THE ELEPHANT IN THE DARK ROOM: A RESPONSE TO FAIR NOTICE, THE RULE OF LAW AND REFORMING QUALIFIED IMMUNITY

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INTRODUCTION

Professor Chapman's recent publication, *Fair Notice, the Rule of Law and Reforming Qualified Immunity*, offers a way to conceptualize one of the most troublesome categories of qualified immunity cases: those instances where government officials know or should know their conduct is wrong but they, nevertheless, are shielded from liability because a court has not yet held that the exact conduct in question violated the Constitution. For years, scholars have lamented this aspect of qualified immunity.[1] In this recent piece, Chapman proposes a way to curtail the qualified immunity defense in these cases.

Chapman grounds his thesis on fair notice—one of several rationales supporting qualified immunity. Specifically, his article "isolates the fair notice rationale to see whether it supports [the] qualified immunity [defense] on its own."[2] From this, he concludes that qualified immunity, "at least as far as the fair notice rationale goes[,] . . . is overbroad" because it shields government officials from liability when it seems like they

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1. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("Today, the law of qualified immunity is out of balance, particularly in the context of rights defined generally without particularizing rules and doctrines, a category of which unconstitutionally excessive force case is both the clearest and most important example."); *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 88 (2018) (arguing "that the doctrine lacks legal justification, and the Court's justifications are unpersuasive").

2. Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 8 (2023).

should pay.[3] Many, at least intuitively, would agree with Chapman's conclusion. Chapman does the hard work of concretizing this intuition. In this regard, his article is an important contribution to the growing body of legal scholarship discussing qualified immunity.Chapman uses six examples of constitutional litigation to frame his discussion of qualified immunity.[4] Although the result is the same for the first five cases—the defendants are shielded by qualified immunity—Chapman concludes that most people (and I include myself in this group) "have the intuition that the officers in the first three cases should be subject to liability."[5] Furthermore, Chapman suggests that it "seems unfair" to make the defendants pay in the last three scenarios.[6] He posits that the fair notice rationale explains this distinction. Specifically, he argues that the fairness rationale does not justify qualified immunity in the first three instances because the defendants could reasonably have predicted their liability.[7] However, he reasons that qualified immunity aligns with the fairness rationale in the last three instances because the scenarios all involved a clear change in the legal doctrine, and, accordingly, the defendants could not have predicted liability.[8]

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3. *Id.* at 4–5.

4. In the first example, police officials had a valid warrant to seize the plaintiff's property but then stole almost $225,000 in cash and gold coins. *Id.* at 12.

In the second, which is based upon *Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020), a police officer stopped a driver and, in violation of the Fourth Amendment, searched the car for almost two hours, causing $4,000 in damage to the car. Chapman, *supra* note 2, at 12.

In the third, an officer accidentally shot a ten-year-old boy who was lying on the ground when the officer attempted to shoot a barking dog who was near the child. *Id.*

In the fourth, a principal and school board expelled three students for using alcohol at a school event. *Id.* at 13.

In the fifth, a state executive official denied a request for a scholarship to a religious school, citing a state constitutional provision. *Id.*

In the sixth, an abortion provider was sued in a state that prohibits abortion and argued that the suit constituted an "undue burden" on the constitutional right to an abortion. *Id.* at 13–14.

5. *Id.* at 14. Chapman posits that the defendant in the sixth hypothetical, an abortion provider, is not entitled to qualified immunity because an abortion provider is a private party. Generally, qualified immunity only protects government officials, not private actors. *But see* Filarsky v. Delia, 566 U.S. 377, 390 (2012) (granting qualified immunity to a private attorney "acting on behalf of the government").

6. *Id*.

7. *See id.* at 41. It is important to note that Chapman defines "knowledge of liability" more broadly than the Court does. In qualified immunity disputes, the Court requires defendants have constructive knowledge that their conduct violates the U.S. Constitution. *See infra* Part III.B. In these three hypotheticals, where Chapman argues the defendants should be denied qualified immunity, it is abundantly clear that that the defendants should have known their conduct was criminally or morally wrong, but it is unclear that any of them would have known their conduct was unconstitutional.

