

ABOMINABLE ACTS

Jacob Heller*

ABSTRACT

A troubling pattern has emerged in a number of recent cases: officials whose conduct is truly abhorrent have been found immune from suit under qualified immunity. The doctrine of qualified immunity, which is meant to shield officials from suit when they are not on notice that their conduct is unlawful, has been stretched to protect officers that strip-search 13-year-old students, handcuff and abandon pretrial detainees in abandoned parking lots, and knowingly incarcerate innocent people. These cases represent a fracture in qualified immunity doctrine: the “clearly established” standard¹ no longer serves the policy goals that underlie the doctrine. And matters will only get worse under *Pearson v. Callahan*, an opinion rendered this Term.²

This Article argues for a new way of evaluating such conduct and applies a new framework to settle a circuit split on qualified immunity. Using new research on moral intuitionism and universal moral grammar, it argues that officers, when committing truly terrible acts, can be presumed to know that what they are doing is wrong and could subject them to suit. Moreover, judges are capable of consistently identifying such acts as truly abominable, despite the fact that the exercise is subjective. The Article argues for a radical departure from the “clearly established” standard, arguing instead that in some rare circumstances where officers commit “abominable acts,” qualified immunity should be waived. Not only will such an exception produce more just outcomes, it will also better serve the goals of the doctrine.

INTRODUCTION

Consider the following cases:

(1) Thomas Snider, John Ponder, Tommy Diltz, and Benny Gilcrest, security officers at a community college, were repeatedly sexually harassed by Chief of Security William Shelnut, who would grab their buttocks,

* J.D. Candidate, Stanford Law School, 2010; B.A., Pitzer College, 2007. I would like to thank Janet Alexander and Pamela Karlan for their help and guidance throughout the writing process, and Miki Litmanovitz, without whose support, advice, and editing this Article would not have been possible.

1. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (articulating the “clearly established” standard).

2. *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

pinch their inner thighs, and make crude and inappropriate jokes, like that they “owed him a blow job” so that they could keep their jobs.³

(2) After a robbery, police officers arrested Christopher Pitt, an innocent man, and incarcerated him for ten days—“despite overwhelming evidence of his innocence,” including one of the victims exclaiming that she got a “good look” at the robber and was “‘certain’ [Pitt] was not the person who had robbed them.”⁴ The arresting officers chose to conceal this and other evidence of innocence from the prosecuting attorney.⁵

(3) To play a prank on the neighboring police department, officers handcuffed Nelson Robles, who had been apprehended for an outstanding traffic warrant, to a pole in the middle of a deserted parking lot at 3:30 a.m. and abandoned him.⁶

(4) A police officer, egged-on by fellow officers, went on a 12-hour drinking binge, resulting in him running over and killing three pedestrians, one of whom was eight months pregnant.⁷

(5) Noelle Way was arrested on the incorrect suspicion that she was high. Though she had committed no crime (a hospital blood test revealed she was not under the influence) and was only being held as a pre-booking detainee, she was subject to a humiliating “visual inspection of [her] unclothed body cavities,” including forcing her to “remove her tampon,” “bend forward, spread [her] buttocks, and cough to allow for visual inspection of the anal area,” and to “spread her labia at the same time to allow a check of the vaginal area.”⁸

(6) A school official subjected a 13-year-old girl to a search of her bra and underpants for prescription-strength ibuprofen and over-the-counter naproxen, both common pain relievers.⁹

These cases have three things in common. First, they all entail government officials violating the Constitution.¹⁰ Second, they all involve

3. Brief of Plaintiffs-Appellants at 5–6, *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325 (11th Cir. 2003) (No. 02-12471-A).

4. *Pitt v. Dist. of Columbia*, 491 F.3d 494, 498–99 (D.C. Cir. 2007).

5. *Id.* (noting that the officer’s affidavit mentioned neither Mr. Pitt’s alibi nor the negative identifications).

6. *Robles v. Prince George’s County*, 302 F.3d 262, 267 (4th Cir. 2002).

7. *Pena v. Deprisco*, 432 F.3d 98, 103 (2d Cir. 2005).

8. *Way v. County of Ventura*, 445 F.3d 1157, 1158–59 (9th Cir. 2006); *id.* at 1160 (noting that “[t]he scope of the intrusion here is indisputably a ‘frightening and humiliating’ invasion) (quoting *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984)); *see also Savard v. Rhode Island*, 338 F.3d 23, 26–27 (1st Cir. 2003) (describing class action against state prison officials for conducting intrusive body cavity searches of detainees without any particularized suspicion and without regard to the severity of the crime alleged).

9. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2637–38 (2009).

10. In every case, the appellate courts held that the conduct was unconstitutional. *See Safford*, 129 S. Ct. at 2644; *Pitt*, 491 F.3d at 511; *Way*, 445 F.3d at 1163; *Pena*, 432 F.3d at 115; *Snider v.*

deeply unsettling conduct.¹¹ Third, and most disturbingly, none of these abominable acts were ever considered by a jury; the officers responsible were never held accountable for their indiscretions, and the victims and families were never compensated for their physical and emotional loss. These suits were all halted by qualified immunity.

That our laws permit such abhorrent behavior is a major cause for concern. The failure to enforce the Constitution against egregious lawbreakers has as its “initial casualties” the victims’ “liberty, privacy, and physical well-being,” but “[u]ltimately, such injuries threaten the vitality of a system of ordered liberty.”¹² “Sanction[ing] brutal conduct . . . afford[s] brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.”¹³

This Article discusses dozens of cases where courts find truly abominable conduct protected by qualified immunity. Surprisingly, despite the shocking quantity and severity of these cases, they have yet to be discussed or examined in the literature on qualified immunity. These cases represent strong evidence that the “clearly established” standard the Court has established for qualified immunity no longer serves the doctrine’s policy goals, at least in rare instances of outrageous behavior. The Article proposes a change in the doctrine, termed the “abominable acts” exception: where officers’ conduct is so far beyond the pale that its wrongfulness is readily apparent, the officers should be presumed on “notice” that their conduct could make them liable to suit, and qualified immunity therefore should be denied. This exception will help further the goals of the qualified immunity doctrine and ensure that officials are held accountable for egregious wrongdoings.

Government officials can be sued for deprivations of rights established by federal law or the Constitution.¹⁴ Qualified immunity protects officials, in certain circumstances, from “the costs associated with the defense of

Jefferson State Cmty. Coll., 344 F.3d at 1329 (11th Cir. 2003); *Robles*, 302 F.3d at 270.

11. Indeed, in most cases, the courts admitted as much. See *Pitt*, 491 F.3d at 498 (“The events giving rise to this case are troubling.”); *Way*, 445 F.3d at 1160 (“The scope of the intrusion here is indisputably a frightening and humiliating invasion.”) (quotations omitted); *Pena*, 432 F.3d at 114 (concluding that the “behavior of the . . . defendants here, over an extended period of time and in the face of action that presented obvious risk of severe consequences and extreme danger, falls within the realm of behavior that ‘can properly be characterized as . . . conscience shocking’”) (quoting *Collins v. City of Harker*, 503 U.S. 115, 128 (1992)).

12. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 447 (1978).

13. *Rochin v. California*, 342 U.S. 165, 173–74 (1951).

14. 42 U.S.C. § 1983 (2006); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

damage actions.”¹⁵ The defense prevents “the diversion of official energy from pressing public issues”¹⁶ and preserves an official’s “willingness to execute his office with the decisiveness and the judgment required by the public good.”¹⁷ It also ensures that able candidates for government office are not deterred from entering public service by the threat of constant litigation.¹⁸ Immunity is therefore immensely important; it serves not only to assist government agents in decision-making, but also the larger purpose of “safeguard[ing] government” itself.¹⁹ All but very few public servants serve the public dutifully and honorably; as a society, we need them to make tough decisions without the fear of lawsuit constantly hanging over their heads.

This immunity is *qualified*, however, because of the injustice absolute immunity would work on people who are deprived of federal or constitutional rights by official misconduct. The doctrine of qualified immunity therefore tries to strike a balance between the concerns of subjecting officers to suit and the need to provide redress and compensation for those deprived of rights.²⁰

The Court struck that balance in *Harlow v. Fitzgerald*.²¹ The test the *Harlow* Court fashioned protects officers from suit unless an officer could reasonably know that his or her conduct is “clearly established” as unlawful.²² Somewhat uniquely, neither the existence of qualified immunity nor the “clearly established” test devised in *Harlow* to implement it has “any support in the common law.”²³ Rather, both were explicitly fashioned by the Court as a matter of public policy.²⁴

The “clearly established” test balances the goals of the *Harlow* Court

15. Crawford-El v. Britton, 523 U.S. 574, 590 (1998) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). The Court continues to note “[t]hat interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated.” *Id.*

16. *Harlow*, 457 U.S. at 814.

17. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Judge Learned Hand observed that to deny such immunity would “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

18. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

19. *Id.* at 168; *see also Scheuer*, 416 U.S. at 242 (noting that immunity “aid[s] in the effective functioning of government”) (quoting *Barr v. Matteo*, 360 U.S. 564, 572–73 (1959)).

20. *See Harlow*, 457 U.S. at 814. “In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. It is this recognition that has required the denial of absolute immunity to most public officers.” *Id.* (citation omitted).

21. *Id.*

22. *Id.* at 818.

23. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 546 (5th ed. 2007) (“Interestingly, although the Court generally emphasizes a historical approach to immunities questions, neither the existence of qualified immunity nor the legal test devised by the Court has any support in the common law.”).

24. *Id.*

well, at least in theory. The number of suits that can be brought against officials is properly conscribed to cases where officials are truly violating the law, thereby reducing the litigation burden on government officials. Moreover, officers are not deterred from taking resolute action, except in those cases where it is abundantly clear their action is unlawful. The key concept here is “notice.”²⁵ As long as an officer is put on notice that certain conduct is unlawful before she takes action, she will know to avoid such unlawful conduct. And as long as the officer can *only* be liable for acts that are clearly unlawful, she can act with resoluteness in all areas of conduct, except those that are explicitly forbidden.

While the “clearly established” test is sound in theory, it has proven disastrous in implementation. A growing number of cases, examined for the first time in this Article, protect truly abhorrent government conduct (of the sort highlighted at the start of this Article) under the banner of qualified immunity. The quantity and severity of these cases should give us pause about the wisdom of the “clearly established” standard and an opportunity to rethink it.

This Article provides that rethinking. While the “clearly established” standard functions as it should in most cases, under certain circumstances the test leads courts astray. This Article makes the intuitive case that when an officer’s conduct is truly abhorrent—sexual harassment, strip-searching 13-year-old girls, handcuffing and abandoning innocent men in a parking lot at 3:00 a.m.—the officer is presumed to be on “notice” about the illegality of his conduct and should therefore not be protected by qualified immunity. Interestingly, roughly half of the circuits have adopted this view, and the Court has recently nodded in its direction. This Article terms this concept as the “abominable acts” exception to qualified immunity.

While the exception is intuitive, defending it turns out to be a rather complex enterprise. Two difficult challenges present themselves. First, the line between “abominable”—meaning an officer is presumed to know that his conduct is unlawful—and conduct that is objectionable but nevertheless a reasonable mistake in the law, is a difficult one to draw and is necessarily subjective. At base, it asks *both officers and judges* to “know” abominable acts “when [they] see it”²⁶—and for both to “see it” the same way. That is,

25. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“[Q]ualified immunity operates ‘to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful.’”) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

26. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could

both officers in committing abominable acts and judges in evaluating them must be able to identify abominable acts as such for the exception to work. Otherwise, officers will be over-deterred from acting out their (lawful) public functions with resoluteness, fearing that judges will arbitrarily find their conduct subjectively “abominable.” The academy has already debated at length whether judges can, and whether it is desirable for judges to, “know it when they see it.”²⁷ However, this Article does not recapitulate that debate. It instead uses new research from the biological and social sciences on moral intuitions to make the case that, in the specific case of abhorrent conduct, judges and officers alike will have surprisingly similar judgments about what conduct is truly abominable. Our shared moral intuitions pervade class, race, and nationality and can serve as an adequate basis to provide notice to officials and a consistent basis for judges to reach conclusions about the conduct they are evaluating.

The second challenge is doctrinal. The exception necessarily conflates abominable with unconstitutional acts. Qualified immunity is only waived for violations of the Constitution, however, not simply for any wrongdoing. While many wrongful acts—even very objectionable conduct—are probably prohibited by some (likely state) law, the Constitution is not a “font of tort law to be superimposed upon whatever systems may already be administered by the States.”²⁸ It is incorrect to say that all abominable acts will trigger constitutional liability. One may argue, however, that officers’ moral intuitions will not provide them with the right *legal* and *constitutional* notice.

