

QUALIFIED IMMUNITY AND FAULT

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INTRODUCTION

As a general rule, liability correlates with fault. That is, when the law declares a person liable, it is usually because the person is, in some sense, at fault. Similarly, when the law does not declare a person liable, it is usually because the person is not deemed to be at fault. There are exceptions, of course. A storekeeper who unwittingly sells a product that harms another may be held liable under the doctrine of strict liability, despite her blameless conduct.¹ Similarly, a website owner who knowingly permits others to post defamatory statements on her website is not liable, despite her blameworthiness.² In these exceptional cases, liability does not correlate with fault because instrumental goals override its importance.

Instrumental goals have long animated qualified immunity law. One goal is to protect government from the perceived burdens of litigation. Litigation can be costly and time consuming and, inasmuch as the qualified immunity defense permits the early dismissal of claims, the defense keeps many lawsuits short and relatively painless.³ Another goal is to ensure that public servants are not overdeterred in discharging their duties. By insulating officers from liability in most instances, officers will presumably feel free

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1 See, e.g., RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW INST. 1998) (“One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”).

2 See 47 U.S.C. § 230(c)(1) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

3 *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).

to vigorously pursue state interests without the fear of private liability.⁴ A third goal of the defense, in the minds of some at least, is enabling constitutional development.⁵ If every declaration of a new constitutional right carried with it significant remedial costs, courts might be less likely to create such rights. By limiting remedies, therefore, the defense promotes the expansion of constitutional rights.

Recent scholarship has cast doubt on these instrumental goals. There is good reason to think that the defense does not relieve governments of the burdens of litigation (because qualified immunity is rarely resolved before trial or settlement),⁶ that the defense does not solve the problem of overdeterrence (because there is not likely an overdeterrence problem),⁷ and does not spur the expansion of constitutional rights (because courts no longer have to delineate rights to approve the defense of qualified immunity⁸). With these instrumental goals swept away, the defense as currently conceived must stand or fall based on the general rule that liability correlates with fault. Fault, which I sometimes refer to as “blame” in this Essay, has generally played a role in the qualified defense,⁹ but given the prominence of instrumental justifications, it has received far less attention.¹⁰ As these instrumental justifications begin to fall, a new evaluation of fault is in order.

This Essay describes, critiques, and attempts to reform the role of fault in the defense of qualified immunity. It first argues, in Part I, that the defense does not properly assess fault because it immunizes persons who are

4 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (An officer’s “fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties’” (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

5 See John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

6 See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) (showing empirically that “courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds”).

7 See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1813 (2018) (“[I]ndemnification practices and litigation dynamics already shield government officials from financial sanctions, obviating the need for qualified immunity to serve that role.”).

8 See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015) (demonstrating empirically that, since *Pearson v. Callahan*, 55 U.S. 223 (2009), the vast majority of qualified immunity decisions do not involve any declaration of constitutional rights).

9 See *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002) (equating the “fair notice” standard in the qualified immunity doctrine with “fair warning” standard applicable in the context of criminal liability).

10 To be sure, other scholars have noted the way in which fault generally informs qualified immunity law. See, e.g., Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940016; John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989). This paper differs from prior treatments in that it attempts to discern whether qualified immunity, rather than being merely informed by principles of fault, is instead fully consistent with those principles.

at fault and holds liable persons who are not. The chief cause of this problem is that the defense is focused on an exceedingly narrow source of law: appellate judicial opinions.¹¹ Appellate opinions are, not surprisingly, rarely read by government officers and, even when their substance is communicated to officers, they only comprise one of many factors that affect the blameworthiness of an officer.

Given that fault can often be assessed outside the context of appellate judicial opinions, the Essay then begins to sketch in Part II two different ways in which this assessment could occur. Neither approach, however, is fully satisfying. One approach would be to base qualified immunity on an officer's adherence to clearly established state law as well as federal law. This approach is appealing because it embraces clearly established law from multiple sources and dispenses with the unrealistic assumption that our sense of fault is only tied to appellate judicial opinions addressing federal constitutional law. Yet this approach is also troublesome because it still leaves fault incompletely assessed in certain cases. Additionally, the approach will be difficult to implement and impinge on traditional state prerogatives regarding the maintenance and operation of state law.

Given the problems with this approach, the Essay takes up another alternative in Part III. Under this approach, an officer's immunity from damages in a constitutional tort action would turn on her actual knowledge of federal unconstitutionality or her compliance with the standard of care prevailing in the officer's department or agency. This approach is attractive because it more closely tracks the blameworthiness of the officer as traditionally understood in criminal and tort law. In addition, the approach is attractive because it may create strong incentives for departmental self-assessment and reform. Yet this approach is also flawed in that it may also create incentives cutting in the other direction—such as incentives to cut back on policy and training. Another problem with this approach is that its benefits will mostly be confined to constitutional tort actions against state officers working for local governments. When it comes to officers working for the state-wide agencies and the federal government, the benefits may not apply with equal force.

Given that neither of these two approaches to reforming qualified immunity is sufficiently compelling, I briefly explain in a conclusion that, however qualified immunity might be reformed (or even if it remains the same), the perceived fault (or lack of fault) of the officer can never support the entire defense without sacrificing instrumental goals or causing other problems. The task facing reformers, therefore, is how to balance the law's

11 See, e.g., *Yates v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016) (explaining that as a general rule, courts look only to “the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose” when determining whether a defendant is entitled to qualified immunity (quoting *Wilson v. Kittoe*, 337 F.3d 392, 402–03 (4th Cir. 2003))); *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007) (“We have held that decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state . . . can clearly establish the law.”).

traditional concern with fault against policy concerns that inevitably invade any body of judge-made law.

I. FAULT UNDER EXISTING QUALIFIED IMMUNITY LAW

The qualified immunity doctrine distinguishes between officers who violated law that was “clearly established” and law that was not “clearly established.”¹² The focus on clearly established law assumes that clear law provides officers with “fair notice” of the wrongfulness of their conduct.¹³ Constitutional law, the argument goes, is full of intricacies and nuances that will escape most government officers. Reasonable officers cannot be expected to grasp these subtleties and thus are not blameworthy when they violate them. Where the law is clear rather than nuanced, however, the officer may fairly be considered to be at fault and thus be held liable. Yet, as explained in Sections I.A and I.B below, this approach will often excuse the faulty and hold liable the faultless.

Before explaining these points, however, it will be useful to note up front this Essay’s working definition of “fault.” As used herein, an officer is “at fault” if, prior to taking some action, she has actual or constructive knowledge that her action is wrongful, and yet takes the action anyway. “Wrongfulness” may feel uncomfortably ambiguous, but it is fact what criminal law uses to allocate fault all the time. As Professor John Jeffries has argued, the legitimacy of criminal liability is not based on the “fanciful” notion that “ordinary citizens have access to [criminal] statutes that define criminal offenses or to the volumes of decisions that interpret them or that, if they did, they would have the skill or aptitude to understand such materials.”¹⁴ Instead, it is based on the “common social duty” that all of us absorb simply by living in a given community.¹⁵ This common social understanding of wrongfulness is both reflective of, and informative of, the law itself. If criminal fault can be based on such a basis, certainly civil liability can be built on the same basis.¹⁶

A. *Excusing the Faulty*

Questions of constitutional law are both easy and hard. Consider first an easy one: To be convicted of treason based on witness testimony, how many witnesses must testify? The answer is at least two. To figure this out, one need only look it up in Article III, Section 3 of the United States Constitution.¹⁷ It’s right there in black and white. Now consider a harder question:

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

13 *Hope*, 536 U.S. at 739.