8. *See* Chapman, *supra* note 2, at 41.

By examining qualified immunity through the lens of fair notice, Chapman helps readers think through the qualified immunity defense from another angle. This is a valuable exercise. Chapman concludes "that some form of immunity is justified when liability depends on an overtly new constitutional doctrine . . . [but] the doctrine should not apply when the conduct was committed in bad faith, violated a criminal law, or was malum in se."[9]

In this response to Chapman's article, I consider the viability of Chapman's proposal. This is a prologue to a lengthier piece. This short article considers, specifically, whether Chapman's proposal is likely to alter qualified immunity litigation. I conclude that it is not. As I detail in Part II, the history of qualified immunity indicates it is highly unlikely the Court will adopt Chapman's approach—they have already rejected subjective inquiries in qualified immunity disputes.[10] Additionally, as I detail in Part III, even if the Court were to adopt this approach, in many cases, procedural rules would preclude § 1983 plaintiffs from successfully overcoming qualified immunity claims.[11] There is a better way forward.

I. THE EVOLUTION OF "GOOD FAITH QUALIFIED IMMUNITY"

Qualified immunity has changed a great deal since the Court first recognized the defense of "good faith probable cause" in *Pierson v. Ray* in 1967.[12] In that case, police officers arrested a group of black and white ministers at a bus depot in Jackson, Mississippi, for violating section 2087.5 of the Mississippi Code, which made it unlawful for persons to gather in public places with the "intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . ."[13] The ministers were convicted at a bench trial and each sentenced to four months in jail and fined $200.[14] In 1965, four years after their arrest, the Supreme Court ruled that the Mississippi statute was unconstitutional.[15] Shortly thereafter, the ministers sued the arresting officers, alleging the defendants "violated § 1983."[16]

The police officials' "defense" was closely tied to the underlying substantive claims: whether the arrests were lawful. Counsel for the

9. *Id.* at 10.

10. *See infra* Part II.

11. *See infra* Part III.

12. 386 U.S. 547, 557 (1967).

13. Brief for Respondents at 75, Pierson v. Ray, 386 U.S. 547 (1967) (No. 79) (citing MISS. CODE ANN. § 2087.5 (repealed 2009)). The officers alleged that an angry white mob had shown up at the bus depot to confront the ministers, and they feared violence would ensue. *See* Brief for Respondents, *supra*, at 8.

14. *Pierson*, 386 U.S. at 549–50.

15. *Id.* at 550.

16. *Id.*

defendants argued that the arresting officers were entitled to immunity on two different bases: (1) that the officers had probable cause to believe the arrestees had violated section 2087.5—specifically that violence was about to ensue;[17] and (2) that when they arrested the ministers, the officers acted in good faith that the statute forming the basis of the arrest was constitutionally valid.[18] Technically, the first argument goes to the plaintiff's case in chief,[19] and only the second argument raises an affirmative defense.[20] Theoretically, either basis, by itself, would be sufficient to preclude liability.

Accepting and blending these arguments, the Court held that "the defense of good faith and probable cause, which . . . [was] available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."[21] The Court reasoned that "a police officer is not charged with predicting the future course of constitutional law."[22] The Court went on to explain the issue was not simply whether the officers had probable cause to believe that violence was imminent, but that, on remand, the court should also consider whether "the officers reasonably believed in good faith that the arrest was constitutional."[23]

Following *Pierson*, the Court extended the defense to *all* government officials and morphed the defense from "good faith probable cause" to "good faith qualified immunity."[24] As the Court explained in *Wood v. Strickland*, "good faith qualified immunity" consisted of both a subjective and an objective prong.[25] Accordingly, a defendant would not be immune from monetary damages under § 1983 if (1) they knew or

17. Brief for Respondents, *supra* note 13, at 8 (arguing that if they had not arrested the ministers, there would have been "violence and possibly bloodshed").

18. *Id.* at 87.

