hold that an official is on notice that he might be subject to moral censure because the conduct was inherently wrong. One potential exception is the Eighth Amendment, which expressly forbids punishment that is "cruel and unusual," a phrase that invites moral condemnation,[279] though even here, courts should be wary of implementing their own reasonably contestable moral views.[280]

This applies doubly to an official who acted in good faith. In such a case, the official was attempting to discharge a legal duty. To condition liability on whether the conduct is malum in se pits a known legal duty against an inchoate and debatable moral prohibition. A malum in se exception to qualified immunity is important for grasping the conceptual reach of the notice rationale but it is unlikely to apply where the conduct was committed in good faith and does not violate an existing criminal law.

D. *Hard Cases: Toward a "Reasonably Foreseeable Liability" Test*

Many constitutional rules are clearly established, yet vague. These present hard cases for qualified immunity. An officer should know and abide by the clearly established rule. The question is whether a reasonable officer would have, or should have, known that the rule applied to the officer's conduct. The notice rationale suggests that what should matter

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277. *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES (1776), *reprinted in* COLLECTED WORKS OF JEREMY BENTHAM 63–65 (J.H. Burns & H. L. A. Hart eds., 1977) (arguing that Blackstone's distinction between malum in se and malum prohibitum is meaningless).

278. *See, e.g.*, Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 96 (1997) (relying on Professor Karl Llewellyn's theory of "situation sense").

279. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 745 (2002) ("The obvious cruelty inherent in [handcuffing a prisoner to a hitching post] should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment."); *see also* Echols v. Lawton, 913 F.3d 1313, 1324 (11th Cir. 2019) (noting that official's libel per se violated the First Amendment, but official was not on notice of constitutional liability).

280. *See* ELY, *supra* note 160, at 38.

is whether the officer could reasonably foresee the constitutional rule applying to the officer's conduct. And that should depend on whether the *rationale* for the rule plainly applies to that conduct. Holding officers liable for violating the rationale for a clearly established rule would reduce the current scope of qualified immunity, vindicating constitutional rights without unfairness to officers.

1. The Application of Existing Standard-Like Rules

The notice rationale supports qualified immunity when liability depends on unpredictable doctrinal change. The vast majority of damages actions, however, do not call for doctrinal change. That is, they do not depend on a decision that overrules a prior case, applies existing doctrine to a new jurisdiction, or applies an existing doctrinal formula to widespread law or custom for the first time. Instead, most claims argue that the defendant violated a clearly established standard-like rule that generally applied to the officer's conduct.[281] What is at issue is whether the officer's conduct violated the rule. Under current doctrine, qualified immunity almost always applies because the official's conduct was not sufficiently similar to conduct that a court had already condemned. So, a reasonable officer would have known that the rule applied but not that it prohibited the officer's specific actions.

Such cases raise a difficult problem of generality.[282] As the Court explained in *Anderson v. Creighton*,[283] qualified immunity

> depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. . . . But if the test of "clearly established law" were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.[284]

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281. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395–96 (1989) (holding that the force used to make a seizure must be "reasonable"); Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that a prison official violates the Eighth Amendment "for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it").

282. *See, e.g.*, Jeffries, *supra* note 273, at 854.

283. 483 U.S. 635 (1987).

284. *Id.* at 639.

Instead, the Court said, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must have been sufficiently clear that a reasonable official would understand that what he is doing violates that right."[285]

No doubt the Court believed that it was clarifying the clearly established rule, but its attempt at redefinition was a model of unhelpfulness. With respect to the officer's standpoint, the Court merely underscored that what matters is whether an officer would have known that the conduct violated the right. Its description of the generality problem did not explain how to tell whether a right has been described with sufficient particularity to apply to the official's conduct. No case is exactly the same as another. Every adjudication involves the application of a general rule to facts. Some rules are broader, more standard-like, than others, but all of them have a problem of generality. Moreover, as the Court implied in *Graham v. Connor*[286] when it laid out the rule for excessive force claims under the Fourth Amendment, some rules are "not capable of precise definition or mechanical application."[287] All rules of reasonableness are necessarily vague.[288] Requiring them to be more precise as a condition of liability effectively defeats liability in every case.