14 John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 865 (2010).

15 *Id.* (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

16 This is, in fact, the form of blame that Professor Jeffries advocates in the qualified immunity context. *See id.*

17 U.S. CONST. art. III, § 3 (“No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”).

If an intoxicated driver who has threatened to kill police officers is leading officers on a high-speed chase, and is approaching a spike strip that will likely end the chase, does an officer engage in excessive force when he, while stationed on an overpass forward of the spike strip, shoots at the driver's car engine but misses and kills the driver?¹⁸ In contrast to the treason example, constitutional text will be of no help here. The question might still have an easy answer, but it will depend on the cases establishing the right to be free from excessive force. If, for whatever reason, the Supreme Court had previously declared it *per se* excessive to shoot at a moving vehicle, the answer would be easy. The officer in our example would have violated a bright-line rule. But the law of excessive force does not contain such bright-line rules. Courts faced with excessive force questions must “analyz[e] the totality of the circumstances” to determine whether an officer acted “reasonabl[y].”¹⁹

Application of this reasonableness test produces law in that it results in precedent that can be applied to future cases. But because the holding in such a case necessarily turns on the “totality of the circumstances,” it will always be challenging to discern the specific rule established by a case. If shooting an intoxicated driver in the situation described above is unconstitutional, would it still be unconstitutional if the driver were sober? What if the driver had not previously threatened the police, or was not likely armed, or the chase had been proceeding at slower speeds? Reasonable attorneys could make arguments on both sides, which means that a case holding a particular use of force unconstitutional puts an officer on notice only when she encounters that *specific situation* in the future.²⁰ If an officer encounters a marginally different circumstance, she will lack that notice.²¹ And when she lacks notice, the argument goes, she is not at fault.

The upshot of this is that clearly established law in the field of excessive force is fairly narrow, which in turn means that qualified immunity is fairly broad. This same result will occur in any area of constitutional law that is based significantly on a standard rather than a rule. For example, a prisoner aggrieved by the lack of medical care must show that the defendant-officer knew that the prisoner had a serious medical need, yet failed to *reasonably* respond.²² A reasonable response in the field of medicine might be slightly more generalizable, but there is by no means bright-line guidance in the caselaw for officers faced with this question. Beyond excessive force and the Eighth Amendment right to medical care, numerous other constitutional

18 These facts are borrowed from *Mullenix v. Luna*, 136 S. Ct. 305, 306–08 (2015).

19 *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

20 *Saucier v. Katz*, 533 U.S. 194, 194–95 (2001) (“The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted.”).

21 See *Jeffries*, *supra* note 14, at 859–66 (addressing the interaction between the qualified immunity defense and excessive force claims).

22 See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

rights are based on open-ended standards and balancing tests.²³ This means that, in many areas of constitutional law, clearly established law and its logical companion, fault, will be small.

If clearly established law is narrow in many areas of constitutional litigation, one would assume—in keeping with the logic of qualified immunity at least—that most officers in these situations would, as a general matter, appear faultless. But fault appears far more justified in reality than it is in the caselaw. Take for example the high-speed chase example mentioned above. Those facts are based on *Mullenix v. Luna*, wherein the Supreme Court held that the officer on the bridge was immune because “existing precedent” did not “squarely govern[]” the officer’s decision to shoot at the car.²⁴ To be sure, the officer may have in fact acted unconstitutionally; but regardless, because his decision did not contravene “existing precedent,” the law does not consider him at fault.²⁵ This is plausible enough, but an additional fact not mentioned above makes the conclusion more troubling. Before firing at the car, the officer radioed his supervisor about his plan and the supervisor told the officer to “stand by” and “see if the spikes work first.”²⁶ Thus, when he shot at the car, the officer was acting in violation of a clear order. Most people would consider this a significant indication of fault, but the qualified immunity doctrine does not. The doctrine ignores the bad faith of an individual officer and confines itself only to appellate precedent.²⁷

This is one example, but it is not hard to find others. Consider the case of *Robles v. Prince George’s County*, which arose from the arrest of Nelson Robles by three police officers.²⁸ The officers initially encountered Robles while responding to a noise complaint at 3:30 a.m.²⁹ After discovering that Robles was wanted on a warrant in Montgomery County—a neighboring county—the officers arrested him.³⁰ Because the warrant originated in Montgomery County, however, the officers had to transfer Robles there, a task usually accomplished by driving the suspect to the county commissioner’s office. But it was 3:30 in the morning. The officers thus requested that police officers from the neighboring county meet them near the county

23 See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995).

24 *Mullenix v. Luna*, 136 S. Ct. 305, 309–10 (2015) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

25 *Id.* at 309. In *Mullenix*, the Court did not decide whether the officer in fact violated the Constitution. Under *Pearson v. Callahan*, 555 U.S. 223 (2009), courts may decide the issue of immunity without deciding whether a constitutional violation in fact occurred. Thus, the Court in *Mullenix* held that, even if the officer violated the Constitution, he was not blameworthy for doing so. *Mullenix*, 136 S. Ct. at 312.

26 *Mullenix*, 136 S. Ct. at 307.

27 See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) (rejecting an officer’s good or bad faith as a ground for assessing qualified immunity).

28 *Robles v. Prince George’s Cty.*, 302 F.3d 262 (4th Cir. 2002).

29 *Id.* at 267.

30 *Id.*

line to arrange a transfer.³¹ But these requests were denied because Montgomery County officers were simply too busy. So the officers took Robles to a parking lot in a deserted shopping center inside Montgomery County. They tied him to a pole using three zip ties and left a note at his feet stating that there was an outstanding warrant for his arrest in the county.³² They then called the Montgomery County Police Department and reported that there was a man tied to a pole in an empty parking lot, but did not identify themselves or reveal that they were the ones who had tied Robles to the pole.³³ About ten to fifteen minutes later, Montgomery County officers retrieved him.³⁴

Robles sued the officers but lost because, in the unanimous opinion of a Fourth Circuit panel, the officers were entitled to qualified immunity. The problem for Robles was that there was no case specifically holding that tying a person to a pole in the middle of the night in a deserted parking lot is unconstitutional.³⁵ Robles could only point to cases holding that it is unconstitutional to handcuff two persons to each other in a sitting position and leave them in a room for twelve hours, to detain a person naked in view of a person of the opposite sex, and to tie a person to a chair for an entire school day.³⁶ None of those cases, the court held, would have put the officers on notice of the wrongfulness of their conduct because those cases all “involve[d] instances where detainees were subject to physical abuse or prolonged and inhumane conditions of detention,” none of which were present in Robles’s case.³⁷

Although officers escaped liability, the Fourth Circuit was careful to point out that “[t]he officers should have known, and indeed did know, that they were acting inappropriately.”³⁸ Apparently relevant to the court in making this statement was the fact that “[t]he officers’ conduct violated police regulations as well as state law.”³⁹ Despite the fact that those authorities prohibited the officers’ conduct, those authorities did not clearly establish *federal* law. “[N]ot every instance of inappropriate behavior on the part of police,” the court explained, “rises to the level of a *federal* constitutional violation.”⁴⁰ The court then concluded: “Going forward, officers are now on notice that the type of Keystone Kop activity that degrades those subject to detention

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 271.

36 *Id.* (addressing *Putman v. Gerloff*, 639 F.2d 415 (8th Cir. 1981); *Fisher v. Wash. Metro. Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); and *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987)).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

and that lacks any conceivable law enforcement purpose implicates federal due process guarantees.”⁴¹

Robles highlights how the clearly established law test will often fail to identify officers at fault. The test is so particularized that it does not speak to “Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose.”⁴² But how is it possible that a *law enforcement officer* should be deemed faultless for acting without “any conceivable *law enforcement purpose*.”⁴³ Looking at *Robles* more closely, one can see at least two particular grounds upon which fault can be constructed.