This contention is wrongheaded, however. In order for qualified immunity to be waived under the doctrine as it currently stands, an officer’s conduct must (1) violate a constitutional right, and (2) that right must be “clearly established.”²⁹ This Article advocates amending the second criterion to read that the “right must be clearly established *or* the act was so abominable that, regardless of the state of the law, its wrongfulness was apparent.” The exception leaves untouched the first criterion. Hence, suits will continue to be halted by qualified immunity for actions based on constitutional wrongs. Officers will continue to be shielded if they commit merely wrongful, but not unconstitutional conduct.

More fundamentally, however, this Article argues that providing

never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. (footnotes omitted). See generally Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023 (1996) (providing a thoughtful analysis and defense of “I know it when I see it”).

27. See, e.g., Gewirtz, *supra* note 26.

28. Paul v. Davis, 424 U.S. 693, 701 (1976).

29. Pearson v. Callahan, 129 S. Ct. 808, 815–16 (2009) (citing *Saucier*, 533 U.S. at 201).

officers with legal or constitutional notice is of little use. Officers do not pause in the course of conduct to ponder whether their behavior violates the Constitution and can therefore subject them to federal liability rather than some state tort. Officers, like most people, make decisions based on their conceptions of right and wrong, buttressed perhaps by a rough sense of the law. The doctrine of qualified immunity is policy-based and founded on the realities of official conduct. There is no use pretending that legal or constitutional notice inherently serves *Harlow's* "balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."³⁰ Instead, that balance is better struck with an abominable acts exception that draws notice from both the law and our shared perceptions of morality, which is a more accurate measure of what "notice" officers are likely to have and act upon.

The remainder of this Article proceeds as follows. Part I briefly introduces qualified immunity law and then explores a shockingly large set of cases where qualified immunity shielded abominable official conduct. Part II introduces the "abominable acts" exception to qualified immunity law. Part III deals with the challenge that this exception would necessarily be subjectively applied. In so doing, it draws on an emerging body of literature on "moral intuitions" and "universal moral grammar" that increasingly shows that all people share common perceptions of morality. That these perceptions are widely shared means that, although judges and officers will be applying the test subjectively, they will do so in a consistent, predictable manner. Part IV responds to the challenge that such notice is extralegal and extra-constitutional. The Article concludes with some observations of how this approach can be used in other contexts.

I. THE ABOMINABLE ACTS PROBLEM

In many cases, constitutional torts are the only way to vindicate constitutional rights, deter unconstitutional behavior, and obtain redress for victims of unconstitutional conduct.³¹ By far the most substantial bar to

30. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). "[T]he need to hold public officials accountable when they exercise power irresponsibly" is another important goal served by making immunity *qualified* not mentioned in *Wyatt*, but worthy of mention here. *Pearson*, 129 S. Ct. at 815.

31. See *Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J. concurring) ("For people in *Bivens'* [sic] shoes, it is damages or nothing."); see also Newman, *supra* note 12, at 451. "The private suit for civil damages can both compensate and deter. In the battle to restrain official

constitutional torts is qualified immunity. Tens of thousands of constitutional tort cases are determined by qualified immunity every year;³² it is “undoubtedly the most significant bar to constitutional tort actions.”³³ The standards that courts choose to determine qualified immunity cases can therefore be of immense consequence to thousands of litigants every year.

In a growing number of cases, the standard that some circuits have applied has produced grotesque outcomes: plaintiffs injured by some of the most outrageous conduct are barred from going forward with their suits by qualified immunity.

This Part first provides a brief primer on qualified immunity law. It then examines representative cases where courts have protected defendants on qualified immunity grounds, even where it was obvious to the officials in question that their actions were wrongful. Next, it explains that a recently decided case will greatly exacerbate the problem. This Part concludes by explaining the challenge that cases of abominable conduct pose to qualified immunity law.

A. The Court’s Qualified Immunity Cases

1. The Clearly Established Law Standard

Modern qualified immunity analysis begins with *Harlow v. Fitzgerald*.³⁴ In *Harlow*, the Court departed from its opinions in *Scheuer v. Rhodes*³⁵ and *Wood v. Strickland*,³⁶ which allowed qualified immunity to be waived if the officer acted either objectively unreasonably or subjectively in bad faith.³⁷ *Harlow* replaced the *Scheuer* and *Wood* tests with one that asks instead whether the constitutional law the officer broke was clearly established: “government officials . . . are shielded from liability for civil

misconduct, it is our most promising weapon . . .” *Id.*

32. Jason P. Rubin, Comment, *A Constitutional Education: Use of the Enforcement Clause to Limit the Unfortunate Effect of the Qualified Immunity Doctrine*, 6 U. PA. J. CONST. L. 163, 180, 180 n.118 (2003).

33. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 80 (1999).

34. *Harlow*, 457 U.S. 800.

35. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

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

37. *Id.* at 321–22 (holding a school board member not immune if “he knew or reasonably should have known that the action . . . would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . .”); *Scheuer*, 416 U.S. at 247–48 (“It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers . . .”).

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁸ The *Harlow* test is the origin of “[t]he current contours of the qualified immunity doctrine”³⁹

The Court has since tried to explain the *Harlow* test—specifically, what it means for a law to be clearly established so that an officer is put on notice that his actions are unlawful. In *Anderson v. Creighton*, the Court, concerned that plaintiffs could convert any abstract right into a basis for suit,⁴⁰ explained that in order for a right to be clearly established “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.”⁴¹ That is, only if the *specific* conduct was already held impermissible could an officer be held accountable for violating the Constitution. This standard has been upheld in subsequent decisions.⁴²

Some of the Court’s later decisions, however, seemed to loosen the *Anderson* standard. In *United States v. Lanier*, the Court explained that:

[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though “the very action in question has [not] previously been held unlawful.”⁴³

Similarly, the Court articulated what appeared to be a looser standard in *Hope v. Pelzer*.⁴⁴ Larry Hope, an inmate in an Alabama prison, had twice been handcuffed to a “hitching post” (a pole that held his arms above his head)—once for seven hours, shirtless, without bathroom breaks, and only

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

39. Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 452 (2000).

40. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (“Plaintiffs 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.”).

41. *Id.* at 640.

42. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam); *Saucier v. Katz*, 533 U.S. 194, 202, 206 (2001), *abrogated on other grounds by* *Pearson v. Callahan*, 129 S. Ct. 808 (2009); *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

43. *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quoting *Anderson*, 483 U.S. at 640) (citation omitted). Interestingly, *Lanier* was a criminal action under 18 U.S.C. § 242, which applies by analogy to qualified immunity in the civil context. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (applying the same logic as *Lanier* in an Eighth Amendment case).

44. *Hope*, 536 U.S. 730.

receiving water once or twice.⁴⁵ The Eleventh Circuit found that the use of the hitching post violated the Eighth Amendment's prohibition against cruel and unusual punishment, but nevertheless held that Hope had no legal recourse because there were no "materially similar" cases clearly establishing that such actions were wrong.⁴⁶ The Court responded that the Eleventh Circuit's "rigid gloss on the qualified immunity standard . . . is not consistent with our cases."⁴⁷ Instead, the proper inquiry should focus on whether the law at the time of the act gave fair warning that an officer's conduct was unlawful.⁴⁸ Citing *Lanier*, the Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."⁴⁹ The inquiry is still conducted, however, with an eye towards the case law.⁵⁰ Therefore, there must be some case law that clearly makes the act unconstitutional, even if the factual circumstances are somewhat changed.

In the brief per curiam opinion of *Brosseau v. Haugen*, the Court reasserted *Anderson*.⁵¹ "If the law at the time did not clearly establish that the officer's conduct would violate the Constitution," the Court explained, "the officer should not be subject to liability or, indeed, even the burdens of litigation."⁵² The Court found that the right at issue needed to be established in a more "particularized" sense.⁵³ The Court then ran through all the relevant case law presented by either party⁵⁴ and concluded that none of the cases "squarely governs the case here" and therefore "by no means 'clearly establish' that [defendant's] conduct violated" a constitutional right.⁵⁵ Hence, the Court was back to *Anderson*. The "obvious tension" between *Hope* and *Brosseau* has not gone unnoticed.⁵⁶

45. *Id.* at 733–35.

46. *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001) (quoting *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269–270 (11th Cir. 1996) (per curiam)).

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

48. *Id.* at 741.

49. *Id.*

50. *See id.* at 739 (finding qualified immunity inapplicable if, "in the light of pre-existing law the unlawfulness must be apparent") (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see, e.g., Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004) (emphasizing that the inquiry is still in light of existing law, even after *Hope*).

51. *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (per curiam).

52. *Id.* at 198.

53. *Id.* at 199 (quoting *Anderson*, 483 U.S. at 640).

54. *Id.* at 200–01.

55. *Id.* at 201.

56. CHEMERINSKY, *supra* note 23, at 555; *see also Brosseau*, 543 U.S. at 205 (Stevens, J., dissenting) (arguing that the Court, through *Lanier* and *Hope*, has "firmly rejected" the *Anderson* rule and that the Court's "search for relevant case law applying" the standard at issue "is both unnecessary and ill advised").

It seems that this is where the Court has stayed. In *Pearson v. Callahan*, the Court cited *Anderson* for the proposition that an officer is entitled to qualified immunity unless “clearly established law” shows that her actions violated the Constitution.⁵⁷ The Court explained that the inquiry “turns on the ‘objective legal reasonableness of the action, assessed in light of the *legal rules* that were clearly established at the time it was taken.’”⁵⁸

In *Safford Unified School District v. Redding*, the Court found that a school official was protected by qualified immunity after stripping a teenage girl down to her bra and panties—all to search for prescription strength ibuprofen.⁵⁹ The Court started with a statement that acknowledged the extremity of the situation: “[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional” because, as Judge Posner has observed, “[t]he easiest cases don’t even arise.”⁶⁰ However, if ever there was a good case for considering certain conduct outrageous, and therefore “obviously . . . unconstitutional,” it was here.⁶¹ The en banc panel of the Ninth Circuit below put it best: “It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity.”⁶² Despite the obviousness of the matter, the Court found that the school official was protected by qualified immunity. Qualified immunity applied because “[a] number of judges” read the relevant case law in accordance with the en banc minority of the Ninth Circuit and so a reasonable officer could be confused as to the state of the law.⁶³ Therefore, the relevant inquiry is still whether the act was clearly established as unlawful, not as wrong.

2. The Policy Rationale: Over-deterrence

Qualified immunity is somewhat unique in that it is an entirely judge-made standard—there was little support for its existence in common law

57. *Pearson v. Callahan*, 129 S. Ct. 808, 822 (2009) (citing *Anderson*, 483 U.S. at 641).

58. *Id.* (emphasis added) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)). Interestingly, the Court only cited *Hope* for the proposition that “qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

59. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2637–38 (2009).

60. *Id.* at 2643 (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)) (second alteration in original).

61. *Id.*

62. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1088 (9th Cir. 2008) (en banc) (quoting *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1999)), *rev’d*, 129 S. Ct. 2633 (2009).

63. *Safford*, 129 S. Ct. at 2643.

before it was fashioned,⁶⁴ and it has no basis in statute.⁶⁵ The policy goals that underlie qualified immunity are therefore quite important, and if they are proven in some sense wrong or incomplete the standard should be altered.

The test was formulated to balance competing interests in holding officers liable for suit.⁶⁶ On one hand, the Court understood that damages are sometimes the “only realistic avenue for vindication of constitutional guarantees.”⁶⁷ On the other hand, it is unfair to hold an officer liable for conduct she thinks is lawful. Such suits also impose social costs—most importantly the threat that officials will not execute their duties unflinchingly.⁶⁸ The *Harlow* rationales appear to be the ones still asserted today.⁶⁹

This fear of over-deterrence is well-founded. For example, we do not want a society without false arrests because if police officers are overly cautious, many criminals would roam the streets.⁷⁰ That is, there is an

64. See CHEMERINSKY, *supra* note 23, at 546 (“Interestingly, although the Court generally emphasizes a historical approach to immunities questions, neither the existence of qualified immunity nor the legal test devised by the Court has any support in the common law.”).

65. In fact, 42 U.S.C. § 1983 (2006) contains no exceptions for the right to sue.

66. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (explaining that qualified immunity is the “best attainable accommodation of competing values”).

67. *Id.*

68. *Id.* The Court listed other costs, including the monetary costs of litigation, diversion of attention from public duty, and deterring qualified citizens from accepting public office. *Id.* But these costs do not seem ill fitting for the “clearly established” test:

Insofar as the aim is to avoid or quickly defeat insubstantial lawsuits, dismissal of all actions founded on new law is a crude tool at best. On the one hand, excluding all claims based on new law will defeat some lawsuits that are not frivolous at all. If the Court were worried only about dismissing legally frivolous actions, it could have forbidden discovery until a court had ruled on the legal sufficiency of the plaintiff’s claim to relief. Sometimes suits founded on new law might survive the test, sometimes not, but the solution would be tailored more precisely to the problem.