The Court muddied the water in *Hope v. Pelzer*,[289] where it emphasized that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[290] The Court held that handcuffing prisoners to a hitching post was an "obvious"[291] violation of the Eighth Amendment's prohibition on "cruel and unusual" punishment because, when unnecessary as a means of restraint, it amounted to "gratuitous infliction of 'wanton and unnecessary' pain that . . . precedent clearly prohibits."[292] This approach promised to expand liability to the extent of the reasonable application of existing rules. In response, lower courts scrambled to adopt qualified immunity tests that offered plaintiffs opportunities to defeat qualified immunity when the particular conduct had been condemned by a court *or* when the

285. *Id.* at 640.

286. 490 U.S. 386 (1989).

287. *Id.* at 396 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

288. *See* Endicott, *supra* note 71, at 6 ("We could not come up with a useful list of prohibitions or permissions that would give a *precise* answer to the question of what the police may do in response to public disorder.").

289. 536 U.S. 730 (2002).

290. *Id.* at 741.

291. *Id.* at 738.

292. *Id.*

violation of an existing standard was sufficiently obvious.[293] The Court itself has rarely applied the *Hope* standard instead of the "clearly established" standard, and only in other cases involving horrific treatment of incarcerated plaintiffs cases that raise an inference of bad faith.[294] Otherwise the Court has consistently maintained that officers are entitled to qualified immunity "unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."[295]

The notice rationale does not go this far. The rule of law and fairness concerns underlying the rationale are satisfied when the application of an existing rule—however standard-like—follows from the stated reasons and purposes underlying it. A rule's reason is capable of guiding rational behavior, and it is neither unfair to the defendant nor offensive to the idea of the rule of law to apply a rule to novel facts that are covered by its rationale. As Professor John Jeffries has noted, "it is natural for lawyers and judges to find meaning and guidance in generalizations drawn from prior decisions."[296] The question is whether the reasons given for the existing rule justify applying it to the official's conduct. Tailoring qualified immunity to this understanding of what fairness and the rule of law require may dramatically reduce the scope of qualified immunity in cases applying an existing rule. There would still be hard cases about which reasonable jurists would disagree; that is unavoidable. The disagreement, however, would be about the right issue, namely, whether the stated reasons for the rule extend to the official's conduct.

Focusing on the reasons that have already been offered for the rule is necessary to ensure notice. Courts subtly reshape rules by changing, or adding to, their rationale. Applying a rule to facts on the basis of a new

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293. *See, e.g.*, Corbitt v. Vickers, 929 F.3d 1304, 1312 (11th Cir. 2019); *see also* Jeffries, *supra* note 273, at 853 ("In my view, the Eleventh Circuit's current blueprint for identifying 'clearly established' law is one of the best of several such attempts. Others are even more elaborate." (footnote omitted)).

294. *See* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) ("[N]o reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."); McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) (vacating for reconsideration in light of *Taylor*). Some have argued these cases are "a signal from the Court that the lower courts have taken the clearly established test too far." Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir*,* Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 135 (2022). Yet one swallow, or even two, does not a spring make. The Court recently has summarily reversed denials of qualified immunity in two excessive force cases. Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021) (per curiam); City of Tahlequah v. Bond, 142 S. Ct. 9, 11–12 (2021) (per curiam).

295. City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) (quoting Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam)).

296. Jeffries, *supra* note 273, at 855.

rationale raises the same notice problems as simply applying a new rule, because in effect it *is* applying a new rule. Rules cannot be divorced from their rationales.