The first is the fact that “[t]he officers’ conduct violated police regulations as well as state law.”⁴⁴ Thus, while a reasonable officer may not have been aware that such conduct violated *federal* law, a reasonable officer would certainly have been aware that the conduct was unlawful in *some* sense. The fault arising from this awareness is sufficient to trigger liability on a constitutional claim. To see why, consider the facts of *Mullenix v. Luna*, the case discussed above involving a high-speed car chase. Recall that in *Mullenix*, one possible indication of the officer’s fault was his decision to shoot at the car despite an order not to.⁴⁵ Suppose, however, that instead of saying “stand by” and “see if the spikes work first,” the commanding officer said “don’t shoot; if you hurt the driver, you will have violated clearly established constitutional law.” Suppose further that the commanding officer’s statement was incorrect—that the driver’s rights in this circumstance were *not* clearly established by the caselaw. Despite this, one could still reasonably conclude that officer is at fault and should be held liable. The officer is at fault in the same sense that a person is at fault for putting sugar in someone’s coffee under the mistaken impression that the sugar is poison. He has acted with a willingness to violate the law.⁴⁶

I am arguing here in favor of something similar to the doctrine of transferred intent in tort law,⁴⁷ something that might be called “transferred fault.” In the field of intentional torts, if a tortfeasor intends to shoot person *A*, but because of his poor aim, shoots person *B* instead, the tortfeasor is still held liable for battery—even though he technically shot *B* accidentally. The tortfeasor’s bad aim, the logic goes, does not vitiate his guilt because he intended to do wrong. In the field of constitutional torts, where an officer is mistaken as to the content of federal constitutional law, but knows and violates a state law that mirrors federal constitutional law, the officer’s mistake as

41 *Id.*

42 *Id.*

43 *Id.* (emphasis added).

44 *Id.*

45 *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015).

46 It is of no matter that putting sugar in coffee involves a mistake of fact rather than a mistake of law. Mistakes of law are even less often forgiven than mistakes of fact. *See, e.g.*, MODEL PENAL CODE § 2.04 (AM. LAW INST., Proposed Official Draft 1962) (effect of ignorance or mistake).

47 RESTATEMENT (SECOND) OF TORTS § 16 (AM. LAW INST. 1965).

to federal constitutional law ought not to vitiate her fault. She did something she knew was wrong.

Indeed, in the field of criminal law, defendants with even less knowledge are routinely convicted of crimes. As noted above, the criminal law regularly puts persons in jail even though they lack real notice. As Professor Jeffries has put the point,

[I]t is fanciful to assume that ordinary citizens have access to the statutes that define criminal offenses The “notice” given in these technical legal documents is, in most circumstances, both fictitious and superfluous. The truth is that criminals simply should know better. They learn this from the society in which they live, not from studying prior decisions.⁴⁸

If the commanding officer in our example had told the shooter “don’t shoot, it’s against the law,” (without mentioning the source of law) the shooter would be just as at fault because few of us know the specific legal source of our “common social duty”—not to mention the specific content of law. A criminal defendant cannot escape liability by arguing that she only studied federal law, not state law, and there is no principled reason that our assessment of an officer’s knowledge should differ. Thus, it is reasonable and appropriate to label an officer at fault in a federal constitutional action when her conduct violated federal constitutional law as well as clearly established state law.

A second source of notice here is the sheer objective outrageousness of the officer’s conduct. To illustrate, suppose that 100 police officers in the department had been polled before the incident in this case and asked whether, when transferring a prisoner to another jurisdiction, it was appropriate to leave the suspect in an abandoned parking lot tied to a pole. One has to imagine that somewhere close to 100% of the officers would respond “no.” As members of this community of officers, the defendants in *Robles* would have been on notice that their conduct was wrongful.

This conception of notice and fault would mirror the logic of tort law. In most areas of tort law, tortfeasors are liable for the harms they cause regardless of whether they violated clearly established tort law. Tortfeasors are deemed to be aware, by virtue of living and working within a particular community, of common practices and customs within that community. Tort law deems storekeepers aware of the prevailing standard of care among storekeepers, accountants aware of the prevailing standard of care among accountants, and so on. If such notice is sufficient for civil liability in the field of tort law, why shouldn’t it be sufficient in the world of constitutional tort law?

To be sure, it will sometimes be difficult to pinpoint the prevailing standard of care. Although nearly every officer might agree that abandoning a suspect tied to a pole is wrong, the opinion might be split more evenly when it comes to shooting at a fleeing car or tasing a disruptive teenager. Yet the

48 Jeffries, *supra* note 14, at 865 (citing John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 209–11 (1985)).

law is well equipped to address these problems—often through the use of expert testimony. A fuller discussion of how the prevailing standard of care might be analyzed is presented in Part III, but for now the point is simply that an additional way to discern an officer's fault is by considering her compliance with the standard of care that prevails among other similarly situated officers.

In sum, the qualified immunity doctrine will sometimes excuse the faulty. By focusing only on the law established in federal appellate judicial opinions, the qualified immunity doctrine ignores other factors that are probative of fault—such as a violation of state law or a breach of the prevailing standard of care. If fault matters, these factors ought to matter as well.

B. *Faulting the Faultless*

Less common than excusing the faulty, but still concerning, is the qualified immunity doctrine's capacity to leave the faultless unprotected by immunity. The problem arises in part from the same phenomenon identified above: the fact that clearly established law, and thus fault, turns on the relatively narrow and obscure world of federal appellate opinions.

As an illustration, consider the case of *Lawrence v. Reed*, a case that arose out of the seizure of abandoned vehicles in the small town of Rawlins, Wyoming.⁴⁹ Joan Lawrence owned a junkyard for cars that was, in the minds of many, unsightly.⁵⁰ The City Council thus enacted an ordinance prohibiting derelict vehicles in residentially zoned areas—which included Lawrence's junkyard.⁵¹ The ordinance authorized the sheriff to seize derelict vehicles but did not provide any procedure for determining whether a vehicle was derelict or not. After many months of back-and-forth, and Lawrence's failure to remove her vehicles, Police Chief Mike Reed readied himself to seize the vehicles.⁵² He contacted the city attorney for guidance on how to enforce the ordinance and was told to tag the vehicles for removal on one day and then remove them the next. Following the attorney's instructions, Reed tagged the vehicles and came back the next day to tow them.⁵³ When he arrived to tow them the next day, however, Reed called the city attorney again for the go-ahead, which he received. Reed towed the vehicles, after which Lawrence promptly sued him for taking her property without due process of law in violation of the Constitution.⁵⁴

Lawrence was correct in her view of the Constitution—*clearly correct* in fact. Both Reed and the city attorney failed to realize that, before seizing Lawrence's vehicles, the city was required to provide Lawrence with a hearing to determine whether the vehicles were in fact derelict.⁵⁵ But Chief of Police

49 406 F.3d 1224, 1228 (10th Cir. 2005).

50 *Id.*

51 *Id.* at 1229.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 1233.

Reed raised the defense of qualified immunity.⁵⁶ Relying on a narrow exception to the clearly established law test,⁵⁷ Reed argued that, even though Lawrence had a clearly established right to a hearing, he reasonably did not know of such a right because a statute enacted by the City Council authorized him to seize the vehicles without a hearing and two consultations with the city attorney confirmed this.⁵⁸

The Tenth Circuit held that Reed was not entitled to qualified immunity because any reasonable officer would know that the government cannot seize property without some minimum level of due process.⁵⁹ Many will sympathize with Police Chief Reed, especially the nonlawyers (as he apparently was). If a car that is illegally parked on the street can be towed without a hearing, why not a car parked in violation of a derelict vehicle ordinance? The answer is clear to most lawyers (Lawrence's cars were on private property), but it is doubtful that it would be to nonlawyers. And even if the police chief might have doubted the lawfulness of such a seizure, the ordinance told him in black and white that it was permissible to tow them, and the city attorney assured him twice of the same. Police Chief Reed, on the facts presented in the case, was not actually or constructively aware that seizing the vehicles violated Lawrence's rights. But yet the qualified immunity doctrine considers him "plainly incompetent."⁶⁰

In a sense, Reed was lucky, however. Unlike the vast majority of officers sued on qualified immunity, Reed at least had the chance to argue that he was reasonably ignorant of clearly established law. Indeed, that argument sometimes works.⁶¹ But regardless of whether it works or not, it is so rarely an option that it is barely worth mentioning. The average officer sued for a constitutional violation is simply stuck with whatever the appellate caselaw declares unconstitutional, *regardless* of whether the content of those cases had been adequately communicated to her. Although it is true that, as explained above, the zone of permissible behavior can sometimes be discerned by an officer simply by living within a community and observing its norms, not every fine point of constitutional law will be borne out in local practices. And even though some conduct is so inherently wrongful that one hardly needs notice from the community or elsewhere that it is wrong, constitutional infractions like a procedural due process violation cannot be reasonably placed in this category.⁶² Thus, the qualified immunity doctrine will expose

56 *Id.*

57 *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) ("[I]f the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.").