On the other hand, the *Harlow* Court, in targeting actions based on new law, conspicuously failed to pursue other possible strategies for promoting the early dismissal of frivolous lawsuits. The Court might, for example, have required more detailed pleading and supporting affidavits in constitutional tort actions in order for a complaint to survive a motion to dismiss.

Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1820–21 (1991) (footnotes omitted). The over-deterrence cost seems the only cost most directly related to the rule the Court actually adopted. *Id.* at 1821.

69. *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”).

70. This logic is explained more fully by Jonathan M. Freiman:

In the arrest context, for instance, few would seek a world in which there are no false arrests. In such a world, officers would so rarely arrest that many wrongdoers would roam the streets at will. . . . The optimal level of arrests, then, partly determines the optimal level of false arrests, and vice versa. . . .

optimal quantity of mistakes that we want our officers making⁷¹ because the absence of mistake indicates that they are not fully fulfilling their duties. The optimal quantity of mistakes is a balance of the individual costs of the mistake relative to the societal costs of avoiding the mistake.

The logic behind the clearly established law standard is that it helps set the optimal level of mistakes. Officers are presumed to know and implement the law to the best of their abilities. The law puts them on notice that certain conduct will be unlawful. We allow officers to act with impunity where the law does not put them on notice so that officers can act with some assurance that their actions will not result in a lawsuit over some as-yet undiscovered constitutional right. That way, the Court avoids the problem of over-deterrence by allowing officers to act everywhere they are not explicitly told is unlawful.

3. The Problem of Under-deterrence and Under-redress

There is a substantial issue, however, of under-deterrence under current law. Just because conduct has not been clearly established as unlawful does not mean that society cannot be harmed by it. The quantity of acts we may wish to proscribe is potentially unlimited and as varied as the people and situations that give rise to them. There is good reason to believe that the body of clearly established law is too circumscribed and consequently will not deter all abhorrent conduct that we want to proscribe:

Because of the common-law, case-by-case method through which constitutional standards develop . . . and the high level of specificity at which the clearly-established-law inquiry is conducted, most fact-intensive constitutional claims can reasonably be characterized as new. A nonfrivolous defense based on the merits of a constitutional issue will generally suffice to support immunity. As a result, qualified immunity has proved to be a virtually insurmountable hurdle to [constitutional tort] actions.⁷²

[O]verdeterrence would occur when police officers decide to make fewer arrests than society as a whole would choose.

Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitutions*, 34 IDAHO L. REV. 61, 64 (1998) (citation omitted).

71. *Id.* (“The notion of overdeterrence assumes an optimal level of accidents.”) (citation omitted).

72. Pillard, *supra* note 33, at 80; *id.* at 82 (criticizing the *Anderson* approach for “barr[ing] constitutional challenges even to egregious conduct that would otherwise seem quite clearly unconstitutional”).

This problem will be exacerbated by a recent ruling. In *Pearson v. Callahan* the Court ruled that judges no longer need to determine if certain conduct violated the Constitution before investigating whether the constitutional right was clearly established,⁷³ abrogating the two-step process laid out in *Saucier v. Katz*.⁷⁴ Now a court only needs to find that the law was not clearly established to dismiss a suit on qualified immunity grounds—leaving no explication of whether the Constitution was indeed violated to guide *later* cases as clearly established law. The result may be that the current limited group of constitutional wrongs will be the only ones of a potentially unlimited set to be clearly established enough to overcome qualified immunity. The irony is that the worst acts are the most likely to have no precedent delineating them as unlawful because their egregiousness makes them rare—and therefore unprecedented.⁷⁵

The challenge, then, is to find a standard that allows us to deter bad acts, even though they have not been specifically delineated as unlawful, while not over-detering officials.

B. Clearly Established Law and Abominable Acts in the Circuits

The circuits have had difficulty applying the broad mandates of the *Harlow* clearly established standard, especially with the challenge of balancing the over- and under-deterrence concerns. The clearly established law requirement is pushed to the limits of logic when courts face unconstitutional acts that have no precedent clearly establishing them as unlawful but where it is painfully obvious that the lawbreaking officer knew her conduct was wrong. This subpart catalogs many such instances.

In these cases, courts take one of two courses: uphold qualified immunity even where the act is patently egregious or to provide an exception to qualified immunity where the conduct in question is both egregious and unconstitutional. This subpart will critically analyze the decisions on both sides of the split. Importantly, all of the decisions discussed below were decided after *Hope*, indicating that although the Court has arguably departed from the *Anderson* requirement that there be a case on point to constitute “clearly established” law, some lower courts still find officers not requisitely “on notice” that their acts were wrongful—even while committing abominable acts.

73. *Pearson*, 129 S. Ct. at 818 (explaining that the *Saucier* rule is no longer mandatory).

74. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated by Pearson*, 129 S. Ct. 808 (2009).

75. *See, e.g.*, *Northen v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997) (holding that officers are not shielded by qualified immunity after arresting someone on “preposterous charges” simply because no court had yet declared such charges to be preposterous).

1. Upholding Qualified Immunity for Egregious Acts

Many circuits have faced situations where an official's conduct was egregious and unconstitutional. Yet these circuits applied the Court's qualified immunity cases and found time and again that extreme behavior, despite its obvious egregiousness, did not put the rights-violator on "notice" that she might be subject to lawsuit.

These circuits have ruled this way in two circumstances: (1) where they faced novel and unusual factual situations and (2) where they encountered novel legal theories of relief. What is interesting about these cases is that, even while shielding officers from suit under qualified immunity, the court often notes that the conduct was reprehensible. That is, while some opinions had a majority of judges agreeing to uphold qualified immunity, they also had a majority of judges agreeing that the core conduct was wrong.

i. Novel Factual Situations

Hope admonished courts to waive qualified immunity in novel factual situations that still constituted a clear violation of the Constitution.⁷⁶ Still, some courts require that the asserted right, in order to be "clearly established," be tethered to *some* previous case law or legal pronouncement.⁷⁷ Thus, when presented with unique situations of egregious conduct, they have applied qualified immunity.

The Fourth Circuit's opinion in *Robles v. Prince George's County* is emblematic of this approach.⁷⁸ Officers of the Prince George's County Police Department apprehended Nelson Robles, who had an outstanding traffic warrant from Montgomery County.⁷⁹ Irked that Montgomery County's police department would not arrange a timely informal prisoner exchange for Robles, they decided to play a prank instead of going through

76. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

77. *E.g.*, *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004).

[Petitioner] has not brought to our attention, and our independent research does not reveal, case law involving the particular circumstances presented by this case. The [clearly established analysis] operates at a high level of specificity. It is insufficient that the broad principle underlying a right is well-established. . . . [I]t has not been clearly established that such race-based differentiation is unconstitutional in the context of a prison-wide lockdown instituted in response to gang-or race-based violence. Defendants are therefore entitled to qualified immunity.

Id. at 977–78.

78. *Robles v. Prince George's County*, 302 F.3d 262, 267 (4th Cir. 2002); *see also* *Robles v. Prince George's County*, 308 F.3d 437 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing en banc).

79. *Robles*, 302 F.3d at 267.

the normal procedures.⁸⁰ The absurdity of what happened next was summed up well by Judge Luttig in his dissent from denial of rehearing en banc:

[A]t three o'clock in the morning, these sworn officers handcuffed [Robles] to a metal pole, in the middle of a deserted shopping center, and left him there [Robles] remained handcuffed to the shopping center pole for some time even after Montgomery County officers arrived at what they understood to be a crime scene, because of an inability to sever the handcuffs by which [Robles] was restrained. . . . [T]he officers "clearly appreciated the wrongfulness of their actions" and "freely admitted that their motive was unrelated to any legitimate law enforcement function."⁸¹

The Fourth Circuit held that handcuffing Robles to a pole in the middle of the night in a deserted parking lot and abandoning him violated his constitutional right to due process.⁸² Nevertheless, the panel concluded that the officers were shielded by qualified immunity.⁸³ The court acknowledged that "[t]he officers should have known, *and indeed did know*, that they were acting inappropriately" and referred to their conduct as "Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose"⁸⁴ But before this conduct can open officers to suit, the court explained "that 'in the light of pre-existing law the unlawfulness must be apparent.'"⁸⁵ Because Robles was unable to cite a case on point,⁸⁶ the law was not clearly established and qualified immunity applied.

Judge Luttig argued that a decided case is unnecessary "in order for officers to be on fair notice that conduct like that by the officers here is violative of the Constitution."⁸⁷ Judge Luttig further explained that "[t]he sheer danger, not even to mention the constitutional irresponsibility, of such conduct is manifest as a simple matter of common sense"⁸⁸ Judge Wilkinson, who authored the panel opinion and concurred in the denial of a

80. *Id.*

81. *Robles*, 308 F.3d at 441–42 (Luttig, J., dissenting from denial of rehearing en banc) (quoting *Robles*, 302 F.3d at 273).

82. *Robles*, 302 F.3d at 270.

83. *Id.* at 271.

84. *Id.* (emphasis added).

85. *Id.* at 270 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

86. *Id.* at 271 ("The cases cited by plaintiff on this point are inapposite.")

87. *Robles*, 308 F.3d at 445 (Luttig, J., dissenting from denial of rehearing en banc).

88. *Id.*; *see also id.* at 443 ("[S]o clear do I believe it to be that conduct like that at issue here is prohibited by the Constitution, that I would think it an affront to law enforcement officers to be told that they would *not* reasonably know that such conduct was violative of a detainee's rights.")

rehearing en banc, rejoined that “‘I know it when I see it’ is not a substitute for qualified immunity analysis.”⁸⁹ To him (and the Fourth Circuit), the crux of the qualified immunity analysis is not whether the officers knew what they were doing was *wrong* and could potentially make them liable for suit; what truly matters is whether they knew that their actions were *unconstitutional*.⁹⁰ Wilkinson’s defense of this principle is impassioned: “To equate knowledge of wrongfulness in a generic sense with knowledge of unconstitutionality in a specific sense is not consistent with the rule of law. The latter requires notice, something to which even the worst criminal wrongdoer is entitled.”⁹¹ The *Robles* opinion still has following in the Fourth Circuit today.⁹²

The Eleventh Circuit’s recent ruling in *Buckley v. Haddock* presents a similar situation.⁹³ In *Buckley*, a police officer pulled over Jesse Buckley, a homeless and destitute man who was unhappy about getting a ticket and began to sob.⁹⁴ Buckley refused to sign the ticket, and he willingly and peacefully submitted to being handcuffed.⁹⁵ After leaving the car, however, Buckley collapsed on the ground, sat cross-legged, continued to sob, did not respond to the officer’s repeated admonitions to walk to the patrol car, and remained limp when the officer tried to move him.⁹⁶ The officer then threatened to taser Buckley.⁹⁷

Uniquely, the events that followed were captured on video, which is available for viewing online.⁹⁸ These events were well-summarized by

89. *Id.* at 440 (Wilkinson, C.J., concurring in the denial of rehearing en banc).

90. *Id.* at 438.

[T]he fact that the officers “clearly appreciated the wrongfulness of their actions” does not mean that they understood their actions to be a violation of the federal Constitution. . . . [S]pecific enunciation of the principles of constitutional liability is required. . . . [C]onduct must violate clearly established *constitutional* rights. . . . [T]he contours of those rights must be clear.

Id. (citations omitted).

91. *Id.* We will return to this argument, a serious challenge to the abominable acts exception to qualified immunity, in Part III.C.1.ii.

92. See, e.g., *Polcyn v. Martin*, No. Civ.A. 6:03-2327-HFF, 2005 WL 2654259, at *8 (D.S.C. Oct. 17, 2005) (“[D]ecisions of the [Fourth Circuit] Court of Appeals indicate that courts should be hesitant to impose liability in the absence of a right clearly established in caselaw *even when the conduct of the state is egregious or offensive.*”) (emphasis added) (citing *Robles*, 308 F.3d at 438 (Wilkinson, J., concurring in denial of rehearing en banc)); *Robles v. Prince George’s County*, 302 F.3d 262, 267 (4th Cir. 2002).

93. *Buckley v. Haddock*, 292 F. App’x 791 (11th Cir. 2008).

94. *Id.* at 792.

95. *Id.*

96. *Id.*

97. *Id.*

98. The video can be accessed at YouTube.com, *Buckley v. Rackard* (TASER video) <http://www.youtube.com/watch?v=vsTcYYdr6Ao> (last visited Nov. 16, 2009).

District Judge Martin, who happened to be sitting on the panel by designation, in her dissent:

As the taser was applied that first time, Mr. Buckley cried out and fell forward from his seated position, with his chest on the ground, his knees bent and his legs folded underneath him. Mr. Buckley squirmed on the ground in response to the taser, but Deputy Rackard followed Mr. Buckley's movement, attempting to maintain the taser gun's contact with Mr. Buckley's back. When Deputy Rackard lost contact with Mr. Buckley's body, he immediately replaced the taser on him. . . .