To illustrate, consider *Corbitt v. Vickers*,[297] the case where an officer shot at a dog but struck a bystander child.[298] A group of officers followed a suspect into the plaintiff's backyard, where an adult, six children, and a dog were playing.[299] None of them knew the suspect.[300] The officers, gun drawn, ordered everyone onto the ground, and they complied.[301] The dog did nothing to threaten the officers.[302] The defendant officer shot at the dog and missed. The dog ran under the house.[303] After about ten seconds, the dog started walking toward its owners (who were lying on the ground).[304] The defendant officer shot at the dog again, missed again, but struck the plaintiff's ten-year-old son, who was lying about eighteen inches from the defendant.[305] The plaintiff sued the officer for using excessive force in violation of the Fourth Amendment.[306]

The applicable legal rule was clearly established. In *Graham*, the Supreme Court held that an officer's use of force in the course of making an arrest must be objectively reasonable in light of all of the facts.[307] The U.S. Court of Appeals for the Eleventh Circuit had articulated an even more specific rule: "[A] police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands."[308] Yet, the Eleventh Circuit held that the officer was entitled to qualified immunity because "[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person."[309] The Supreme Court declined to review the case.[310]

In light of the Supreme Court's insistence on a high degree of specificity, the decision in *Corbitt* is understandable. And it is true that

297. 141 S. Ct. 110 (2020).
298. *Corbitt*, 929 F.3d at 1308.
299. *Id.*
300. *See id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. 490 U.S. 386, 395 (1989).
308. Saunders v. Duke, 766 F.3d 1262, 1265 (11th Cir. 2014).
309. *Corbitt*, 929 F.3d at 1318.
310. Corbitt v. Vickers, 141 S. Ct. 110 (2020).

the Supreme Court has never held that an officer making an arrest who shoots at a dog and strikes a bystander violates the Fourth Amendment. Such cases are fortunately rare.

But the Supreme Court *had* held that using deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights.[311] The Court had also explained that the following facts are important for determining whether the force is objectively excessive: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others at issue, and whether he is actively resisting arrest or attempting to evade arrest by flight."[312] Boiling these factors down, the Eleventh Circuit had determined that using "gratuitous and excessive" force in the course of an arrest violates the Fourth Amendment.[313] The reasons for prohibiting gratuitous and unnecessary force need hardly be stated: Police officers are meant to protect people, not to needlessly harm them. The reason underlying the rule is plain, and the rule itself is sufficiently precise and clear to guide official conduct.

According to the plaintiff in *Corbitt*, the dog posed no threat.[314] It was acting in a nonthreatening manner and walking towards its owners.[315] The Eleventh Circuit considered the complaint's allegation that the dog was not a threat to be "conclusory," and it is true that the plaintiff could have provided more factual detail.[316] But the conclusion, if it was one, follows from the other facts the plaintiff had pled: there were multiple officers in the backyard with their guns drawn; the two adults in the backyard—the suspect and a bystander—were both handcuffed and on the ground; and the children were likewise on the ground, obeying orders. The dog was "approaching its owners" and the officer made no attempt to secure the dog without shooting it. Taken together, the facts support an inference that shooting the dog was gratuitous and unnecessary to make the arrests.[317]

This proposed rule for qualified immunity when liability turns on the application of a clearly established rule will not eliminate disagreement about the doctrine's application in hard cases. Reasonable judges will disagree about whether a reasonable official would have foreseen the application of the rule. But their disagreement will be about the right thing. Instead of debating the extent to which a violation was "obvious"

311. Graham v. Connor, 490 U.S. 386, 395 (1989) (describing the holding in Tennessee v. Garner, 471 U.S. 1 (1985)).

312. *Id.* at 396.

313. *Saunders*, 766 F.3d at 1265.

314. *Corbitt*, 929 F.3d at 1308.

315. *Id.*

316. *Id.* at 1322.

317. *See Saunders*, 766 F.3d at 1265.

or whether the facts of a prior case were sufficiently close to give the official "fair warning," they will be debating the scope of the reasons underlying the rule. Doing so will not only promote fairness to plaintiffs without sacrificing fairness to defendants but will also promote serious judicial engagement with the reasons and scope of constitutional prohibitions—the sort of engagement the current doctrine too frequently forecloses.