58 *Lawrence*, 406 F.3d at 1234–35.

59 *Id.*

60 *Malley v. Briggs*, 475 U.S. 335, 335 (1986).

61 *See, e.g.,* Amore v. Novarro, 624 F.3d 522, 531 (2d Cir. 2010) (declaring an officer immune for the unconstitutional arrest of a loiterer because no one had informed the officer "that the statute he was attempting to enforce had been held unconstitutional").

62 *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998) (arguing that, as a descriptive matter, the qualified immunity doctrine is most pro-

at least some officers to liability even though they cannot reasonably be deemed at fault.

* * *

In sum, the qualified immunity defense as it currently operates both immunizes the faulty and holds liable the faultless. These results flow from the defense's focus on a narrow body of law—federal constitutional law as described in appellate judicial opinions. By focusing on this narrow body of law, the defense overlooks the blameworthiness of officers who violate nonfederal law, and also overlooks the innocence of officers who had no way to know of the wrongfulness of their actions. With these points made, the Essay now looks to two ways in which the problem might be fixed.

II. FINDING FAULT IN STATE LAW

The preceding Part explained that the qualified immunity defense, as it currently operates, does not properly sort the faulty from the faultless. In this Part, I assess one way in which that problem might be solved. Following the observation that state law will sometimes indicate an officer's fault, this Part considers whether constitutional tort law should regard state law violations as indicative of fault. Although attractive in one sense—because it extends liability to officers that appear to be at fault—the approach nonetheless suffers from several flaws. In particular, the approach only solves part of the fault problem, ignores (and likely impinges upon) state interests, and will be difficult to administer in many instances.

A. *The Approach Explained*

Under this approach, an officer would be liable if either of two circumstances applied: (1) if she violated clearly established federal constitutional law, or (2) if she violated federal constitutional law as well as any clearly established state law that is binding on the officer. This option expands the current qualified immunity approach by offering plaintiffs another way to demonstrate the officer's fault: show that the officer violated a clearly established state law that applied to her.

B. *The Approach Analyzed*

1. A Partial Solution to the Fault Problem

The chief benefit of this approach is that it is more attentive to the blameworthiness of the defendant than the current approach. As explained in the preceding Part, an officer can be fairly faulted for her conduct if she

tective of officers when the constitutional violation alleged is not inherently wrongful); see also *Lambert v. California*, 355 U.S. 225, 229 (1957) (citing O.W. HOLMES, JR., *THE COMMON LAW* 50 (1881)) (observing that criminal behavior that is not considered blameworthy by the average member of a community may be subject to heightened notice requirements).

had actual or constructive knowledge that the conduct was unlawful, regardless of whether it was unlawful under state or federal law. It is this knowledge, combined with subsequent action, that reveals the officer's culpable mental state. That culpable state, when combined with an actual violation of federal constitutional law, should be sufficient to hold the officer liable under federal law.

Despite being an improvement over the current qualified immunity defense, this approach would still suffer from some problems. In particular, the approach still leads to false positives and at least some false negatives. A false positive—such as occurred in *Lawrence v. Reed*—will still occur under this option because involving state law in the qualified immunity analysis only serves to increase findings of fault, not to limit them. Police Chief Reed can only be helped by state law if, instead of indicating his blameworthiness, it indicated his innocence. But any such law would be unconstitutional under the Supremacy Clause.⁶³ A false negative—such as occurred in *Robles*—could still occur in situations where an officer engages in conduct that is patently unreasonable but, for whatever reason, had never been declared unlawful under state law. This drawback aside, however, looking to state law will certainly extend liability to numerous officers that are fairly considered faulty. The approach is for that reason at least an improvement on current doctrine.

2. Being Fair to the Officer

One might be concerned that this approach is unfair to the officer. In fact, this was a chief concern of the Supreme Court when it rejected state law as relevant to the qualified immunity analysis. In *Davis v. Scherer*, the Court asserted that, if liability in a federal constitutional action follows from a violation of state law, officers will not be able to “reasonably . . . anticipate when their conduct may give rise to liability for damages.”⁶⁴ The point seems to be that, even though officers must of course obey all applicable law (state law or otherwise), not all violations are necessarily enforceable through a private cause of action. Thus, officers might find themselves unexpectedly liable.

The problem with this argument is threefold. First, and most importantly, officer indemnification is nearly universal.⁶⁵ Thus, regardless of whether a cause of action exists or not, officers can *already* “reasonably . . . anticipate when their conduct may give rise to liability for damages,”⁶⁶ i.e.,

63 See generally *Howlett v. Rose*, 496 U.S. 356 (1990).

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

65 See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that, in an empirical study, “[b]etween 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases,” and “[o]fficers did not pay a dime of the over \$3.9 million awarded in punitive damages”).

66 *Scherer*, 468 U.S. at 195.

almost never. Second, even if indemnification were not nearly universal, it is doubtful that officers are able to, and do in fact, weigh their different legal obligations against each other (as well as the laws' attendant causes of action and immunities) when considering whether to take a particular action. Causes of action are esoteric legal concepts that are rarely, if ever, part of an officer's training. It is thus unlikely that officers regard their potential legal *liability* as distinct from their legal *obligations*. Third and finally, if the Supreme Court were to declare that state law would henceforth be relevant to qualified immunity, then officers would have such notice by virtue of that declaration.⁶⁷ Given these three points, the concern with fairness raised in *Davis* is unpersuasive here.

3. Mixing State Law and Federal Constitutional Law

Another concern with this approach is that it inappropriately mixes federal and state law. There is a long and well-justified tradition in the field of constitutional torts of keeping state and federal law separate, and by relying on state law to measure an officer's fault, this approach would seem to violate this tradition. As explained below, however, this approach does not seriously violate that tradition.

There are two aspects to the tradition, one that applies in cases against state officers and one that applies in cases against federal officers. In the state officer context, the tradition is most clearly stated in *Monroe v. Pape* (though earlier cases expressed the same point⁶⁸):

It is [irrelevant to the availability of a § 1983 action] that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.⁶⁹

Monroe thus reiterated the basic rule that federal constitutional rights are fully enforceable without regard to the existence or nonexistence of a state law violation. Importantly, however, *Monroe*'s chief concern was not that state *law* was too weak or biased, but rather that "state *agencies*," whether because of "prejudice, passion, neglect, intolerance or otherwise" might fail to

67 It is perhaps arguable that the quantity of state law is so voluminous that even declaring state law violations sufficient to pierce qualified immunity will not relieve officers or departments of the burden of discerning state law. But officers, of course, are obliged to obey state law already. So the question here is not really about whether officers and departments can keep track of large volumes of state law but rather whether it is unfair to hold them liable for disobeying a law they are already bound to obey. As long as officers have notice of such potential liability, fairness concerns would seem to be minimal, if nonexistent.

68 See, e.g., *Screws v. United States*, 325 U.S. 91, 108 (1945); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 294-95 (1913).

69 *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

enforce state law.⁷⁰ Indeed, when § 1983 was enacted in 1871, there was no such thing as a constitutional tort as it is known today. Suits against officers took the form of ordinary tort actions.⁷¹ Thus, what § 1983 primarily did was provide a federal *forum* for the protection of state citizens, not a body of substantive federal *rights*.

Given that the original tradition of keeping state and federal law separate in the realm of civil rights litigation is based on suspicion of state courts, not suspicion of state law, there is no concern here that using state law in the qualified immunity setting contradicts this tradition. Those who remain distrustful of state courts need not be concerned here because, even if state law is brought to bear on a federal constitutional claim, it will occur in federal court, not state court. And moreover, the federal courts are careful to police any state law interference in the enforcement of federal rights, regardless of the forum.⁷²

The second aspect of this tradition—the one that applies in the federal officer context—can be found in *Bivens v. Six Unknown Named Federal Agents*.⁷³ In *Bivens*, federal agents sued for entering a man’s apartment in violation of the Fourth Amendment argued, similar to the officers in *Monroe*, that the plaintiff’s remedy lay in a state law trespass action. The Court rejected this argument, but not because of any “prejudice, passion, neglect, [or] intolerance” that might exist in state courts. Rather, state law was an insufficient alternative because it might be “inconsistent or even hostile” to federal civil rights.⁷⁴ The particular inconsistency or hostility of state law in *Bivens* stemmed in part from the fact that the officers knocked on the plaintiff’s door, requested entry, and were granted such by the plaintiff.⁷⁵ Having been granted entry, the officers could likely escape liability under state law by arguing consent.⁷⁶ Thus, a federal cause of action was necessary because a state law action was potentially unreliable.