19. This argument essentially conflates with an element of plaintiff's case-in-chief. To establish a false arrest claim under either state law or Fourth Amendment jurisprudence, civil plaintiffs must show the defendant lacked probable cause for the arrest. *See* 42 U.S.C. § 1983 (2018). If they fail to do so, the defendant is not liable. *See id.* Defense counsel, however, characterizes this as an "immunity" rather than failure to prove a claim. *See* Brief for Respondents, *supra* note 13, at 45.

20. "An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence." Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999). To prove their case, § 1983 plaintiffs alleging false arrest must prove they were deprived of their Fourth Amendment right to be free from an unreasonable seizure. *See* Teressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C. L. REV. 379, 396 (2021). This requires them to prove the police arrested them without probable cause. *See id.*

21. Pierson v. Ray, 386 U.S. 547, 557 (1967).

22. *Id.*

23. *Id.* (explaining that if the officers acted in good faith, "then a verdict for the officers would follow even though the arrest was in fact unconstitutional").

24. *See* Wood v. Strickland, 420 U.S. 308, 318–19, 321–22 (1975).

25. *Id.* at 321.

should have known that their conduct would deprive the plaintiffs of their constitutional rights or (2) if they acted maliciously to injure the plaintiffs or deprive them of a constitutional right.[26] In short, there were two avenues to deny an executive official immunity, one based upon the defendants' objective unreasonableness, the other based upon their subjective intent.[27]

Then, in 1982, the Court made a *major* modification to the defense—one that is especially pertinent to Chapman's thesis. In *Harlow v. Fitzgerald*, the Court was asked to consider "the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts."[28] The Court held that these defendants were not entitled to absolute immunity and then went on to reevaluate the qualified immunity defense.[29] The Court explicitly rejected the subjective prong of the "good faith qualified immunity defense."[30]

Chapman, for all intents and purposes, has invited a return to the good faith qualified immunity defense by denying qualified immunity in situations where the defendant acted in bad faith or was *malum in se*. In fact, Chapman fully recognizes this point[31] and suggests the Court's primary concern—that the subjective prong prolongs qualified immunity disputes—can be resolved with some procedural tweaks.[32] This nod to the practical difficulties of a subjective approach to qualified immunity, however, seems to underappreciate both the way in which the Court has woven the qualified immunity defense together with the procedural rules courts employ to litigate these disputes and the evidentiary challenges civil rights plaintiffs frequently face at the pleading stage of litigation.

The Court consistently has held that qualified immunity is not simply a shield from monetary liability; it is a right "not to stand trial or face the other burdens of litigation,"[33] and the "defense should be resolved as early as possible" in the litigation process.[34] This is precisely why the

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26. *Id.* at 322.

27. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The Court in *Harlow* summarized its good faith qualified immunity precedent as follows: "Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or if* he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . .'" *Id.*

28. *Id.* at 802.

29. *Id.* at 813.

30. *See id.* at 816–18.

31. *See* Chapman, *supra* note 2, at 48.

32. *Id.* at 48–49 (noting that courts could require "plaintiffs to allege the facts constituting an official's bad faith with a higher degree of particularity" or "require plaintiffs to establish a prima facie case of bad faith before the official is obligated to come forward with contrary evidence").

33. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

34. Crawford-El v. Britton, 523 U.S. 574, 600 (1998).

Court eliminated the good faith prong of good faith qualified immunity (to increase the likelihood that courts resolved qualified immunity disputes before discovery and as early in the litigation process as possible).[35] An objective standard, at least in theory, allows judges to resolve qualified immunity claims before discovery based on the parties' pleadings.

Given this history, it seems unlikely that the Court will reintroduce a subject prong into the qualified immunity defense. If it were to consider such a move, one pressing question would seem to be whether courts could continue to resolve qualified immunity disputes at the pleading stage if they were to consider the defendant's subjective intent. This depends, in part, on how courts interpret the procedural rules governing qualified immunity disputes.