2. The Merger of Reasonableness Tests

There is a special subset of preexisting rules that may apply to official conduct: rules that require official conduct to be objectively reasonable. For instance, to satisfy the Fourth Amendment, a search must be reasonable. Suits for violations of reasonableness rules involve analyzing two layers of such rules: the merits rule and the qualified immunity reasonableness rule. For instance, an officer must have a reasonable basis for probable cause to make a search or seizure. The officer is entitled to qualified immunity unless no reasonable officer could have believed there was a reasonable basis for probable cause.[318] The same dynamic arises in excessive force cases: Could a reasonable officer have concluded that the use of force was reasonable?[319] Justice John Paul Stevens famously argued that this "double standard of reasonableness . . . affords a law enforcement official two layers of insulation from liability."[320]

This analytical puzzle is confusing and unnecessary from the standpoint of the notice rationale. Reasonableness rules have rationales that guide officials. An officer whose conduct is not objectively reasonable is on ample notice of constitutional liability. The only work the doctrine is doing in these cases is to provide extra protection to officials and limit the costs of litigation.[321]

3. The "Hollowness" Problem

This Article began by noting the claim that qualified immunity renders constitutional rights "hollow." Were the courts to apply the notice rationale faithfully, however, this problem would dissolve. From the standpoint of notice, what matters is the law at the time of the official's conduct. When the official's conduct violates that law, or could reasonably be predicted to violate that law, qualified immunity would not apply, and the right would be vindicated. When the conduct does not violate the law, or a foreseeable application of it, the official would be

318. *See* Anderson v. Creighton, 483 U.S. 635, 638–40 (1987).

319. *See* Saucier v. Katz, 533 U.S. 194, 202 (2001), *overruled on other grounds by* Pearson v. Callahan, 55 U.S. 223 (2009).

320. *Anderson*, 483 U.S. at 659 (Stevens, J., dissenting); *see also Saucier*, 533 U.S. at 213–14 (Ginsburg, J., concurring in the judgment).

321. *See* Jeffries, *supra* note 273, at 866–67.

entitled to qualified immunity because, in the strict sense, the official's conduct did not, at the time, violate a duty owed to the plaintiff arising from the reasons underlying an existing rule. This understanding of qualified immunity would make rights clearer, not hollow.

E. *Addressing Objections*

There are at least two objections to the above argument that arise from concerns about fairness to non-officials. The first is that reforming the doctrine of qualified immunity to square with the fairness rationale would protect officers more than criminal defendants are protected by the fair notice defense in criminal law. This Article's focus has necessarily been limited to the application of the interrogation of the fair notice rationale offered in support of qualified immunity. There may be good reason to extend this Article's notion of fair notice to other doctrinal domains, including criminal liability, that would reduce such inter-doctrinal asymmetry.

The second objection is that anything short of abolishing qualified immunity would unfairly expose vulnerable communities to the harms caused by unconstitutional conduct. For example, Professor Carbado argues that qualified immunity disincentivizes "police officers to be careful"[322] and serves as one of "six dynamics" that contribute to "blue-on-black violence"—"police violence against African-Americans."[323] Accordingly, concerns about racially disparate police violence have powerfully influenced the movement to abolish qualified immunity.[324]

This Article can offer only a tentative answer to this objection. The myriad social, political, and legal factors that may influence specific police conduct or general patterns of conduct are difficult to tease apart. Under Professor Carbado's "provisional account," qualified immunity is only one strand of a complicated social and legal web that contributes to blue-on-black violence.[325] One of those dynamics consists of "a variety of social forces (including, but not limited to, broken windows policing, racial stereotypes, racial segregation and gentrification, and Fourth Amendment law) [that] converge to make African-Americans vulnerable to ongoing police surveillance and contact."[326] Given the complexity of the social, political, and legal factors that contribute to blue-on-black violence, it is difficult to identify qualified immunity's role. Legislatures are in a better position to evaluate the evidence for eliminating qualified immunity on the basis of structural racial inequality than courts ordinarily would be.