Upon completion of the first discharge, Mr. Buckley laid flat with his chest and face on the ground and his hands still cuffed behind his back, crying. Three seconds passed, and Deputy Rackard ordered Mr. Buckley to stand up, threatening again to shoot him with the taser gun. Though Mr. Buckley had been responsive and defiant before, he did not respond to Deputy Rackard's second warning.

Deputy Rackard again discharged the taser into Mr. Buckley's back, just twenty seconds after he had completed his first five-second discharge. This second tase also lasted five seconds. In response to the taser, Mr. Buckley flipped over onto his back, causing the taser gun to lose contact with his body. Deputy Rackard quickly re-pinned it onto Mr. Buckley's chest, and in response, Mr. Buckley jerked forward. As with the first tase, Deputy Rackard followed Mr. Buckley's movements in attempt to continue the contact between the taser and Mr. Buckley's body. . . .

[A]pproximately thirty seconds later [Deputy Rackard] again ordered Mr. Buckley to stand up. Mr. Buckley sat cross-legged, leaning forward and still crying. He offered no response to Deputy Rackard. After again attempting to lift Mr. Buckley, Deputy Rackard pressed the taser gun against Buckley's back, warned Buckley, and discharged it a third time.

The final discharge caused Mr. Buckley again to lurch forward onto his side. As Deputy Rackard had before, he followed the movement of Mr. Buckley's body with the taser gun. He lost contact with Mr. Buckley's body at least four times, and each time re-pinned the taser against Mr. Buckley onto different areas of Mr. Buckley's chest and back.

After the final discharge, Deputy Rackard left Mr. Buckley for the third time and returned to his police car. He announced over the radio that the "subject's in custody; not wanting—refusing to come to the car." . . . Less than three minutes later—

and five minutes from the time Deputy Rackard first tased Mr. Buckley—a second officer arrived on the scene. The two officers easily lifted Mr. Buckley off the ground and escorted him away.⁹⁹

Buckley later described the pain as “tremendous” and “intense;” the tasing left 16 burn scars, “which evidence the level of pain he experienced.”¹⁰⁰

Buckley brought an excessive force action in federal court.¹⁰¹ A majority of the judges on the panel found the tasing unconstitutional,¹⁰² as did the district court judge.¹⁰³ Yet the majority held that because there was no “earlier case” that is not “fairly distinguishable from the circumstances facing a government official,” the officer was protected by qualified immunity.¹⁰⁴

Judge Martin instead argued that even if there were no cases on point, the officer should have known that repeated use of violence against a non-violent offender is unconstitutional:

In light of the repeated and continuous nature of the force used against Mr. Buckley, the substantial pain and bodily injury that resulted, and the absence of any arguable justification, I have no difficulty in concluding that no particularized preexisting case law was necessary for it to be clearly established that Deputy Rackard’s conduct was unconstitutional. Deputy Rackard’s use of force was so grossly disproportionate to the need for force that no reasonable officer would have believed such conduct was legal.¹⁰⁵

As in *Robles*, the court’s inability to find a case on point precluded it from finding the officer to be “on notice” that his acts were wrongful, even though common-sense would readily provide that answer. That the acts arose in novel factual circumstances—in *Robles* because the act was so far from the ordinary, in *Buckley* because the technology involved was new—should not prevent a court from finding that the officers had “notice” that their conduct was wrongful. That result is obvious: we know it when we see it.

99. *Buckley*, 292 F. App’x at 800–01 (Martin, J., dissenting).

100. *Id.* at 804.

101. *Id.* at 793.

102. *Id.* at 799 (Dubina, J., concurring); *id.* at 805 (Martin, J., dissenting).

103. *Buckley v. Haddock*, No. 5:06cv53-RS, 2007 WL 710169, at *1 (N.D. Fla. Mar. 6, 2007).

104. *Buckley*, 292 F. App’x at 797 (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1352 (11th Cir. 2002); *see also id.* (“Neither Plaintiff nor the district court has cited case-law establishing that Deputy Rackard’s use of the taser was clearly unlawful.”)).

105. *Id.* at 805–06 (Martin, J., dissenting).

ii. Novel Legal Arguments

More commonly, courts have upheld qualified immunity where the officer acted egregiously but the theory of relief had not yet been established. In *McClendon v. City of Columbia*, the Fifth Circuit held in an en banc opinion that a police officer who supplied his informant with a pistol, despite knowing that the informant was a gang member with a history of drug abuse who was about to confront a drug dealer, was not on notice that he could be liable for suit when the informant consequently shot Peter McClendon in the face and permanently blinded him.¹⁰⁶ The dissents were livid. “[O]nly the most naive Pollyanna,” wrote Judge Wiener, would not know the result of handing the informant a gun “would be anything other than physical and violent.”¹⁰⁷ Judge Parker agreed:

There are certain things any police officer should know will violate the Constitution even if no reported case exists which finds the action in question unlawful. . . . [A]ny officer with enough sense to be entrusted with a gun knows that giving a gun to a gang member with a history of drug involvement who is anticipating a confrontation with a drug dealer is creating a dangerous situation. Thus, a reasonable officer would recognize that this type of action could result in a violation of [plaintiff’s] constitutional rights.¹⁰⁸

The majority, however, scoured through case law for opinions that were “in agreement as to the specific nature of” the right in question.¹⁰⁹ Unable to find a case that applied to a “factual context similar to that of the instant case,” the opinion found that the law was not sufficiently “clearly established” to warrant a lawsuit against the officer.¹¹⁰

McClendon has since been used to uphold similarly shocking opinions. In one, Texas A&M’s annual “Bonfire” tradition (overseen and administered by state school officials), which included constructing an

106. *McClendon v. City of Columbia*, 305 F.3d 314, 319–20 (5th Cir. 2002) (en banc).

107. *Id.* at 342 (Wiener, J., concurring in Judge Parker’s dissent and further dissenting from the en banc opinion). Judge Parker noted:

What would a reasonable person think would happen if a police officer . . . takes a pistol from the evidence locker . . . and gives it to a gang member with a history of drug involvement who needs it for a confrontation with a drug dealer? Any reasonable person would conclude that the state created or enhanced a dangerous situation when the officer gave the pistol to the gang member.

Id. at 333–34 (Parker, J., dissenting).

108. *Id.* at 341–42 (Parker, J., dissenting).

109. *Id.* at 331.

110. *Id.* at 332–33.

eight-foot tall, two-million-pound stack of wood loosely held together with wire, tragically collapsed, killing 12 students and injuring 27 more.¹¹¹ Despite the obvious danger that this towering inferno presented to those involved, the Fifth Circuit was unable to find a case on point about the “state-created danger theory” within the circuit and therefore barred the suit from going forward on qualified immunity grounds.¹¹²

In *Roe v. Texas Department of Protective & Regulatory Services*, the Fifth Circuit confronted a social worker who, without training or reasonable grounds to do so, body-cavity searched and photographed Jackie, a six-year-old girl, as part of a sexual harassment investigation.¹¹³ The court concluded that while the search “did violate Jackie’s Fourth Amendment rights,” those rights “were not clearly established” at the time of the incident.¹¹⁴ Because it had never addressed “whether the traditional test or the ‘special needs’ doctrine applies to a social worker’s visual searches of naked juveniles,” the court concluded that it would be “difficult to argue that” cavity-searching Jackie was a clearly established constitutional violation when the circuit had “not opined on the issue in question” and when other circuits disagreed about the correct legal standard.¹¹⁵

Other circuits have similar opinions. The D.C. Circuit held that police officers who apprehended and incarcerated an innocent man for ten days—despite clear and convincing knowledge of his innocence and despite withholding that knowledge from prosecutors—were immune from suit.¹¹⁶

The Third Circuit, in *Hubbard v. Taylor*, confronted the practice of triple-bunking pre-trial detainees, which required inmates to sleep on the floor next to a toilet.¹¹⁷ The practice resulted in, among other things, “urine and feces regularly splashing on whomever is relegated to the floor mattress” as well as serious injuries—including a broken leg and an infected shin—and disease from the constant exposure to human waste.¹¹⁸ The inhumanity of the practice is exacerbated by the fact that “the conditions apply to *pre-trial* detainees who have *not been convicted*, some of whom are imprisoned because they cannot afford bail” and that “at least

111. *Breen v. Texas A&M Univ.*, 213 F. Supp. 2d 766, 769–71 (S.D. Tex. 2002), *rev’d*, 343 F.3d 533 (5th Cir. 2003).

112. *Breen v. Texas A&M Univ.*, 485 F.3d 325, 339–40 (5th Cir. 2007), *opinion withdrawn in part on rehearing*, 494 F.3d 516 (5th Cir. 2007).

113. *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 398–99 (5th Cir. 2002).

114. *Id.* at 403.

115. *Id.* at 409–10.

116. *Pitt v. Dist. of Columbia*, 491 F.3d 494, 512 (D.C. Cir. 2007).

117. *Hubbard v. Taylor*, 538 F.3d 229, 234 (3d Cir. 2008).

118. *Id.* at 239 (Sloviter, J., dissenting in part and concurring in judgment) (quoting *Hubbard v. Taylor*, 399 F.3d 150, 154–55 (3d Cir. 2005)).

some of the detainees are subject to these horrific conditions . . . for as long as two to seven months.”¹¹⁹ The dissenting opinion concluded that the practice was conscience-shocking.¹²⁰ The majority, however, ruled that the responsible officers were not liable because of the lack of any circuit or Supreme Court cases making the specific conduct unlawful.¹²¹

The First Circuit held immune from suit officers enforcing a Rhode Island policy of body-cavity searching every pre-trial detainee, even non-violent, non-drug offenders who they had no reason to believe were smuggling contraband or weapons.¹²² One plaintiff was a father who loaned his car to his son who received, but never paid, a traffic ticket. Six years later the father was picked up on the misdemeanor charge, taken to the Rhode Island prison, and cavity searched twice.¹²³ The court held, however, after a dig through the case law, that they could not find another case that is “a very exact match”¹²⁴ to provide the requisite notice that the policy was unconstitutional, and hence the responsible officials were not liable to suit.¹²⁵ The case has since been upheld by courts in the First Circuit¹²⁶ whose policy is apparently that “an inquiring court must look back in time and conduct the juridical equivalent of an archaeological dig”¹²⁷ to find whether a law is clearly established.

In *Snider v. Jefferson State Community College*, the Eleventh Circuit considered a case where the Chief of Security repeatedly sexually harassed

119. *Id.* (emphasis added).

120. *Id.*

121. *Id.* at 236–38.

122. *Savard v. Rhode Island*, 338 F.3d 23, 25, 33–34 (1st Cir. 2003) (equally divided en banc) (Bowes, J., dissenting).

123. *Id.* at 34 (Bowes, J., dissenting).

124. *Id.* at 30 (majority opinion).

125. *See id.* at 42 (Bowes, J., dissenting). “[B]y implying that previous cases must be ‘a very exact match’ before they can give fair warning for purposes of the qualified immunity analysis, our brethren have tipped the balance away from the Constitution. They have gone far toward granting absolute immunity under the cloak of qualified immunity.” *Id.*

126. *See, e.g., Doe v. Preston*, 472 F. Supp. 2d 16, 26 (D. Mass. 2007) (citing *Savard*, 338 F.3d at 28, 30).

127. *Bergeron v. Cabral*, 560 F.3d 1, 11 (1st Cir. 2009) (quoting *Savard*, 338 F.3d at 28).

The court should search the relevant authorities In order to show that a principle is clearly established in the pertinent sense, a plaintiff ordinarily must identify “cases of controlling authority . . . at the time of the incident . . . [or] a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”

Id. (alteration in original); *see also id.* at 12 (holding that even though *Hope* applies, “[i]n the last analysis, a plaintiff may satisfy the [“clearly established”] prong of the qualified immunity inquiry by showing that the relevant legal principles were both specific enough and sufficiently well-established that the unlawfulness of the defendant’s conduct ought to have been apparent”); *Whalen v. Mass. Trial Court*, 397 F.3d 19, 30 (1st Cir. 2005) (Stahl, J., dissenting) (arguing that the circuit approach inappropriately requires a “search through our precedent for a perfect factual match”).

his male security guard employees.¹²⁸ He persistently grabbed their buttocks, pinched their inner thighs, and made crude and inappropriate jokes, like that they “owed him a blow job” to keep their jobs.¹²⁹ The harassment was persistent and lasted over 15 years.¹³⁰ Though a “male supervisor sexually harassing male employees engages in contemptible conduct,” and though the Eleventh Circuit held that such conduct was unconstitutional, the case establishing that same-sex sexual harassment was unconstitutional came after the harassment in the *Snider* case.¹³¹ “Because the preexisting case law available to” the sexually harassing supervisor “did not make apparent that the Equal Protection Clause protected against same-sex sexual harassment,” he was entitled to qualified immunity.¹³²

Interestingly, the Second Circuit seems to be somewhat conflicted over this question. The appeals court has straightforwardly held that egregious and conscience-shocking behavior does not imply that the officer was on “notice” that the behavior was unconstitutional.¹³³ In one case, a police officer—a known alcoholic—was encouraged by his peers to go on a 12-hour drinking binge and then to drive home across New York City with explicit assurances from his fellow officers that he would not get into trouble for doing so.¹³⁴ After speeding through a few red lights, the officer ran over three pedestrians, one of whom was eight months pregnant, killing them all.¹³⁵ Because no case law clearly delineated the actions of the inviting officers as unlawful, the suit was halted on qualified immunity grounds.¹³⁶

District courts in the Second Circuit, on the other hand, have begun to hold with some consistency that acts so egregious as to put any reasonable officer on notice that they are wrongful is enough to waive qualified immunity.¹³⁷

128. *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325 (11th Cir. 2003).