II. THE PROCEDURE OF QUALIFIED IMMUNITY

The majority of § 1983 cases are litigated in federal courts.[36] Accordingly, the proceedings are governed by the Federal Rules of Civil Procedure.[37] Pretrial, courts may resolve qualified immunity disputes on a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment.[38] Regardless of the procedural posture, the Court has advised judges that, as a general matter, "discovery should not be allowed" until the qualified immunity issue is resolved.[39] Judges regularly decided qualified immunity claims on the pleadings.[40]

Rule 8 of the Federal Rules of Civil Procedure requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief."[41] In *Bell Atlantic Corp. v. Twombly*,[42] the Court held the plaintiff must allege "enough facts to state a claim to relief that is

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35. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982) (reasoning that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial").

36. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, BUREAU OF JUST. STATS. (Dec. 1994), https://bjs.ojp.gov/content/pub/ascii/CCOPAJ.TXT#:~:text=1%20(1%20Generally%20speaking%2C%20most,the%20authority%20to%20resolve%20them [https://perma.cc/4D9Z-TBD8].

37. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965) (noting that federal courts are required to apply the Federal Rules of Civil Procedure).

38. *See Mitchell*, 472 U.S. at 526; Hunter v. Bryant, 502 U.S. 224, 227 (1991).

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

40. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009) (reviewing qualified immunity argument on the basis of the pleadings); Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 714 (2d Cir. 2022) ("Although qualified immunity defenses are often decided on motions for summary judgment, in appropriate circumstances a district court may address qualified immunity at the pleadings stage.").

41. FED. R. CIV. P. 8(a)(2).

42. 550 U.S. 544 (2007).

plausible on its face."[43] The Court then elaborated on this standard in *Ashcroft v. Iqbal*, explaining:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.[44]

When courts resolve qualified immunity disputes at this stage in the litigation process, the overarching question is whether, assuming the truth of the plaintiff's allegations, the defendant violated a clearly established right.[45] Courts should begin their analysis by identifying and eliminating legal conclusions, leaving just the plaintiff's factual allegations. Then, the judge should consider whether these factual allegations are even plausible. In short, it is not enough for the plaintiff simply to state the defendant acted in bad faith; rather, the court must be able to infer the defendant's bad faith from the plaintiff's factual allegations.

Legal scholars have debated exactly how much recent Supreme Court cases—namely *Twombly* and *Iqbal*—transformed federal pleading rules.[46] Regardless of what side one comes out on, it seems these recent cases would assuage the Court's concerns in *Harlow*. In *Harlow*, the Court lamented, "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial."[47] The Court was

43. *Id.* at 570.

44. *Iqbal*, 556 U.S. at 678–79.

45. Siegert v. Gilley, 500 U.S. 226, 232 (1991) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

46. *See, e.g.*, James V. Bilek, Twombly*,* Iqbal*, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 CHAP. L. REV. 377, 377–78 (2011) (exploring the adopted pleading standards for affirmative defenses and arguing that "[t]o require a defendant to make a plausibility assessment prior to pleading . . . would discourage defendants from pleading otherwise legitimate defenses"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) (critiquing the Court's decision in *Twombly* for "propounding an untenable interpretation" and abandoning a notice pleading standard for the sake of judicial efficiency).

47. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982).

especially concerned about the costs of discovery.[48] Specifically, as it eliminated the subjective prong of the good faith qualified immunity defense, the *Harlow* Court noted, "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[49] This seems to presume the only way to ensure frivolous claims do not reach the discovery stage of litigation is to eliminate the subjective prong. However, pleading rules show there is another alternative.

The problem courts resolving qualified immunity disputes faced pre-*Harlow* was not simply claims of malice but "bare allegations of malice."[50] Rather than eliminating the subjective prong, the courts could have resolved their concerns by simply requiring more robust pleadings.[51]

If *Twombly* and *Iqbal* have, in fact, ratcheted up pleading requirements, as many scholars suggest,[52] then courts could reintroduce a subjective prong to qualified immunity without necessarily pushing § 1983 litigation into discovery and trial.[53] Under *Iqbal* and *Twombly*, § 1983, plaintiffs cannot circumvent a motion to dismiss by simply claiming the defendant behaved maliciously or acted in bad faith.[54] Instead, plaintiffs must allege specific facts which, if true, establish this point.[55]

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48. *Id*. at 816–17 ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.").