The Supreme Court still adheres to this core observation in *Bivens* in certain contexts, but has backed off it in other contexts, thus casting some doubt on the vitality of this tradition.⁷⁷ To the extent the tradition retains some force, however, it does not militate against using state law violations as

70 *Id.* at 180 (emphasis added).

71 See John F. Preis, *The False Promise of the Converse-1983 Action*, 87 IND. L.J. 1697, 1732 (2012).

72 See, e.g., *Haywood v. Drown*, 556 U.S. 729 (2009).

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

74 *Id.* at 394.

75 *Id.* at 389.

76 WILLIAM L. PROSSER, LAW OF TORTS § 8, at 82 (3d ed. 1964); see also *Bivens*, 403 U.S. at 394 (citing 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 1.11 (1956)) (“A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another’s house.”).

77 In later cases, the Court specifically rejected *Bivens* actions because plaintiffs were thought to have adequate remedies under state law. See *Minneci v. Pollard*, 565 U.S. 118, 125–26 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73–74 (2001).

an indication of fault in the qualified immunity context. There is no chance that state law might be “inconsistent [with] or . . . hostile to” the enforcement of federal civil rights because state law only comes into play when it is *consonant* with federal law. Unlike in *Bivens*, state law does not muddy the remedial waters and potentially leave the plaintiff without a cause of action. Instead, state law—inasmuch as it mimics federal law—operates to put remedies within reach. Thus, by definition, this objection to mixing state and federal law does not apply here.

4. The Problem of State and Local Interests

Even if this approach is fair to the officer, it might still be unfair to the state or locality that enacted the law. Indeed, the potential unfairness to state or locality is the most significant problem with this approach. To illustrate the problem, suppose that a county enacts a local ordinance prohibiting its police officers from shooting at moving vehicles. Suppose further that when enacting the ordinance, the county purposefully declined to attach a private cause of action to the ordinance and instead planned to enforce it through disciplinary proceedings against individual officers. If the Supreme Court were to declare that state law violations can be used to overcome qualified immunity, the Court would be, in effect, overruling the county’s enforcement decision. Not only would this be contrary to the traditional respect for state prerogatives, it would also contradict the Court’s standard assumptions in constitutional tort actions. In both *Bivens* and § 1983 actions, when Congress has enacted a statute that regulates conduct that is the subject of a constitutional claim, federal courts usually require the plaintiff to seek relief under the statute itself, not through a constitutional tort action.⁷⁸ If no relief is available under the statute, then the plaintiff is simply out of luck. The Court is bound to respect Congress’s enforcement choices.

The Court is not bound, of course, to respect states’ enforcement choices when it comes to federal constitutional rights.⁷⁹ But the willingness to overcome state interests only arises when there is a concern that state enforcement choices will frustrate the enforcement of constitutional rights.⁸⁰ Yet, it is hardly possible to conclude that a state’s affirmative decision to *limit* its officer’s authority to use force will stand in the way of the enforcement of constitutional rights. Just because states have not affirmatively adopted their own private enforcement regimes does not mean that federal constitutional rights are any less enforceable.

78 See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983) (holding that federal statute impliedly prohibited resort to *Bivens* action); *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (holding that federal statute implied prohibited resort to § 1983 action); see also John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1674–81 (2009) (explaining that Congress has near-plenary authority to replace a constitutional cause of action with a statutory cause of action).

79 See, e.g., *Haywood v. Drown*, 556 U.S. 729, 729 (2009); *Howlett v. Rose*, 496 U.S. 356 (1990); *Felder v. Casey*, 487 U.S. 131 (1988).

80 See *Johnson v. Fankell*, 520 U.S. 911 (1997).

5. The Problem of Purpose

Another challenge is the issue of purpose, i.e., whether the purpose of a particular state law relates to preventing the constitutional violation alleged. To see this problem, suppose that an officer uses excessive force while arresting a suspect. Suppose further that the officer was obliged to wear and activate a body camera while on duty, but for whatever reason, stopped wearing the camera an hour before the incident. Thus, when she used excessive force in violation of the Constitution, the officer was also violating the state body camera law. Must the officer forfeit her immunity? It is plausible that the county enacted the body camera law under the assumption that officers who were aware that they were being taped were less likely to engage in excessive force. If so, it is at least arguable—though tenuously so—that violating the body camera law would be grounds for forfeiting immunity. But, almost certainly, the law was not justified on excessive force grounds alone. The county could easily have believed that the camera would reduce *all* types of constitutional violations, including improper *Terry* stops or racial profiling. And the county could also have believed that, on top of these other rationales, the cameras were useful for collecting evidence and encouraging suspects not to resist arrest. Violating a body camera law is undoubtedly wrongful, but the nature of the wrong is not exactly clear.

One can see the problem here: in many cases, judges may have an extraordinarily hard time determining whether a given state law is aimed at preventing the particular constitutional violation alleged. There may certainly be cases where state law perfectly mimics federal constitutional law (state constitutional law is a good candidate), but there will be many cases where it does not. In those cases, judges will be required to determine if the purpose of a particular state law aligned with the purpose of a particular federal constitutional provision (assuming a purpose is even cognizable). This will be no easy task, and even if judges are willing to take on the burden, it seems likely that the resulting decisions will be based more on intuition than clear rules.

* * *

In sum, looking to state law as an indication of fault improves qualified immunity's overall assessment of fault, but still comes up short as a viable alternative to the current approach. Not only does it fail to fully capture the faulty, but it also impinges on states' enforcement choices and requires federal courts to sort through complicated questions about the purpose and content of state law. These problems are enough to make state law an inappropriate tool for better assessing fault in the context of a constitutional tort action.

III. LOOKING FOR FAULT IN BAD FAITH AND THE STANDARD OF CARE

As explained in Part I, the central problem with focusing on clearly established law is that the vast majority of government officers do not read, not to mention understand, appellate judicial opinions. The solution that

flows from this observation is to focus on the information that *does* inform officers' decisions. The best candidates for this approach are the department's actual practices—i.e., the behaviors that an officer is exposed to over and over again and which are therefore ingrained in her as acceptable. Although this approach will better assess the blameworthiness of the officer, it still suffers from some drawbacks. The two biggest problems with this approach are (1) that agencies will have an incentive to dilute policies and decrease training, and (2) that the tools that might be used to counteract these incentives (custom and policy actions) are not available against federal and state-wide agencies.

A. *The Approach Explained*

Under this approach, an officer would forfeit her immunity if (1) she actually knew that her conduct was unconstitutional or (2) she violated the standard of care prevailing among similarly situated officers.

1. Proving Actual Knowledge

A plaintiff could prove actual knowledge in this context in much the same way that actual knowledge is proven in any other case. *Farmer v. Brennan* is illustrative.⁸¹ There, the Court held that the liability of a correctional officer was a question of the officer's actual knowledge that the plaintiff faced a substantial risk of harm. The Court further explained that actual knowledge was "a question of fact subject to demonstration in the usual ways."⁸² Most relevant here, these included showing that the "official being sued had been exposed to information concerning the risk and thus 'must have known' about it."⁸³ It is of course *possible* that one exposed to information does not absorb and understand the information, but a factfinder is surely able to infer that one exposed to information on a regular basis had knowledge of that information.⁸⁴

Following *Farmer*, plaintiffs wishing to prove actual knowledge in constitutional tort cases would likely focus most intently on the training provided to the officer, including specific instruction on constitutional boundaries. If a department's training materials made clear that a particular act was unconstitutional, a reasonable jury will often be able to infer that the officer had actual knowledge of the act's unconstitutionality. Of course, any other information tending to show knowledge could be used as well, such as statements by the officer herself or testimony by the officer's peers.