129. Brief of Plaintiffs-Appellants, *supra* note 3, at 5–6.

130. *Snider*, 344 F.3d at 1327.

131. *Id.* at 1330.

132. *Id.*

133. *See Pena v. Deprisco*, 432 F.3d 98, 114–15 (2d Cir. 2005); *see also Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (requiring a closely matching precedent before action can be “clearly established”).

134. *Pena*, 432 F.3d at 103–04.

135. *Id.* at 103.

136. *Id.* at 115.

137. *Baker v. Gerould*, 598 F. Supp. 2d 357, 366 (W.D.N.Y. 2009); *see also Olesen v. Morgan*, No. 1:06-CV-959 (FJS/DRH), 2008 WL 5157459, at *6 (N.D.N.Y. Dec. 8, 2008); *Deal v. Seneca County*, No. 07-CV-6497, 2008 WL 2020004, at *7 (W.D.N.Y. May 8, 2008).

2. Denying Qualified Immunity for Egregious Acts

In cases where an official's unconstitutional conduct is so egregious it is beyond doubt that he was aware (or should have been aware) that his actions would subject him to suit, some appellate courts have held that qualified immunity does not apply.

In *Smith v. City of Chicago*, the Seventh Circuit explained that there were two ways to "dissolve" qualified immunity: by pointing to an analogous case that clearly established the right or "when the conduct is so egregious that no reasonable person could have believed that it would not violate clearly established rights."¹³⁸ A clear application of the *Smith* standard can be found in *Steidl v. Fermon*.¹³⁹ In that case, Gordon Steidl spent over 17 years in jail for a double homicide he maintained he never committed.¹⁴⁰ The suit alleged that Illinois state police officers withheld evidence from Steidl, and there was some credence to that theory because a district court released Steidl after finding that a jury would likely acquit him had it been presented with all the evidence.¹⁴¹ The court held that Steidl successfully alleged facts that establish the officers violated the Constitution and then turned to the issue of whether Steidl's right was clearly established.¹⁴² The court searched for case law that was "directly analogous to the alleged misconduct" in the case but found none.¹⁴³ While this might have ended the analysis in other circuits,¹⁴⁴ the Seventh Circuit

138. *Smith v. City of Chicago*, 242 F.3d 737, 742 (7th Cir. 2001); *see also* *Northen v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997) (Posner, C.J.).

But the police cannot obtain immunity for liability for false arrests by arresting people on preposterous charges and then pointing to the absence of any judicial decision that declares the statutory interpretation underlying the charges to be preposterous. Their interpretation must be reasonable in light of existing law. The fact that a statute has not been construed does not mean that there is no law, that anything goes. There is always the statute itself, and if its meaning is clear without benefit of judicial interpretation the officials enforcing it cannot reasonably go against it. The clearest violations may never generate an appeal, just because there is no nonfrivolous ground for an appeal; and without an appeal there will be no authoritative judicial interpretation of the statute. It would be a considerable paradox to say that public officers have a license to commit statutory violations so outlandish that they have never been the subject of a published appellate decision.

Id. (citations omitted).

139. *Steidl v. Fermon*, 494 F.3d 623 (7th Cir. 2007).

140. *Id.* at 625.

141. *Id.*

142. *Id.* at 632.

143. *Id.*

144. *Compare id. with Pitt v. Dist. of Columbia*, 491 F.3d 494, 512 (D.C. Cir. 2007) (stating that because freedom from malicious persecution was not clearly established as a constitutional right at the time of the *Pitt* trial, the defendant officers were entitled to qualified immunity), *and Robles v.*

decided that it then needed to “decide whether the alleged actions were ‘so egregious’ that no reasonable person could have believed that they were permissible.”¹⁴⁵ Sensibly, the court held that the officers had “ample notice that the knowing suppression of exculpatory material . . . violated the defendant’s constitutional rights.”¹⁴⁶

The Eleventh Circuit has also recently indicated that it will follow the Seventh Circuit’s approach. The Eleventh Circuit allows a right to be clearly established in three ways: (1) “case law with indistinguishable facts clearly establishing the constitutional right,” (2) “a broad statement of principle . . . that clearly establishes a constitutional right,” or, importantly for our purposes, (3) if conduct is “so egregious that a constitutional right was clearly violated, even in the total absence of case law.”¹⁴⁷

The Sixth and Ninth Circuits have announced principles bringing them in line with these circuits, although it is unclear whether their recent pronouncements will take hold as precedent setting. These circuits faced the same issue and decided in the same way.

In Overton County, the School Board approved the installation of video surveillance cameras throughout Livingston Middle School—including in the boys’ and girls’ locker rooms, videotaping areas in which the students normally changed.¹⁴⁸ Students from the school sued, and the School Board asserted that qualified immunity prevented the suit from proceeding.¹⁴⁹ The Sixth Circuit concluded that the students’ Fourth Amendment rights were violated¹⁵⁰ and then turned to whether the right not to be videotaped while changing was clearly established. Though the court was able to find case law supporting that the right was clearly established,¹⁵¹ it held that the law

Prince George’s County, 302 F.3d 262, 271 (4th Cir. 2002).

145. *Steidl*, 494 F.3d at 632 (quoting *Smith v. City of Chicago*, 242 F.3d 737, 742 (7th Cir. 2001)).

146. *Id.*

147. *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009) (citing *Long v. Slayton*, 508 F.3d 576, 584 (11th Cir. 2007)); *see also Mercado v. City of Orlando*, 407 F.3d 1152, 1158–59 (11th Cir. 2005) (finding that plaintiff “could show that this case fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary” to overcome qualified immunity challenge); *Thomas v. Roberts*, 232 F.3d 950, 955–56 (11th Cir. 2003) (defining exception as “a narrow one, applying only when the conduct in question is so egregious that the government actor must be aware that he is acting illegally” and holding that unconstitutional strip search of students to not be “so egregious that the unconstitutionality of it would be readily apparent to Defendants absent clarifying caselaw”) (citing *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)).

148. *Brannum ex rel v. Overton County Sch. Bd.*, 516 F.3d 489, 492 (6th Cir. 2008). Oddly enough, the camera feeds were accessible over the Internet with a proper password and login information. The web-feed was accessed 98 times, including by computers located hundreds of miles away from the school. *Id.*

149. *Id.*

150. *Id.* at 498.

151. *Id.* at 499 (finding that “the cases we have discussed . . . would lead a reasonable school

was clearly established because *anybody* should have known the videotaping was wrong:

Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. . . . [M]ore specifically, *a person of ordinary common sense*, to say nothing of professional school administrators, would know *without need for specific instruction from a federal court*, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room. These notions of personal privacy are “clearly established” in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment’s proscription against unreasonable searches.¹⁵²

The holding came after a string of cases in the Sixth Circuit that, unlike the Seventh and Eleventh Circuits, held that specific case law is necessary to clearly establish conduct as unconstitutional.¹⁵³ Whether the ruling in *Brannum* will be applied in the future is therefore an open question.

An en banc panel of the Ninth Circuit similarly held in *Redding v. Safford Unified School District* that school officials who strip-searched a middle school girl looking for prescription-strength ibuprofen violated the student’s Fourth Amendment rights.¹⁵⁴ Though the court found “no case presenting identical facts,” it held that common sense was enough to establish clearly that the student’s rights had been violated.¹⁵⁵ Whether the

administrator to conclude that the students’ constitutionally protected privacy right not to be surreptitiously videotaped while changing their clothes is judicially clearly established”).

152. *Id.* (emphasis added).

153. *See, e.g.,* *Lanman v. Hinson*, 529 F.3d 673, 688 (6th Cir. 2008) (noting that conduct’s unlawfulness “can be apparent from direct holdings, from specific examples described as prohibited, or from general reasoning that a court employs”) (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)); *Revis v. Meldrum*, 489 F.3d 273, 285 (6th Cir. 2007); *Sample v. Bailey*, 409 F.3d 689, 698 (6th Cir. 2005) (quoting *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993)).

154. *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1087 (9th Cir. 2008) (en banc), *overruled by* *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

155. *Id.* at 1088. “It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity.” *Id.* (quoting *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1999)).

Ninth Circuit's analysis will carry forward is an open question as the Court overturned *Safford* on qualified immunity grounds.¹⁵⁶

The approaches adopted by the Eighth and Tenth Circuits are similar to those of the Sixth, Seventh, Ninth, and Eleventh Circuits, with some minor modifications. The Eighth Circuit has held that when officers engage in conscience-shocking or egregious conduct, they are by definition acting outside the scope of their official duties and therefore are not entitled to qualified immunity.¹⁵⁷ The Tenth Circuit, on the other hand, uses a sliding-scale approach: the more egregious the conduct, the less specificity from prior case law is required to show conduct violated clearly established law.¹⁵⁸ Hence, in a case where an innocent man was imprisoned after a lab technician fabricated inculpatory evidence,¹⁵⁹ the Tenth Circuit concluded that no official could "have labored under any misapprehension that the knowing or reckless falsification and omission of evidence" was reasonable and denied qualified immunity.¹⁶⁰

C. Abominable Acts and the Policy Goals of Harlow

When courts use qualified immunity to protect officials who commit abominable acts the balance struck in *Harlow* is completely undermined. Immunizing these officers from suit (obviously) does not serve the goals of redressing the plaintiff's harm or holding officers accountable for lawbreaking conduct. But it also does not serve to reassure future officials that they can act resolutely in carrying out their duties.

After all, the officers' conduct in all of these cases is nothing close to what an officer would contemplate in the normal execution of her job duties. It is shallow comfort for officers in the Fourth Circuit to know that if they chain a man to a post and abandon him there in the middle of the night after *Robles*, they would not be immune from suit; or for officers in the Second Circuit to know that if they encourage a fellow officer to drink and drive after *Pena*, that they would have to spend a day in court. The message

156. *Safford*, 129 S. Ct. at 2638, 2644.

157. *Hawkins v. Holloway*, 316 F.3d 777, 788 (8th Cir. 2003) (noting that a sheriff's threat of deadly force "was so far beyond the bounds of the performance of his official duties that the rationale underlying qualified immunity is inapplicable"); see also *Moran v. Clarke*, 359 F.3d 1058, 1060-61 (8th Cir. 2004) (applying the *Hawkins* standard to police conduct where officers manufactured evidence to scapegoat another officer, possibly on account of his race).

158. *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); see also *Meyer v. Bd. of County Comm'rs of Harper County*, 482 F.3d 1232, 1240 (10th Cir. 2007) (applying the *Pierce* standard to find a district court's grant of summary judgment to be in error where officer's falsified statements to commit a detainee to a mental institution).

159. *Pierce*, 359 F.3d at 1282-83.

160. *Id.* at 1299.

sent to officials is, at best, that courts are willing to overprotect officers, even in the most extreme cases; and at worst, that officers are above the rule of civilized law.

II. THE ABOMINABLE ACTS EXCEPTION

The necessity for an exception to the clearly established standard is perhaps obvious from reading the cases above. Our courts should never condone government officials playing pranks with arrestees, incarcerating the innocent and withholding exculpatory evidence, sexually harassing their employees, constructing towering inferno “bonfires” around students, or going on 12-hour drinking binges, driving, and running over pedestrians. This Part introduces the “abominable acts” exception to qualified immunity.

The exception would function as follows: In order for a court to deny an officer’s qualified immunity defense, the officer must commit an act that is both (1) unconstitutional and (2) *either* a violation of a clearly established right *or* “abominable.” (The difference between the formulation of this test, and the test as it is currently employed, is that the exception adds “*or* abominable.”)¹⁶¹

Abominable acts have two defining characteristics. First, they are the sort of conduct that, after a consideration of all the facts (including the alleged justification for it) its moral status is subjectively obvious. The thing speaks for itself—*res ipsa loquitur*. The source of such moral clarity comes not from the law but from one’s moral intuitions. Second, it is conduct at the extremes of egregiousness. Imagine all conduct along a spectrum of wrongfulness. If “completely acceptable” is on one end, abominable acts would be on the other. This is all a subjective exercise: each person must ask if such conduct is obviously wrong and at the limits of egregious behavior.