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322. Carbado, *supra* note 29, at 1524.
323. *Id.* at 1480, 1483.
324. *See supra* note 1 and accompanying text.
325. Carbado, *supra* note 29, at 1483–84.
326. *Id.*

In any case, this Article's proposed reform of qualified immunity would reduce qualified immunity's role in police violence. The fair notice rationale does not extend to conduct committed in bad faith, conduct that violates criminal law, or conduct that could reasonably be expected to conflict with the underlying rationale for existing constitutional standards. The doctrine would no longer protect violence that is plainly unnecessary to secure suspects and protect bystanders.

It is also important to remember that qualified immunity does not apply exclusively to the conduct of police officers or to the use of force. It applies to virtually all discretionary official conduct, much of which is bureaucratic.[327] The doctrine is most consistent with the fair notice rationale when it protects officials—of whatever sort—from unpredictable liability based on subsequent constitutional change, something that can apply to officials performing a wide array of duties. Addressing the unfairness to officials of post-hoc constitutional liability is compatible with efforts to reduce blue-on-black violence. In fact, limits on the retroactive application of constitutional rules reduce the cost of judicial expansion of constitutional rights.[328]

V. EXTENDING A MORE QUALIFIED "QUALIFIED IMMUNITY"

This Article has focused on the extent to which the notice rationale supports the current scope of qualified immunity, arguing that it does support official immunity in cases of doctrinal change but not in many of the cases to which it ordinarily applies. Concerns about the rule of law and fairness to officials explain many intuitions about when a defendant should be personally liable for unconstitutional conduct. Under current doctrine, only *officials* are entitled to qualified immunity.[329] The Supreme Court has declined to extend the doctrine to municipalities and private parties—both of which may be held liable for unconstitutional conduct. Nothing about the fairness rationale is limited to officials. The rationale supports a measure of immunity from constitutional liability for municipalities and private parties too.

Consider municipal liability. Since *Monell v. Department of Social Services of the City of New York*,[330] the Supreme Court has held that municipalities count as "persons" subject to suit under § 1983 for violating federal rights.[331] Unlike states, however, which are ordinarily

327. *See supra* note 56 and accompanying text.

328. *See supra* note 23 and accompanying text.

329. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

330. 436 U.S. 658 (1978). Before *Monell*, the Court had declined to extend § 1983 liability to municipalities. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled by Monell*, 436 U.S. 658; *see* David Y. Bannard, Note, *A Foreseeability-Based Standard for the Determination of Municipal Liability Under Section 1983*, 28 B.C. L. REV. 937, 946 (1987).

331. *Monell*, 436 U.S. at 690–91.

entitled to absolute immunity from suit, and unlike officials, who are entitled to absolute or qualified immunity depending on their function, the Court has consistently held that municipalities are not entitled to any sort of immunity.[332] The Court has based this decision on the fact that municipalities, like other corporations, were not entitled to immunity at common law.[333]

Some scholars have argued that municipalities should be entitled to qualified immunity, effectively converting the law of municipal civil rights liability into a regime based on fault rather than strict liability.[334] This argument finds additional support in the notice rationale for qualified immunity. The rule of law and fairness concerns underlying the notice rationale apply to some extent to municipalities, but perhaps without the same force with which they apply to official liability. For example, corporations lack some aspects of the dignity inherent in natural persons as agents; corporations are, after all, the agents of people, not people themselves. Yet ensuring their ability to make reasonable decisions guided by law serves the dignity of those who rely on the corporate form to accomplish their goals. Municipalities, too, must exercise discretion to enforce the law, and retroactive constitutional adjudication can conflict with that duty. Municipalities, unlike people, do not necessarily have a dignitary interest in avoiding public moral censure. Whatever moral censure falls on municipalities from constitutional liability is shared by all the responsible officials and, to some extent, *their* principals, the voters themselves. The moral judgment of municipal liability is therefore more diffuse and less stigmatic than official liability.