One may reasonably wonder why, if the focus of this Essay is on *fault* and, as argued above, fault in a constitutional tort action can be inferred from state law, plaintiffs ought not be allowed to prove actual knowledge of

81 *Farmer v. Brennan*, 511 U.S. 825 (1994).

82 *Id.* at 842.

83 *Id.*

84 *See id.* (noting that the factfinder may conclude that an officer had actual knowledge through "inference from circumstantial evidence").

state law as well? The reason is because, as explained in the previous Part, using state law in a qualified immunity inquiry will not only be difficult to administer, but will also impinge on state prerogatives to choose the enforcement regimes applicable to state law. Thus, although knowledge of unconstitutionality is, on principle alone, unduly narrow in its indication of fault, it is, on a practical basis, the appropriate inquiry here.

2. Proving the Standard of Care

Proving the standard of care involves two different issues. First, one must define the relevant community of “similarly situated persons,” and second, one must adduce evidence showing the standard of care that prevails within that community.

As to the first matter, given that the aim of this approach is to better assess when an officer has fair notice that her conduct is wrongful, the relevant community ought to be one from which the officer would likely draw her sense of norms. For most officers, this will usually be the officer’s local department or agency. A correctional officer’s sense of what is permissible and impermissible in her daily activities will largely derive from the behavior of other officers at the prison. Of course, a guard’s sense of norms will rarely be entirely dependent on custom within her department. For example, she may learn how other prisons conduct strip searches by attending system-wide training exercises or a professional school. Given this, it might be arguable that the relevant community should be expanded beyond her department. There are two reasons, however, that the relevant community should not be drawn so broadly. First, and most importantly, for purely instrumental reasons having to do with custom suits under § 1983 (which will be discussed below), focusing only on the department will have salutary benefits. Second, even though this approach might inappropriately limit a plaintiff’s ability to prove a violation of the standard of care, it would not limit the plaintiff’s ability to use extradepartmental experiences to demonstrate actual knowledge. Thus, if an officer is exposed to training and other experiences outside her department, a plaintiff could make use of these events to show that the defendant-officer actually knew that a particular action was unconstitutional.

Although the relevant community will be the department for most officers, it may fall short for some officers. Consider, for instance, the chief of police in a police department. The chief is faced with the decision of whether to hire an officer who has twice been convicted of domestic abuse. It is possible that a custom might exist within a single department—such as if the police chief had addressed the issue several times before or if another officer, though not the police chief herself, had addressed the issue. The most important criterion in determining the relevant custom community would be whether the police chief’s experiences within the chosen community would have put her on notice of the norms of that community. Unlike other officers, a department head would be more likely to interact with a community of department heads on a regional and national basis. Further,

the instrumental reason for confining the relevant community to the department itself, which was important above, is not important in this context. Thus, with regard to departmental leaders, the relevant community of similarly situated persons may appropriately extend beyond the officer's own department.

Turning to the second issue—how to actually prove the standard of care once the relevant community has been defined—consider first the following illustration. An officer encounters a trespasser on public property who has wrapped his arms and legs around a stop sign.⁸⁵ The officer attempts to persuade the trespasser to leave numerous times but is met with firm, though peaceful, resistance. The officer then tases the trespasser and arrests him. The trespasser later sues for excessive force and the officer asserts the defense of qualified immunity. Assuming that the officer used an unconstitutional level of force, her liability under the standard-of-care test will turn on whether officers in her department would normally tase persons in that situation or regard tasing as a permissible option. If so, the officer is immune; if not, she is liable.

So how would the plaintiff prove that the defendant departed from the standard of care, and how would the defendant prove that she behaved according to it? The most obvious way is through interviews and depositions. The plaintiff, for example, could depose other officers in the department and ask them how they have used tasers in their line of work, whether they would have tased the trespasser in this case, and what they regard as the generally applicable taser standard (written or unwritten) in their department. The defendant could offer affidavits from other officers defending such behavior as within the standard of care. For those skeptical that officers would offer evidence in a case against one of their own, it should be remembered that such evidence would tend to *help* a fellow officer, not hurt her. Beyond this, attorneys for both sides could review and summarize use-of-force reports pertaining to taser use, as well as citizen complaints regarding taser use. Such reports and complaints would contain information illustrating departmental norms regarding taser use. A third place to look for such information would be the training materials and departmental policies regarding taser use. The training materials and policies might contain instructions on the circumstances in which to use, and not use, a taser. Of course, just because such instructions exist does not mean that they conclusively establish the standard of care. They would still have probative value, however, as community norms might be more likely to conform to stated instructions than otherwise.

Fourth and finally, the parties could rely on expert testimony. At first blush, expert testimony would seem difficult to obtain, because one would need to find an expert not on police use of force in general, but on police use of force in, for example, the Toledo Police Department. Do such experts

85 See *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 896–97 (4th Cir. 2016), *cert. denied*, *Vill. of Pinehurst v. Estate of Armstrong*, 137 S. Ct. 61 (2016).

even exist? Yes and no. While there are not likely experts that focus their expertise on a single department, there are indeed experts that focus their expertise on single field—like use of force. An expert in this field could develop an opinion about a particular department’s approach to taser use by reviewing discovery that has already been obtained—including witness statements, records of prior incidents, and formal instructions or policy.

B. *The Approach Analyzed*

1. A Better Job Assessing Fault

This approach is superior to the state-law approach in discerning fault, but still comes up short in certain respects. Focusing first on the standard-of-care option (not the actual-knowledge option), this approach is superior because it assigns fault in much the same way as the criminal law. Government officers, like members of the general public, will often lack a precise understanding of the applicable law. But yet criminal law recognizes that, by working within a community of similarly situated persons, officers will come to understand, and may be held accountable to, a “common social duty.”⁸⁶ This explains why the officers in *Robles* are fairly considered blameworthy even though an appellate case did not clearly prohibit their actions. Any reasonable officer within their department would have known that, to put it colloquially, *you just don’t do that*.

This approach also treats Sherriff Reed more fairly. Assuming that Reed acted consistently with the custom of his department by asking the county attorney (twice) for guidance on enforcing the derelict vehicle ordinance, he is properly deemed immune for his constitutional violation. One may immediately wonder how a sheriff can violate clearly established law but yet be considered faultless, but this assumes that clearly established law is accessible to and understood by a reasonable officer. Yet much of constitutional law, being contained within appellate caselaw, is hardly accessible and understandable to the average officer. Just as with criminal law, government officers “learn [right and wrong] from the society in which they live, not from studying prior decisions.”⁸⁷

Of course, government officers are not the same as ordinary citizens in an important way. Ordinary citizens are not counseled on the content of criminal law, but government officers are frequently counseled on the content of constitutional law. If the officers in a particular department had received numerous lessons explaining that a taser may not be used against persons under 100 pounds, yet persisted in doing so, it hardly seems fair to immunize the officers just because, to invoke perhaps one of the most common defenses of all time, “everyone was doing it.”

⁸⁶ See Jeffries, *supra* note 14, at 865 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)).

⁸⁷ *Id.*

This is where the actual knowledge option would arise. If an officer, for whatever reason, actually knew that her actions were unconstitutional, she would forfeit her immunity and may not hide behind the “everyone was doing it” defense. If Police Chief Reed actually knew, based on his training or other experiences, that it was unconstitutional to enforce the derelict vehicle ordinance, he could be fairly held liable—even though the city attorney thought otherwise.

In sum, this approach will hold liable an officer who actually knew her actions were unconstitutional or breached the standard of care prevailing within the department. That is, it will immunize Police Chief Reed but hold liable the officers in *Robles*. Though better than the state-law approach, this approach still falls short in that actual knowledge must be in reference to federal constitutional law. Thus, if a department maintains a standard of care that is violative of state law and federal constitutional law, but officers only know that the custom is violative of state law, they will still be entitled to immunity. This is a drawback, of course, but it is justified by the concern raised in Part II that federal immunity law not be based on state law violations. On the whole, however, this approach comes close to properly assessing fault.