Judges in the above cases would therefore be free, as they are in the Seventh, Eleventh, and other circuits, to determine whether the conduct, even if not clearly established as unlawful, was abominable.¹⁶² If the conduct was also unconstitutional, a judge would deny qualified immunity.

Courts unwilling to waive qualified immunity in such instances likely refrain for two reasons. First, they fear that there is no extralegal source of notice and that establishing an extralegal standard of notice would require too much subjective bias on the part of judges. Second, they are likely to insist that officers require *legal and constitutional* notice, not just notice

161. Pearson v. Callahan, 129 S. Ct. 808, 815–16 (2009).

162. See *supra* notes 138 and 147.

that the conduct is egregious. This Article will take up these two hefty challenges in full over the next two Parts.

One final note before moving on: the exception is arguably in accord with—or even compelled by—the Court’s qualified immunity precedent. *Hope* declared that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.”¹⁶³ Now, the Court has recognized that “[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional.”¹⁶⁴ If notice and not factually identical case law is the proper inquiry, the fact that one’s act violates core concepts of morality is arguably probative of the fact that the officer had notice.

The response, however, is that *Hope* and *Redding* still anchored their analysis of notice in the law.¹⁶⁵ Even if there is no factually similar case law, under *Hope* there must be *some* preexisting legal grounds that could provide notice to a lawbreaking officer. And in *Redding*, the Court evaluated whether the law was unclear by evaluating a split among district courts, despite the clarity of the underlying moral issues.¹⁶⁶ The abominable acts exception, however, is completely untethered from any previous legal pronouncements, clearly established or otherwise. The entire concept is that certain acts are clearly wrong, and we know it intuitively—without having to conduct a scavenger hunt through F.3d to be assured of that fact. This subtle difference makes the exception distinguishable from *Hope* and *Redding*.

The confusion on this point possibly explains why the circuits disagree over whether there should be such an exception. It might take nothing less than a clear pronouncement from the Court to ensure that the exception is recognized in all circuits.

III. MORAL INTUITIONS AND ABOMINABLE ACTS

The first major challenge to this exception is that it would be applied subjectively and therefore in a biased and inconsistent manner. The determination of whether an act is or is not truly “abominable” is necessarily a subjective exercise. But, as this Part will demonstrate, just because an exercise is subjective does not mean it will be biased or inconsistently applied. To the contrary, this Part presents evidence that the

163. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citing *U.S. v. Lanier*, 73 F.3d 1380 (6th Cir. 1996)).

164. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009).

165. *See supra* note 50 (citing cases that anchored notice in pre-existing law); *Safford*, 129 S. Ct. at 2644; *Hope*, 536 U.S. at 739.

166. *Safford*, 129 S. Ct. at 2644.

opposite is the case: using one's subjective moral compass will likely produce more consistent judgments than many other forms of judging.

This Part first lays the groundwork on how people think about morals generally. There are three important takeaway points: (1) people normally think using intuitions rather than reason; (2) our thinking about moral issues is similar; and (3) our intuitions of morality and justice are to some extent universal—they are widely shared across demographic groups.

This Article (and the scholarship it draws on generally) uses the term “moral” in perhaps an unfamiliar way that needs explanation. In most cases, morality is perceived as a normative (or even “objective”) statement: X is definitively wrong for Y and Z reasons. This Article instead explores how morality is perceived. Morality, for the purposes of this Article, is a subjective experience: *I feel* X is wrong.

A. Two Systems of Thought

First, a test:

- (1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
- (2) If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
- (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?¹⁶⁷

Most people, including very educated people¹⁶⁸ and judges,¹⁶⁹ get these relatively basic questions wrong. Here are the answers: the ball costs five cents, not ten; the widgets would still be prepared in five minutes, not 100; the lake would be half-covered in 47 days, not 24. Here, as in many other areas of life, we unthinkingly use intuitions even when it supplies the wrong answer and even when the slow, deliberative thought process that we are well-accustomed to would supply the answer without much effort.

It is now widely accepted that people have two modes of thinking. One

167. Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 27 fig.1 (2005). This has been termed the “Cognitive Reflection Test” or CRT.

168. *See id.* at 29 tbl.1 (showing that a majority of Princeton and University of Michigan students answered CRT questions incorrectly).

169. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 17–18 (2007).

type of thought is characterized by quick, automatic, intuitive thinking.¹⁷⁰ This is the sort that most people use when answering the short test above: an unthinking, quick assessment of what we *feel* is right. This is also the type of thinking we are most accustomed to and the one we employ most frequently.¹⁷¹ This type of thinking even predominates in areas where one would think it should be relatively uncommon. In the study that sparked the field of research into this area of the mind, Amos Tversky and Daniel Kahneman researched professionals accustomed to using complex statistical models. They found that professional statisticians used intuitions and heuristics (mental short-cuts) in answering questions of relative complexity.¹⁷² Like with the above test, their intuitions would often drive them in wrong directions, but these professionals persisted in using them.

The use of intuition is not always bad; there is a substantial amount of evidence that people use their intuitions in many beneficial ways.¹⁷³ When a grandmaster chess player glances at a board and says “white checkmate in three,” she is using her intuitions.¹⁷⁴ For better or worse, this is the way most people think most of the time.

When we instead really think about a problem—weigh possibilities and tradeoffs or consider counterfactual situations—we are using another type of thought.¹⁷⁵ The operations of this type of thought “are slower, serial, effortful, more likely to be consciously monitored and deliberately controlled; they are also relatively flexible and potentially rule governed.”¹⁷⁶

The first type, intuitive thinking, has been termed “System 1,” while the latter deliberative process has been termed “System 2.”¹⁷⁷

170. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 698 (2003).

171. See generally *id.* (citing a host of studies showing that we do most of our thinking with this sort of thought process).

172. Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971).

173. See, e.g., ATUL GAWANDE, *COMPLICATIONS: A SURGEON’S NOTES ON AN IMPERFECT SCIENCE* 247–48 (2002) (explaining that professionals’ intuitions inform them what is right at times). See generally GARY KLEIN, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* (1998) (arguing that intuitions can at times be strengths instead of weaknesses in decision-making).

174. See Herbert A. Simon & William G. Chase, *Skill in Chess*, 61 AM. SCIENTIST. 394 (1973) (discussing theories of problem solving in chess).

175. See Kahneman, *supra* note 170, at 698.

176. *Id.*

177. See Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, 23 BEHAV. & BRAIN SCI. 645, 658 (2000). This terminology is now widely used in the psychological literature on heuristics and rationality. See Kahneman, *supra* note 170, at 698.

B. System 1 and Moral Intuitions

Consider your feelings about the characters in the following story:

Julie and Mark are brother and sister. They are traveling together in France on summer vacation from college. One night they are staying alone in a cabin near the beach. They decide that it would be interesting and fun if they tried making love. At the very least it would be a new experience for each of them. Julie was already taking birth control pills, but Mark uses a condom too, just to be safe. They both enjoy making love, but they decide not to do it again. They keep that night as a special secret, which makes them feel even closer to each other. What do you think about that? Was it OK for them to make love?¹⁷⁸

When confronted with the story, most people immediately say that it was wrong.¹⁷⁹ If you are among those that felt it was wrong, try to explain why. There is no threat that they would produce offspring. Their relationship was strengthened, not injured, by the experience—the story says as much. Both parties thoroughly enjoyed it. There is no implication of coercion. Although most people identify the Mark and Jane story as objectionable, they cannot explain why. They are emotionally repulsed first and search for an explanation second.¹⁸⁰ This result has been confirmed by a host of studies with other seemingly offensive stories¹⁸¹ and by straightforward moral tests.¹⁸²

It has long been assumed that moral decisions are the result of slow, deliberative processes representative of System 2 thinking. There is growing evidence, however, that we do most of our moral thought using System 1.¹⁸³ That is, we use moral intuitions—“a subclass of intuitions, in

178. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001).

179. *Id.*

180. *Id.*

181. See generally Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 J. PERSONALITY & SOC. PSYCHOL. 613 (1993) (studying how various cultures react to harmless, yet morally offensive, stories).

182. John Mikhail, *Aspects of the Theory of Moral Cognition: Investigating Intuitive Knowledge of the Prohibition of Intentional Battery and the Principle of Double Effect* 96 (Georgetown University Pub. Law & Legal Theory Working Paper Series, Working Paper No. 762385, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=762385 (“Significantly, this [moral] knowledge appears to be merely tacit: when participants were asked to explain or justify their judgments, they consistently failed to provide adequate justifications for their judgments.”).

183. Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues*, 133 DAEDALUS 55, 57 (2004) (“[R]ecent research in social psychology suggests that responses to such [moral] dilemmas mostly emerge from the intuitive system:

which feelings of approval or disapproval pop into awareness . . . as we consider choices for ourselves”¹⁸⁴—to judge whether something is right or wrong. Sometimes those moral intuitions conflict even with reason, as it does for most people confronted with the Julie and Mark story above. Experiments by John Mikhail and others show that people are quick to come to moral judgments in classic “trolley” moral dilemmas¹⁸⁵ but are unable to come up with a reason to explain their judgment. Instead, they simply intuit the result, thinking first about how they feel about the situation and only later attempt to rationalize it.¹⁸⁶

The conclusion to be drawn from these and other experiments is that our morals are intuitive; even when there is no rational reason to find some conduct objectionable, we simply do. This is not to say that all moral intuitions are without any reason. There are plenty of good reasons to feel that the cases this Article opened with are objectionable, for example. But it is likely that you *felt* they were wrong well before you thought about the reasons behind that feeling. We use System 1 thinking to come to most of our moral conclusions. Indeed, studies in neuroimaging have shown that people use the affective parts of their brain—not the reasoning parts—while making moral judgments.¹⁸⁷

C. The Common Content of Moral Intuitions

One of the most fascinating findings from studies on moral intuitions is that they are, to some extent, *shared*. Many of the bases of these moral

people have quick gut feelings that come into consciousness as soon as a situation is presented to them. Most decide within a second or two . . .”). Studies with neuroimaging devices seem to support the contention that moral judgments are very much emotionally charged. *See, e.g.*, Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 522 (2002).

184. Haidt & Joseph, *supra* note 183, at 56.

185. Here is just one example of the many permutations of a “trolley” problem (Mikhail uses trains instead of trolleys, but the problem is obviously the same):

Frank is on a footbridge over the train tracks. He knows trains, and can see that the one approaching the bridge is out of control. On the track under the bridge there are five people; the banks are so steep that they will not be able to get off the track in time. Frank knows that the only way to stop an out-of-control train is to drop a very heavy weight into its path. But the only available, sufficiently heavy weight is a large man wearing a backpack, also watching the train from the footbridge. Frank can shove the man with the backpack onto the track in the path of the train, killing him; or he can refrain from doing this, letting the five die.

Is it morally permissible for Frank to shove the man?

Mikhail, *supra* note 182, at 101.

186. *Id.* at 96.

187. *E.g.*, Greene & Haidt, *supra* note 183, at 522.

intuitions transcend culture, ethnicity, religion, age, and class.¹⁸⁸ That is, whether you are an upper-middle-class white female law professor, a poor Latino immigrant, a Japanese schoolgirl, a WWF wrestler, a prince, or a pauper, there are certain moral common grounds.

1. Universal Moral Grammar

John Mikhail postulated that people have a “Universal Moral Grammar.”¹⁸⁹ Building on the research of Noam Chomsky, whose work on “Universal Grammar” showed that people have an innate biological matrix providing the framework under which patterns of language develop,¹⁹⁰ Mikhail argued that people also have a “Moral Grammar”—an innate framework under which people’s morals develop.¹⁹¹

Using studies on “trolley” (as well as other) moral dilemmas, Mikhail discovered that both adults and children of all backgrounds “possess intuitive or unconscious knowledge of specific moral principles”¹⁹² When confronted with different moral dilemma scenarios that all involved killing one man to save five lives, opinions of what was moral and immoral changed based on the scenario. For example, people felt it was immoral for a doctor to kill one healthy patient to harvest his organs and save five lives but moral to flip a switch and divert the path of a train so it hits one person instead of five.¹⁹³ People were therefore not strict utilitarians, as they would let one person die for the sake of others in some circumstances but not others; nor were they strict deontologists because they would switch the tracks and take a direct part in the killing of another person.¹⁹⁴ This inexplicable inconsistency (and the participants’ inability to articulate coherent reasoning behind their judgments) is highly indicative that people use quick intuitive System 1 decision-making for moral judgments as opposed to slow, deliberative System 2 thinking.¹⁹⁵ The combined evidence

188. Marc Hauser et al., *A Dissociation Between Moral Judgments and Justifications*, 22 MIND & LANGUAGE 1, 16 (2007). Many studies show little variation in moral judgments “across a variety of nationalities, ethnicities, religions, ages, educational backgrounds (including exposure to moral philosophy), and both genders, shared principles exist. . . . Even in those cases in which significant differences were identified between subpopulations, the extent of the difference between groups was small.” *Id.*

189. Mikhail, *supra* note 182, at 3.

190. See, e.g., NOAM CHOMSKY, RULES AND REPRESENTATIONS 187 (1980).

191. Mikhail, *supra* note 182, at 17.

192. *Id.* at 96.