Under this analysis, there is an even better case for extending this Article's notion of qualified immunity to private parties acting under color of law. The Supreme Court has held that such parties are not entitled to qualified immunity, even though they may be subject to the same sorts of constitutional surprise as government officials.[335] In one case, the

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332. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 657 (1980).

333. *Id.* at 638.

334. *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 242–50 (2013); *see also* Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 509–10 (2018) (proposing that municipalities should be subject to respondeat superior liability but should be allowed to assert the same qualified immunity defense available to their officers whose actions are the basis for the suit); Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 680–83 (proposing that a municipality should be liable in direct instances of unconstitutional conduct but not in instances where the law is unclear).

335. *See* Richardson v. McKnight, 521 U.S. 399, 412 (1997); Wyatt v. Cole, 504 U.S. 158, 164–68 (1992) (concluding that the rationales mandating qualified immunity for public officials are not applicable to private parties). *See generally* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) (supporting the proposition that "under the color of" means the inappropriate use of power authorized by state law).

Court reasoned that "[a]lthough principles of equality and fairness may suggest" that private parties acting under color of law should enjoy the same immunity, "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good."[336] This difference is irrelevant from the standpoint of fair notice—constitutional liability can be equally unpredictable and equally contrary to a legal duty for a private party acting under color of law as it can be for a government employee.

In *Richardson v. McKnight*,[337] the Court rejected qualified immunity for private prison guards largely on the ground that the over-deterrence rationale did not apply to them.[338] Unlike government-run prisons, the Court reasoned, private prisons have to compete with one another for government contracts.[339] Economic competition would ensure private prisons would zealously enforce the law even if they did not enjoy the protection of qualified immunity.[340] Whatever the application of the overdeterrence, or "unwarranted timidity," rationale for qualified immunity to private parties,[341] the fair notice rationale applies with equal force to private parties tasked with safeguarding constitutional rights.

Some lower courts, however, have held that private parties who are subject to suit under § 1983 for acting under color of state law are entitled to a good faith defense when they acted without malice and they neither knew nor should have known that their conduct would be held unconstitutional.[342] As one court recently put it, "The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future."[343] A bit dramatic, perhaps, but it sounds like the fair notice rationale.

This good faith defense has had recent purchase in cases arising in the aftermath of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[344] where the Supreme Court overruled

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336. *Wyatt*, 504 U.S. at 168. The defendants in this case arguably acted with malice, so they would not have been eligible for a notice-based version of qualified immunity anyway. *See id.* at 159–60.

337. 521 U.S. 399.

338. *Id.* at 409–11.

339. *Id.* at 409–10.

340. *Id.*

341. *Id.* at 409.

342. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 942 F.3d 352, 366 (7th Cir. 2019); Clement v. City of Glendale, 518 F.3d 1090, 1096–97 (9th Cir. 2008); Pinsky v. Duncan, 79 F.3d 306, 311–12 (2d Cir. 1996); Vector Rsch., Inc. v. Howard & Howard Att'ys, 76 F.3d 692, 699 (6th Cir. 1996); Wyatt v. Cole, 994 F.2d 1113, 1118–21 (5th Cir. 1993); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994).

343. *Janus*, 942 F.3d at 366.

344. 138 S. Ct. 2448 (2018).

Abood v. Detroit Board of Education[345] to hold that public employee unions violate the Free Speech Clause when they require nonmember employees to pay dues.[346] Courts have uniformly held that unions sued after *Janus* for taking dues from nonmembers before *Janus* are entitled to a good faith defense to suit for damages under § 1983,[347] and with good reason: it would be unfair to require private parties, especially, to predict in advance that the Supreme Court would overrule a forty-year-old decision.[348]

The same dynamics can arise when private party civil or criminal liability depends on an unpredictable constitutional change. Consider, for example, those who could be held liable for aiding or abetting an abortion under Texas Senate Bill 8.[349] The law provides a defense when denial of an abortion would create an "undue burden" under the Supreme Court's current jurisprudence.[350] When *Dobbs* overruled *Casey* and *Roe*, however, the defense disappeared, creating retroactive liability.[351] The notice rationale for qualified immunity supports limiting the liability for abortions conducted before the Court decided *Dobbs*.[352] The principal difference in these cases and official tort suits is that the liability is statutory and civil and may therefore lack the moral censure of constitutional liability. Yet the social context makes it clear that liability

345. 431 U.S. 209 (1977).