2. Secondary Benefits of a Standard-of-Care Approach

Not only does focusing on the departmental standard of care better approximate the fault of an officer, it will also have secondary benefits in some cases—perhaps many cases. These benefits arise from the fact that, by placing local custom at issue, officers will be forced to testify as to how their department actually operates. This testimony, if it does not impugn the individual officer, may impugn the department instead.

To illustrate this, consider the taser example introduced above. If the plaintiff there sued the individual officer for excessive force, that officer’s immunity would depend on whether tasing the plaintiff in that situation was consistent with the departmental standard of care. The officer will attempt to present evidence that other officers in his department would have done exactly what he did, and the plaintiff will attempt to present evidence that he did not conform to the standard of care. If the officer’s colleagues testify that they would have done what she did, the officer will escape liability—but importantly, the plaintiff will not be out of luck. By testifying that the defendant-officer followed the standard of care, the officers would be providing evidence that can be used to establish a custom claim under *Monell v. Department of Social Services*.⁸⁸

Custom claims are usually difficult to win because, to get past an initial motion to dismiss, plaintiffs must normally allege a pattern of prior constitutional violations—a task made quite difficult by the fact that most violations do not give rise to lawsuits, and even when they do, the suits must be so numerous as to show that the unlawful acts were part of a department-wide

88 See generally *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

practice.⁸⁹ Without a prior pattern, custom claims never get off the ground. If qualified immunity, however, turns on the custom in the department, a custom claim that might never make it past a motion to dismiss can be initiated or revived during discovery.⁹⁰

Just because an officer's unconstitutional conduct is consistent with the custom of her department does not mean that a custom claim will certainly be actionable, however. Custom claims require not only that a custom of unconstitutional conduct exists, but also that the chief policymaker in the department have actual or constructive knowledge of the custom.⁹¹ There will undoubtedly be situations in which the chief policymaker lacks knowledge of a custom but, importantly, the lawsuit itself will put the policymaker on notice of such a custom from that point forward. The ordinary personal capacity lawsuit will focus simply on whether appellate opinions clearly addressed the precise constitutional question presented and leave completely untouched the prevailing norms in the local department. Thus, the policymaker will have significant incentive to address those customs in the future. What this means is that, although the *officer* can hide in her ignorance, the *department* cannot. Because of this, the department will have incentives to make sure that unconstitutional customs do not take hold in a department. Put differently, by giving individual officers the incentive to characterize their unconstitutional actions as reasonable within the department, this approach to immunity also gives departments the incentive to root out unconstitutional custom.

3. The Problem of Strategic Responses

Although using actual knowledge and standard of care to measure an officer's fault hold promise, it may create troubling incentives for strategically minded actors. The incentives are twofold. First, to the degree that evidence demonstrating the standard of care might give rise to a custom claim under § 1983, a policymaker in a particular department may find it advantageous to stay ignorant of the prevailing standard of care. This is because, to prevail on a custom claim, a plaintiff must not only show that the constitutional violation she suffered was the product of a custom within the department, but also show that the chief policymaker in the department had actual or constructive knowledge of the custom. To protect a department

89 See, e.g., *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007); *Russell v. Hennepin Cty.*, 420 F.3d 841, 849 (8th Cir. 2005); *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990).

90 To be sure, statute of limitations issues could impede this strategy to a degree, but with proper pleading, plaintiffs' lawyers should be able to overcome this problem in many instances.

91 See, e.g., *Cox v. City of Dallas*, 430 F.3d 734, 748–49 (5th Cir. 2005) (“The policymaker must have either actual or constructive knowledge of the alleged [unconstitutional] policy.”); *Baron v. Suffolk Cty. Sheriff's Dep't*, 402 F.3d 225, 243 (1st Cir. 2005) (holding that municipal liability can be based on a policymaker's constructive knowledge).

from custom liability, therefore, a policymaker might reasonably choose to stay ignorant.

Despite the potential that policymakers will attempt to stay ignorant, it is important to note two points. First, departmental liability usually turns not only on *actual* knowledge but actual *or constructive* knowledge.⁹² A policymaker could perhaps still create a system that would prevent an inference of her constructive knowledge, but that would presumably be at least somewhat more difficult than creating a system that deprived her of actual knowledge. Second, there is *already* an incentive to remain ignorant under the current liability regime. Thus, the problem here is one of degree; to the extent that custom claims will be more frequently litigated under this approach, this incentive will increase. It is impossible to say whether such an incentive will be problematic in actual practice, for far too many assumptions must be made at this point. What can be said, however, is that this is a potential drawback of uncertain degree.

A second problem involving strategic responses is that, inasmuch as training materials and instruction might be used to establish actual knowledge or the standard of care within a particular department (which could then be used to impose liability on an individual officer), the department might reasonably choose to offer less training materials or instruction. More concretely, if explicit instructions on taser use can be used to hold an individual officer liable, the department (which will cover the officer's liability in any event) may wish to publish fewer instructions on how to use a taser. Indeed, if instructions can become the basis for liability, why publish any instructions at all? The result of this behavior might be more constitutional violations, not fewer, which is hardly an acceptable result.

Like the previous incentive to act strategically, this one too is difficult to assess with any degree of confidence. There are reasons, however, to think that such behavior would be limited. The limit would arise from the fear of failure-to-train claims, as well as any other law requiring a particular level of training. Failure-to-train claims, it is true, are difficult to win. The chief impediment is usually the lack of an established pattern of constitutional violations that would suggest the need for training.⁹³ When such a record is lacking, plaintiffs are left to pursue a so-called "single incident" failure-to-train claim.⁹⁴ These claims are also difficult to win, but that is usually because the training in most departments is minimally sufficient for the mine run of circumstances faced by officers. Plaintiffs victimized by an unnecessary tasing, for example, usually fail in their single-incident failure-to-train claims because they must show that the agency did not train officers on the basics of tasers. But most departments do this. If departments cut back on

92 See *Cox*, 430 F.3d at 748–49; *Baron*, 402 F.3d at 243.

93 See *Connick v. Thompson*, 563 U.S. 51, 62 (2011) ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997))).

94 See *id.* at 63.

basic training to avoid establishing a standard of care that could give rise to officer liability (and thus avoid departmental costs arising from promises of indemnification to the officer), the departments would potentially be leaving themselves open to single-incident failure-to-train claims.

Another reason that departments may not cut back on training is that some degree of training is usually required by regulators and, where applicable, accreditors. Thus, just because a department might desire to limit its training programs does not mean that it possesses the power to do so. Of course, it cannot be denied that many departments *will* have the power to limit training and may find it in their financial interest to do so under this approach to qualified immunity. The only way to measure this incentive more precisely is to focus on the exact ways in which department training will shed light on the overall standard of care within a department. This Essay has not endeavored to specify the possible doctrine at that level of detail, but there is no doubt that the specific doctrinal rules will affect the significance of this problem.

Even if departments did not cut back on training for the above reasons, there would still exist a rather simple workaround that would enable departments to protect individual officers from liability but not open themselves up to failure-to-train liability. The workaround would work as follows: instead of instructing officers on the content of constitutional law (which would put them on notice of the law itself), departments could instead simply omit any mention of the federal Constitution, thus leaving officers in the dark about whether a particular action is required by the Constitution or by some other local law or departmental policy. If qualified immunity is to turn on knowledge of *unconstitutionality*, rather than just knowledge of unlawfulness, then a department desiring to limit its risk of financial loss would be wise to simply tell officers what to do and what not to do without specifying whether a particular action is required by the federal Constitution rather than some other law or departmental policy. For those that doubt such strategic behavior, there is ample evidence that departments—and the industries that advise them—will seize upon this possibility.⁹⁵

Moreover, such a strategic response might in fact be a good way to protect constitutional rights. If the goal of a training program is to train officers on what to do and what not to do, then it might very well be counterproductive to tie each requirement to a specific provision of positive or policy. If the federal Constitution, a state constitution, state law, and departmental policy all address when and how to make an arrest, why trouble the officers with whether a particular requirement is required by the state constitution as

95 See Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX L. REV. 891 (2018) (explaining the practices of “Lexipol”—a large police consulting company serving over 3000 departments—and documenting its focus on risk management); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV L. REV. 1539 (2017) (explaining how the insurers of police departments, who have a financial interest in limiting claims, encourage departments to modify policies and practices in furtherance of that goal).

opposed to the federal constitution?² Including such information will only lead to unnecessary confusion. Indeed, the Department of Justice has criticized the Baltimore City Police Department's training materials for similar problems:

[T]he rules governing officers' uses of their service weapons are contained in at least four separate policies and a "Training Guideline" on the use of deadly force, rather than a single, cohesive policy. Additionally, when the Department updates a policy, each update is written in a new and separate document. One policy can have many updates, and thus officers are expected to keep track of many different documents simply to understand a single policy. To understand all of the applicable policies governing force, officers must be aware of and synthesize dozens of documents. There is no cohesive, comprehensive guidance for officers that is digestible and workable. Having this critical guidance scattered throughout dozens of disparate documents makes it difficult to understand and operationalize what guidance the Department does provide its officers about use of force.⁹⁶

Baltimore City's example is not directly on point here, but it does illustrate how the quality of officer training falters when it is tethered too closely to the norms of legal practice—which involve copious citations, updates, pocket parts, and the like. Thus, even if a department is not narrowly focused on limiting its financial exposure, it might still reasonably omit any mention of the federal Constitution from its training materials.