193. *Id.* at 7.

194. *Id.* at 7–8.

195. *Id.* at 96.

that moral beliefs are intuition-based as well as universal provides strong backing for the argument that a Universal Moral Grammar exists.

2. Shared Moral Intuitions

Mikhail's work is buttressed by the research of Jonathan Haidt and others that have found specific moral intuitions are shared across cultures. Haidt's work, using a cross-cultural meta-analysis of varied studies, identified five intuitions that "undergird the moral systems that cultures develop"¹⁹⁶ and that are found widely across cultures: harm/care, fairness/reciprocity, ingroup/loyalty, authority/respect, and purity/sanctity.¹⁹⁷ Haidt has noted that "[e]ach system is akin to a kind of taste bud, producing affective reactions of liking or disliking when certain patterns are perceived in the social world."¹⁹⁸

Take, for example, this short story: "Michael violently beats an infant to death." When you are exposed to that situation, your harm/care moral intuitions are likely triggered, finding Michael's action detestable. Suppose the story was instead: "Michael attempts to violently beat an infant to death, but Ben prevents him from doing so, saving the infant's life." You likely now feel both sides of the harm/care intuition—both a rejection of Michael's actions and an acceptance of Ben's. Haidt's research indicates that your feelings about Michael and Ben are likely universal, inhering in at least every culture Haidt included in his studies.

This is not to say that everyone has the same morals. Indeed, in a study of political conservatives and liberals Haidt found that although all types of moral intuitions are present in everyone, some are more or less represented in liberals and conservatives. Liberals care relatively more about harm/care and fairness/reciprocity, and relatively less about ingroup/loyalty, authority/respect, and purity/sanctity.¹⁹⁹ Conservatives, on the other hand, care about all the aspects of moral intuitions nearly equally.²⁰⁰ While everyone has the same base moral intuitions, we are socialized to care about

196. Haidt & Joseph, *supra* note 183, at 56.

197. Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98, 99 (2007).

[I]n all human cultures, individuals often react with flashes of feeling linked to moral intuitions when they perceive certain events in their social worlds: when they see others (particularly young others) suffering, and others causing that suffering; when they see others cheat or fail to repay favors; and when they see others who are disrespectful or who do not behave in a manner befitting their status in the group.

Haidt & Joseph, *supra* note 183, at 58.

198. Haidt & Graham, *supra* note 197, at 104.

199. *Id.* at 108 fig.1.

200. *Id.*

some more than others. They are like dials on an equalizer, where we can have more or less bass or treble.

For example, this short story might be perceived differently based on one's relative respect for authority and ingroup loyalty: "Ann is cleaning up around the house, and finds an old American flag. Having no need for it, she decides to cut it up and use it for rags to clean her toilet."²⁰¹ If Haidt's hypothesis is true, conservatives will care relatively more deeply about Ann's actions (based on respect/hierarchy and ingroup/loyalty intuitions) while liberals will care relatively less.

The important conclusion drawn from Haidt's research for the purposes of this Article, however, is not where we differ but where we converge. At the extremes of these moral intuitions, people from all cultural backgrounds share common moral intuitions. Even if your purity/sanctity "equalizer" is turned way down, it is likely that your intuitions will be triggered by the most extreme violations (as they might have been for the Mark and Jane story, for example, or as they probably would with stories of sexual abuse to children or extreme desecration of the environment).

3. Shared Intuitions of Justice

Studies on liability and punishment, mostly done in the context of determining criminal liability, have provided support for and an interesting extension of this contention. Though people vary in *how much* liability or punishment should be meted out based on a specific indiscretion, nearly everyone *ranks* the extent of punishment or liability each act deserves the same.²⁰² When presented with a battery of different crimes, from

201. Adapted from Haidt et al., *supra* note 181, at 617.

202. See, e.g., PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 12, 209 (1997) (finding fairly strong consensus on the "seriousness ordering of crimes, with those involving actual or threatened physical harm to victims generally considered the most serious" and finding "there is very little, if any evidence that there exist subgroups within the American population with radically different views about sentencing norms").

[P]eople tend to agree on the relative degree of blameworthiness among a set of cases. . . . [T]hey agree on the relative placement of cases along [a] continuum. . . . The existing studies reveal an extraordinary extent of agreement across a variety of issues and demographics. . . . [T]he conclusions are all essentially the same, confirming the existence of shared intuitions as to relative seriousness of different variations of wrongdoing.

Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1854–55 (2007). *But see* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1263 (2005).

What is especially interesting about the studies conducted in this field is that these studies are conducted in precisely the sort of circumstances that should prompt wide disagreement, but there is still an incredible amount of consensus:

[B]y virtue of [the study's] design, one could expect a fair amount of

unintentional robbery to coercive kidnapping,²⁰³ different people rank the severity of the crimes nearly identically. These studies have been conducted with different demographic groups within a country and between citizens of different countries. For example, a study of this kind given to whites and blacks in Baltimore found an “impressive” degree of consensus across racial, socioeconomic, and gender lines.²⁰⁴ In another study of intuitions of justice between police, judges, and students in Taiwan, the sample was found not only to agree widely with each other but also with Americans on intuitions of justice.²⁰⁵ Even when tests are made with the explicit purpose of making the distinction between separate crimes incredibly subtle and complex, a study has found “the levels of agreement” to be “astonishingly high.”²⁰⁶ Because such intuitions of justice have been found to be universal across societies and demographics, researchers have concluded “that this intuition is insulated from the influence of the society and the situation.”²⁰⁷

D. Abominable Acts

Using this theory, we can construct a better picture of what, precisely, is an “abominable act.” Recall that abominable acts include conduct that we subjectively view as at the extremes of egregiousness. A working illustration might be the cases in the Introduction. If you felt the conduct described in those cases was objectionable, you are not alone. Those cases,

disagreement. When two people are given a skeletal description of an offense, as most of these studies provide, both of the persons are likely to visualize a “story” of the offense, yet they may well “fill in” different details to complete the picture. Demographic differences could prompt subjects to fill in different details, reflecting the different life experiences from which the details are drawn. If subjects visualize slightly different stories, one would expect them to give slightly different assessments of relative seriousness, even if they in fact agreed in their intuitive judgments. This potential for exaggerating the extent of disagreement becomes greater as the crime descriptions become more skeletal, and is at its worst when researchers use crime labels rather than factual descriptions, as in some of the studies reported above, because different people are quite likely to visualize different stories when given just the bare offense label. Despite this serious potential to underestimate the extent of agreement, the studies consistently show a significant level of agreement on intuitions of justice, even across demographics.

Robinson & Kurzban, *supra* note 202, at 1860.

203. See, e.g., Robinson & Kurzban, *supra* note 202, at 1894–98 (listing 24 different scenarios that participants in a study were asked to rank according to degree of punishment deserved).

204. Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 230–31 (1974).

205. Marlene Hsu, *Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency*, 64 J. CRIM. L. & CRIMINOLOGY 348 (1973).

206. Robinson & Kurzban, *supra* note 202, at 1867.

207. *Id.* at 1892.

as well as the ones discussed in Part I, clash sharply against at least one of the five shared moral intuitions identified by Haidt and others. Consider, for example, the case of Noelle Way, a pretrial detainee who was subjected to a humiliating body cavity search despite the fact that she had committed no crime.²⁰⁸ This act violates both our intuition of fairness/reciprocity, as she was being punished despite committing no wrong, and our intuition of purity/sanctity, as any gruesome violation of the most intimate parts of the body would.²⁰⁹ The *why* (moral intuitions), however, does not matter as much in defining abominable acts. It is the *what*—that one judges the conduct to be obviously wrong, and that the act is at the extremes of egregiousness.

Working with this definition of abominable acts, this Part employs the above research to draw two conclusions particularly relevant to doctrines concerning government conduct. First, when an act is egregious enough, we know it intuitively, and one's subjective assessment of the official's conduct will not vary substantially from another's. Though our judgment is subjective, the alleged consequences of that subjectivity (arbitrariness, bias, and inconsistent application of justice) are not nearly as extreme as many fear. Second, when an officer commits abominable acts, she is cognizant that she is doing it. While courts have long presumed that only laws can provide notice that specific conduct is impermissible, our moral intuitions can provide an extralegal source of notice. It should be noted that these conclusions (or presumptions) can only operate at the extremes of human conduct—that is, for abominable acts.

E. Subjectivity and Abominable Acts: We Know It When We See It

The best way to kill a legal standard is to claim it is applied “subjectively.”²¹⁰ The argument goes that a subjectively applied law allows judges to inject their own bias, resulting in an arbitrary and uneven administration of justice.

Subjectivity need not result in (impermissible) bias and arbitrariness, however. Indeed, all judgments and legal standards are *always* to some extent subjective: they ask judges “what do *they believe* the meaning of this

208. Way v. County of Ventura, 445 F.3d 1157, 1158–59 (9th Cir. 2006).

209. If Way *had* been guilty, or even if the officer had a good reason to believe she might be concealing contraband or weapons, then our intuition for purity/sanctity would be balanced against our intuition for fairness and justice.

210. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment) (arguing that the majority opinion reinstates “the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity,” assuming that such a subjective standard is *per se* wrong).

statute is” or “whether *they believe* any reasonable jury could hold for the plaintiff.” Yet we entrust these judgment calls to judges, believing them “objective enough” that they will, despite their subjectivity, produce consistent results. This subpart argues that a judge’s adjudication of whether conduct is “abominable” will produce similarly consistent judgments that we should be comfortable allowing judges to make.

1. Abominable Acts as Categorically Different

Bias is most likely in cases on the margin. Where the facts are complex, the interests to be weighed are varied, or culpability is unclear, the likelihood that viewpoints will clash—and that the laws will therefore be applied inconsistently—is exceedingly high.

By their very nature, abominable acts are categorically different from the close calls we naturally worry about. They leave no doubt in one’s mind as to their objectionable content. In coming to this conclusion, we are guided by a Universal Moral Grammar.²¹¹ “Universal” because it has been found in every person in every culture. The moral intuitions identified by Haidt to be present to some extent across cultures, although calibrated differently in every person, can only be pushed so far until even the most hardened of hearts is stirred to repulsion. Moral intuitions are therefore an adequate basis for making judgments specifically in cases of abominable conduct. We know it when we see it.

This concept is difficult to swallow—difficult because the contrarian inside us can always imagine some judges whose moral intuitions are so off-base that they would treat as permissible what you believe to be the worst indiscretions (or vice versa).

But taking this concept out of the abstract and into the real world makes this imaginary judiciary harder to envisage. In the *Robles* case, police officers handcuffed a pre-trial detainee to a pole in a deserted parking lot at 3:30 a.m. and abandoned him there to play a prank on a neighboring police department.²¹² What judge—real or imagined—would find such an act justifiable? Interestingly, while the court found for the defendant police officers on qualified immunity, there was no doubt in anyone’s mind that the police officers acted inappropriately.²¹³ And, as we will see shortly, this sort of behavior is not the worst of it.

Another way of thinking about this concept is in terms of the studies on

211. *See supra* Part III.C.1.

212. *Robles v. Prince George’s County*, 302 F.3d 262, 267 (4th Cir. 2002).

213. *See id.* at 271 (condemning the officers’ actions as “Keystone Kop activity that degrades those subject to detention and that lacks any conceivable law enforcement purpose”).

intuitions of justice mentioned above. In those studies, people of all ethnic, cultural, educational, and national backgrounds ranked indiscretions from least to most offensive in a nearly identical fashion. As long as the category of “abominable acts” is reserved for what they put at the top, a judge’s perception of wrongfulness will likely be shared widely with others.

2. Judges Are Best Positioned for Such Determinations

Judges are in the best position to determine whether an act is comparatively abominable. It is the one profession that interacts with the array of human conduct on a near-daily basis.²¹⁴ After hearing thousands of cases ranging from rape and murder to property theft, it means a lot for a judge to believe that certain conduct is the worst she has ever seen. Consider, for example, an Eighth Circuit opinion, *Hawkins v. Holloway*.²¹⁵ The court there dealt with a “shocks the conscience” substantive due process argument concerning sexual harassment. While the facts of the case may alert a normal individual’s sensitivities, the court was able to conclude that “allegations similar to [the sexual harassment claims] the plaintiffs make against the sheriff are commonplace in many . . . cases that come before us, and they simply do not amount to behavior . . . prohibit[ed] under the rubric of contemporary conscience shocking substantive due process.”²¹⁶ Very few professionals would come to the same judgment based on similar experience. If people rank wrongs along a spectrum in nearly identical fashion, a judge is able to do the same (indeed most of the studies on intuitions of justice included judges) but benefits from a much fuller spectrum fashioned by her experience.