346. *Janus*, 138 S. Ct. at 2486.

347. *See* Akers v. Maryland State Educ. Ass'n, 990 F.3d 375, 380 (4th Cir. 2021) (following the First, Sixth, Seventh, and Ninth Circuits by holding that the good faith defense was available to unions sued after *Janus*); Diamond v. Pa. State Educ. Ass'n, 972 F.3d 262, 269 (3rd Cir. 2020); Doughty v. State Emps.' Ass'n of N.H., SEIU Loc. 1984, 981 F.3d 128, 137 (1st Cir. 2020); Wholean v. CSEA SEIU Loc. 2001, 955 F.3d 332, 336 (2d Cir. 2020); Lee v. Ohio Educ. Ass'n, 951 F.3d 386, 391 (6th Cir. 2020); Danielson v. Inslee, 945 F.3d 1096, 1100 (9th Cir. 2019); *Janus*, 942 F.3d at 366. For discussion of the defenses potentially available to the unions, see William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 201–04 (2018).

348. This is in spite of the fact that the Supreme Court declared that "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*." *Janus*, 138 S. Ct. at 2484; *see also id.* at 2485 ("[A]ny public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain"). The "misgivings" of some members of the Court do not carry the authority of law, and they can be unpredictably buoyed or overwhelmed by the tides of personnel and jurisprudential change.

349. Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212 (West 2022)).

350. TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)(2) (West 2022).

351. *See id.* at § (e).

352. *Dobbs* presents an unusually hard case for determining when a legal change becomes "predictable." Does legal change become predictable at oral argument? When a draft opinion overruling settled precedent is leaked to the public? Here, the Court's own procedures should be a guide. A case is not decided until the opinions are announced. Until then, the Court's judgment is subject to change.

carries an unusually heavy dose of moral blame. The same analysis ought to apply to a private party whose liability for conspiracy or concerted action under § 1983 depends on an unpredictable constitutional ruling.[353]

CONCLUSION: REFORMING QUALIFIED IMMUNITY

Qualified immunity has serious problems. In an effort to avoid difficult factual inquiries and to spare officials the cost of litigation, the Supreme Court has gradually expanded the defense well beyond its original doctrinal bounds and rationales. The result is that § 1983, designed to empower plaintiffs and federal courts to police the unconstitutional conduct of state and local officials, is nearly a dead letter. People are rightly outraged.

There is, however, a baby in the bathwater. One need not be a hardcore legal realist to acknowledge that the Supreme Court newly articulates constitutional rights, and that sometimes those new statements are unpredictable. Nixing the defense altogether would raise serious questions of fairness and the rule of law, just as preserving it would. This Article offers a principled roadmap for reforming qualified immunity in a way that would be true to its original justification and accord with the basic intuition that it is unfair to punish someone for something they could not have reasonably known to be unlawful. The reformation would not end qualified immunity, but would revolutionize constitutional litigation, clarifying rights, expanding compensation and vindication for violations, and opening the door to discovery and punishment of officers who violate rights in bad faith. It may even have the valuable side-effect of promoting more trust in public officials and courts alike.

353. *Compare* Downs v. Sawtelle, 574 F.2d 1, 15–16 (1st Cir. 1978) ("Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights."), *with id.* at 16 (Coffin, C.J., dissenting) ("[B]oth a sense of fairness and public policy caution against adopting an inflexible rule permitting private parties to be held liable when relevant and perhaps critically important state actors are immune.").