In sum, it is difficult to predict at this point exactly how departments are likely to react to this change in qualified immunity. It seems likely, however, that departments will respond in at least some ways that will undercut some of the gains that would otherwise accrue from the change.

4. Dealing with the Reality of Indemnity

Another relevant issue here is the fact that departments nearly always indemnify individual officers.⁹⁷ This creates a possibility that, when a constitutional violation occurs, the department will either pay through its promise of indemnification or pay on a custom or failure-to-train claim. If the department is made to pay no matter what, this would essentially amount to strict liability, which would be a dramatic shift in the law in this area.

There are two points to address here. The first is that, as noted above, custom or failure to train claims will not inevitably follow a finding that the individual officer is entitled to qualified immunity. These claims will only succeed if the policymaker has actual or constructive knowledge of the unconstitutional policy or failure to train.⁹⁸ Thus, departmental liability may very well be more common, but it will not necessarily be strict. Second, the

96 U.S. DEP'T OF JUSTICE, INVESTIGATION OF BALTIMORE CITY POLICE DEPARTMENT 99–100 (2016), <https://www.justice.gov/crt/file/883296/download>.

97 See Schwartz, *supra* note 65, at 890.

98 See cases cited *supra* note 91.

prospect of strict liability is not unattractive to many commentators⁹⁹ and the idea has some currency among at least some Supreme Court Justices.¹⁰⁰ Thus, this possibility may be more a feature than a bug. Even if that is so, however, one has to wonder whether the feature is well designed to fulfill its purpose. Justice Breyer's complaint about the current doctrine of entity liability is apt here. In *Board of Commissioners v. Brown*, Justice Breyer complained that the doctrine of entity liability is "highly complex" and "difficult to apply"¹⁰¹ and should be replaced with vicarious liability, which in effect would create a system of strict liability.¹⁰² If Justice Breyer is correct (and few could disagree with him on the complexity of the doctrine), then it would seem that the approach here is needlessly complicated. That is, if the approach here will result in something close to strict liability, why not adopt that approach straight out, rather than allowing it to occur through the chain of events identified above? In this respect, the prospect of strict liability under this approach is a double problem. For those who oppose strict liability, this approach will be undesirable; and for those who favor strict liability because of the needless complexity of current law, this approach will be undesirable as well.

5. The Problem of Burdens on Government

Inasmuch as this approach focuses on the prevailing standard of care, this approach is likely to turn immunity issues into jury questions rather than legal questions capable of resolution early on in the lawsuit. Although immunity questions are sometimes jury questions,¹⁰³ that approach is highly disfavored—which suggests that this approach ought to be disfavored as well. The problem with this conclusion, however, is that qualified immunity as it *already operates* does not relieve government of these so-called burdens. As Professor Joanna Schwartz has demonstrated empirically, qualified immunity plays at most a minor role in ensuring that insignificant suits against governments are quickly dismissed.¹⁰⁴ Thus, even if burdens on the government were an

99 See, e.g., Harold S. Lewis, Jr., & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 762 (1992).

100 Justice Breyer has not advocated strict liability per se, but he has advocated that liability for custom and policy be replaced with a law of vicarious liability, which is in practice identical to strict liability. See *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting).

101 *Id.* at 430–31.

102 See *id.* at 437.

103 See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (“[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation.” (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); *ACLU of Md., Inc. v. Wicomico Cty.*, 999 F.2d 780, 784 (4th Cir. 1993) (“Where . . . the defendant’s entitlement to immunity turns on a factual dispute, that dispute is resolved by the jury at trial.”).

104 See Schwartz, *supra* note 6, at 10 (finding that “just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds”).

appropriate concern, this approach does no worse than the current approach.

6. The Problem of Partial Applicability

One significant drawback of this approach is that, to the extent that it relies on custom and failure-to-train claims against government entities, these claims are not universally actionable. In particular, custom and failure-to-train claims cannot be brought against federal departments or agencies,¹⁰⁵ as well as a department or agency that is part of statewide government.¹⁰⁶ Counties and municipalities may still be sued on these claims, but entities such as the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Ohio State Highway Patrol, or the Florida Department of Health will all be effectively out of reach on such claims.

This is a potentially significant problem, but its size depends on the degree to which custom and failure-to-train claims are necessary components of making this approach workable. With regard to custom claims, they are undoubtedly of some value here because, without them, officers will tend to affirm the defendant-officer's actions as typical of the department—thus protecting the officer from liability without shifting it to the department itself. There may of course be nonlegal but still significant consequences to such testimony (because it would essentially reveal a problem within the department), but if those consequences are not sufficient to induce truthful testimony, one option would be to change the relevant community from the department to *all* the officers working under similar conditions. Thus, if a plaintiff is unable to show that an officer with the Ohio State Highway Patrol acted contrary to the standard of care prevailing within the department because officers are reluctant to testify truthfully or directly, a plaintiff could resort to experts with knowledge of the standard of care generally on such matters. It is unclear at this early stage whether this approach should be modified in light of this concern, but it is obviously a factor to consider.

When it comes to the value of failure to train claims, these too are of uncertain value to the overall approach. The benefit of these claims, it will be recalled, is that if departments reduce their reliance on training because training can be used to establish the standard of care, a plaintiff could potentially bring a failure-to-train claim against the department. The potential for this claim, therefore, should encourage departments to maintain appropriate training programs. As noted above, however, a department's potential response to this new approach is at this point simply conjectural. Would departments actually reduce training programs? Perhaps not—especially given that some types of training are required by regulatory agencies. But perhaps so. The answer lies in a closer analysis of the regulatory requirements that are applicable to state-wide and federal departments—something that is beyond the scope of this Essay.

105 See generally *FDIC v. Meyer*, 510 U.S. 471 (1994).

106 See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

CONCLUSION

The goal of this Essay has been to explore the role of fault in qualified immunity doctrine, both as it currently exists and as it might exist if the doctrine were reformed. As it currently operates, the doctrine does not reliably differentiate between the faulty and the faultless. Although reforms can significantly improve upon this, the reforms are not without their own problems. Looking to state law for an indication of fault is unwise because it would infringe upon states' reasonable claims to control the enforcement of state law. Looking instead to an officer's bad faith and the prevailing standard of care has problems as well. In particular, the most significant problem is that it may result in something close to strict liability for local governments—though that conclusion is admittedly tentative at this point.

Perhaps it is not surprising that liability in constitutional tort actions cannot be made to perfectly track the fault of the officer. As noted at the outset of this Essay, many doctrines that define an individual's liability are based on a mixture of instrumental and moral concerns. There is nothing wrong with such a mixture in most instances and this Essay was not an effort to prove otherwise. What this Essay shows, if anything, is that as one begins to recalibrate qualified immunity doctrine to better address moral concerns (like fault), instrumental concerns inevitably crop up and must be accommodated. These instrumental concerns push back against the moral concerns, which in the end will inevitably limit the doctrine's ability to accurately assess fault.