Some may argue that judges, who are asked to decide most cases with System 2 rather than System 1 thought, are not well positioned to make such subjective determinations. However, judges have experience with similar standards, like when they determine whether certain conduct “shocks the conscience” under substantive due process.²¹⁷ More

214. *But see* Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 416–17 (1988).

[A] judge is less likely . . . to render a normative judgment that reflects the shared community sense on an issue Magistrates and judges are not typical members of the community. . . . [T]he criminal court judge is exposed to a daily parade of the worst side of human behavior. Such exposure is likely to alter the judge’s perceptions about the standard of unacceptable conduct.

Id.

215. *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003).

216. *Id.* at 786.

217. *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (describing a thorough analysis of the totality of the circumstances as required to determine “conscience shocking” conduct).

importantly, a body of evidence now shows that judges, like most people, *do not* normally use System 2 reasoning.²¹⁸ Engaging in System 1 thought is neither new nor vastly different from normal, everyday judging.

F. Notice: They Know It When They Do It

Especially in the context of government action, unpredictability in the law is a cause for concern. The ability to predict with some accuracy how a court will eventually adjudicate one's actions shapes our decisions.²¹⁹ Unpredictable law might make one overly cautious,²²⁰ and the application of unpredictable law seems unjust.²²¹ Thus, in legal doctrines as diverse as criminal law²²² and qualified immunity, the concept of notice is an important element.

In the criminal context, although notice is required, some acts are so obviously wrong (murder, rape, theft, wanton destruction of another's property, etc.) that notice is unnecessary.²²³ In the special case of abominable acts, our moral intuitions can function as a similar form of extralegal notice, providing predictable warning that one should not be engaging in such conduct.

When officers commit an abominable act, they know it. While the set of moral intuitions is far from identical for everyone, all of our moral feelings can be traced to relatively few shared core intuitions.²²⁴ When officers commit an act so clearly abominable that it completely violates our core moral intuitions, we all know that what they did was wrong.²²⁵ If they also share our moral intuitions, then when committing an act we would term "abominable," it is fair to presume that they knew their actions were wrong.

Powerful biological evidence confirms this logic. Studies have been conducted using stories in which someone commits a violation of a social norm—for example, being a dinner guest and spitting out the food in front

218. Guthrie et al., *supra* note 169, at 17–18.

219. Holmes went so far as to argue that our prediction of what a court will do is what compromises law. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

220. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

221. *See Wood v. Strickland*, 420 U.S. 308, 318–19 (1975) (noting that public policy supports predictable laws).

222. The requirement of notice in criminal law can be traced to *Lambert v. California*, 355 U.S. 225, 228–29 (1957) and its progeny.

223. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 384 (2d ed. 1960). "A plea of ignorance . . . is rarely encountered in prosecutions for serious crimes . . . [N]o sane defendant has pleaded ignorance that the law forbids killing . . . or forced intercourse . . ." *Id.*

224. *See supra* Part III.C.2.

225. *See supra* Part II.A.

of the hosts.²²⁶ Participants read these stories twice, once with the dinner guest being a third party and once with the dinner guest being the reader (the first-person).²²⁷ Neuroimaging of the brain reveals that the reader uses different parts of his brain associated with judgment to think about what he had just read.²²⁸ The experience of imagining committing a violation is more severe and uncomfortable than thinking about others doing it.²²⁹

This evidence shows that the subjective experience of even *imagining* committing a violation of a norm, and of someone else doing it, are far different.²³⁰ When an officer is *actually acting*—not just spitting out food but rather committing an abominable act—we may properly presume that the subjective experience would indicate to him that he is doing something wrong. This presumption can only extend to the most egregious acts, however, as it is possible that acts on the border between abominable and acceptable will be perceived by some to be the former and by others to be the latter.

This is also a presumption, not a truism. There are those officers that, for whatever reason, do not have the subjective experience of wrongfulness when committing an abominable act. It is possible, for example, that it never crossed the minds of the officers who encouraged their peer to drink for 12 hours and then drive across New York City,²³¹ that what they were doing was wrong. But in such a case, where the act was clearly unjustifiable regardless of the aberrant subjective views of those officers, we should presume that they understood their conduct was wrong.

G. The Harlow Goals

We now return to the policy goals of *Harlow* to see if they would be better served by an abominable acts exception to qualified immunity.

In all likelihood, the exception would not change the deterrence calculation of an officer whatsoever. Officers presumably know they should not be committing wrongful acts, and when they do commit an egregious act they probably know that a possible consequence will be a lawsuit. The likelihood that the lawsuit could be a federal constitutional one rather than a

226. E.g., S. Berthoz et al., *Affective Responses to One's Own Moral Violations*, 31 NEUROIMAGE 945, 946 (2006).

227. *Id.*

228. *Id.* at 948.

229. *Id.* (finding “enhanced activity in the amygdala when participants were presented with stories that narrated their own intentional violation of social norms” likely caused by “subjective emotional response[s]”).

230. *Id.*

231. *Pena v. Deprisco*, 432 F.3d 98, 103–04 (2d Cir. 2005).

state tort suit is likely to be of little, if any, practical consequence to their deterrence calculation. It is hard to believe that an officer would ever think, “If I do X act, which I know is wrong, I may be sued, but *not* under section 1983, because the doctrine is not ‘clearly established’ there. So I’ll do it.”

That the deterrence calculation is unchanged means there is little risk that this will introduce too much *over*-deterrence. While it might make an officer pause and think “will this be perceived as an abominable act?” that is precisely the sort of thinking we want officers to be doing. But it will not *increase* deterrence for these wrongful acts either; the officers who choose to commit abominable acts likely know they are making themselves liable to suit, but decide that whatever they are doing is “worth it” or that they will not be caught or charged.

Even if it does not substantially alter the deterrence calculus, the exception still makes sense. The exception puts potential lawbreakers on notice (to the extent that they were not already) that if they do something that is particularly egregious their official status will not protect them. Every time an official commits an egregious wrong and is protected by qualified immunity, the message is sent to other officials and society more broadly that some conduct, despite its wrongfulness, will be tolerated. The combined effect of such cases is to implicitly condone official wrongs.²³²

Such an exception also allows victims of egregious official wrongs to be compensated for their physical and emotional loss. This not only has the immediate effect of compensation, but it also signals to the wider community that the law is just and that officials who violate the Constitution in an extreme manner are not immune from the rule of law.

IV. MORAL VERSUS LEGAL NOTICE

The final challenge that must be handled is the argument that qualified immunity requires not just notice that an act is wrong but that the act is illegal or unconstitutional.²³³ This challenge is a serious one. The exception does not necessarily conflate abominable acts with unconstitutional acts—it asks courts to waive qualified immunity when the right was not clearly established in instances where conduct is not necessarily illegal but is clearly wrong. The Court has emphasized, however, that the Constitution is not a “font of tort law to be superimposed upon whatever systems may

232. Cf. *Rochin v. California*, 342 U.S. 165, 173–74 (1951).

233. See *Robles v. Prince George’s County*, 308 F.3d 437, 438 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing en banc). “To equate knowledge of wrongfulness in a generic sense with knowledge of unconstitutionality in a specific sense is not consistent with the rule of law. The latter requires notice, something to which even the worst criminal wrongdoer is entitled.” *Id.*

already be administered by the States.”²³⁴ And the distinction between constitutional wrongs and wrongs generally is one of some consequence: a constitutional wrong can bring a tort action into federal courts,²³⁵ and victory on a constitutional claim may entitle the plaintiff to attorney’s fees.²³⁶

There is no distinction between moral notice on one hand and legal or constitutional notice on the other, especially when dealing with abominable acts. First, under the current formulation of the doctrine, two elements must be satisfied in order for qualified immunity to be inapplicable: (1) an officer’s conduct must violate a constitutional right, and (2) that right must be clearly established.²³⁷ The abominable acts exception amends the second criterion to read that the “right must be clearly established *or* the act was so abominable that, regardless of the state of the law, its wrongfulness was apparent.” The exception leaves untouched the first criterion. It would not be sufficient for a plaintiff to simply point out that the act was wrongful and file a lawsuit under section 1983—the court would still rule against him if his injury did not rise to the level of a constitutional injury.²³⁸ Officers will continue to be shielded if they commit merely wrongful but not unconstitutional conduct.

Second, providing officers with legal or constitutional notice is of little practical use. Officers are unlikely to be thinking about the federal forum or attorney’s fees when committing egregious violations of the Constitution. Their moral intuitions, and their common-sense knowledge of liability to suit, are far more likely to guide their decisions. Officers, like most people, make decisions based on their conceptions of right and wrong, buttressed perhaps by a rough sense of the law.

The doctrine of qualified immunity is policy-based, and founded on the realities of official conduct. It is no use pretending that there is something inherent in legal or constitutional notice that best serves *Harlow*’s “balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”²³⁹ Instead, that balance is better struck with an abominable acts exception that

234. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

235. Civil litigation of this matter proceeds under 42 U.S.C. § 1983 (2006) for violations of the Constitution. Federal courts therefore have federal question jurisdiction. 28 U.S.C. § 1331 (2006).

236. 42 U.S.C. § 1988(b) (2006).

237. *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009).

238. *Id.* at 816.

239. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). “[T]he need to hold public officials accountable when they exercise power irresponsibly” is another important goal served by making immunity *qualified* not mentioned in *Wyatt*, but worthy of mention here. *Pearson*, 129 S. Ct. at 815.

draws notice from both the law and our shared perceptions of morality, which is a more accurate measure of what “notice” officers are likely to have and upon which to base their actions.

CONCLUSION

“I know it when I see it” has been a feature of our law for some time.²⁴⁰ The concept is unsettling to some because the law should be a way of enforcing universally applicable standards and rules.²⁴¹ There are no assurances that you and I will “see it” the same.

The concept of abominable acts provides an exception to the rule. New and emerging research in the biological and social sciences confirms that we share a universal set of moral intuitions. These shared intuitions ensure that you and I will see particularly egregious conduct similarly. Even those who commit such acts can be presumed to know that their conduct was wrong. That is, for abominable acts, we know it when we see it, and they know it when they do it.

These two powerful conclusions were used to argue one side of an emerging circuit split in qualified immunity law. And in that application, it is important in its own right: for all the injured persons for whom redress was blocked and justice was denied, an abominable acts exception would make an enormous deal of difference.

This Article concludes by urging that the concept be used in contexts much broader than qualified immunity. Its underlying logic and arguments apply everywhere that judges need to be able to separate out the merely wrongful from the truly abominable.

The “shocks the conscience” doctrine, for example, first recognized over 50 years ago in *Rochin v. California*,²⁴² has been derided as subjective. Justice Scalia (channeling jazz legend Cole Porter) mocked it as “the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity.”²⁴³ This perceived “weakness” of subjectivity is what has

240. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

241. “[F]rom the perspective of the traditional model of judging, ‘I know it when I see it’ is disturbing.” Gewirtz, *supra* note 26, at 1025. Of course, Gewirtz goes on to defend the concept in the Essay, on the grounds that the use of emotion in law should, at least to some degree, be embraced. *Id.* at 1025–26.

242. *Rochin v. California*, 342 U.S. 165, 172 (1951).

243. *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment) (footnote omitted); *see also* Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 468–69 (2001).

The subjectivity of the shocks the conscience test stems from the fact that shocks the conscience is not a true standard of conduct at all. . . . [T]he shocks the

arguably prevented the doctrine from developing further; analysis of its implementation at the circuit courts has found that they have been “increasingly unreceptive to substantive due process challenges to executive misconduct.”²⁴⁴ But applying the abominable acts concept, one can at least question this characterization of “shocks the conscience” as the creation of “a standard that is determined by standards as numerous as there are individuals.”²⁴⁵ Due to our common moral intuitions, conduct that truly “shocks the conscience” should be perceived similarly across wide swaths of people. By challenging the caricature of “subjectivity” that its critics have placed on the standard, we can perhaps reinvigorate what can be an important tool “to deter and punish abuses of power.”²⁴⁶

conscience concept turns on the *personal reaction of another to particular conduct*, that is, whether the conduct shocks the conscience of others. Thus, the primary focus in the shocks the conscience test is not on the person whose conduct is at issue, but on the person who perceives that conduct and her reaction to it. And this is what makes the shocks the conscience analysis such a sticky inquiry. . . . [T]he Court has created a standard that is determined by standards as numerous as there are individuals.

Id.

244. Rosalie Berger Levinson, *Reigning in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 536 (2008); see also *id.* at 536–51 (cataloging ways that appellate courts have unjustifiably limited the shocks the conscience standard).

245. Umhofer, *supra* note 243, at 469.

246. Levinson, *supra* note 244, at 524.