Similarly, discovery costs seemed to undergird much of the Court's rationale in *Twombly* and *Iqbal*. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (discussing the costs of discovery); Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.").

49. *Harlow*, 457 U.S. at 817–18.

50. *See id.*

51. *See* Robert Weems, Essay, *Questioning the U.S. Supreme Court's Legalistic Qualified Immunity Approach and Suggestions for A Better Approach*, 66 S.C. L. REV. 543, 557 (2014).

52. *See, e.g*., Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 STAN. L. REV. 905, 918 (2010) (noting that both Twombly and Iqbal apply a heightened pleading standard); A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188–89 (2010) (explaining how the pleading standard was more strict as-applied by the Court in *Twombly*); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1737 (2013) (noting that Twombly and Iqbal are "part of a series of cases moving civil procedure in a restrictive direction").

53. *Iqbal*, 556 U.S. at 676–79 ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

54. *See* Kilaru, *supra* note 52, at 918.

55. *Id.*

Whether this happens in practice largely depends upon plaintiffs' ability to plead sufficient facts for judges to infer defendants' bad faith. This may be easier said than done.

III. PLEADING QUALIFIED IMMUNITY

Pleading qualified immunity is complicated. When it comes to qualified immunity disputes, courts suspend some of the most basic rules of pleading. In most instances, a defendant bears the burden of pleading an affirmative defense.[56] In federal practice, this means that the plaintiff will file a complaint,[57] and the defendant will file an answer that includes any affirmative defenses.[58] Typically, civil plaintiffs are not required to anticipate affirmative defenses in their complaint.[59] Nevertheless, courts regularly resolve qualified immunity disputes on the basis of the plaintiff's complaint.[60] Although the Supreme Court has not explicitly held that § 1983 plaintiffs bear the burden of proof and pleading on qualified immunity,[61] that is the practical effect of resolving qualified immunity disputes on the basis of the plaintiff's complaint. Accordingly, well-advised § 1983 plaintiffs will take care to plead facts to defeat qualified immunity. This is a departure from the usual rules of pleading and procedure.[62]

Chapman does not challenge nor question the procedural posture of qualified immunity disputes.[63] Rather, Chapman simply notes that "[w]hen an officer acted without good faith, her conduct violated an

56. FED. R. CIV. P. 8(c)(1); *see also* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (explaining that the burden of pleading rests with the defendant since qualified immunity is an affirmative defense); Blissett v. Coughlin, 66 F.3d 531, 538 (2d Cir. 1995)) (noting that it is the defendant's burden to plead and sufficiently develop a qualified immunity defense).

57. FED. R. CIV. P. 8.

58. *Id.*

59. In fact, in *Gomez v. Toledo*, the Supreme Court addressed the question of pleading in the context of qualified immunity. 446 U.S. at 635–36. Specifically, the Court considered "whether, in an action brought under 42 U.S.C. § 1983 against a public official whose position might entitle him to qualified immunity, a plaintiff must allege that the official has acted in bad faith in order to state a claim for relief or, alternatively, whether the defendant must plead good faith as an affirmative defense." *Id.* Reasoning that a § 1983 claim consisted of just two elements, the Court held that the government official bears the burden of pleading qualified immunity. *Id.* at 639–40.

60. *See, e.g.*, O'Rourke v. Hayes, 378 F.3d 1201, 1206 (11th Cir. 2004) ("When qualified immunity is asserted in the context of a motion to dismiss, we look to the pleadings to see if the plaintiff has successfully alleged the violation of a clearly established right.").

61. *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 136 (2007).

62. *See, e.g.*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (disregarding anticipated defenses raised in plaintiff's complaint when determining whether a federal question appears on the face of plaintiff's well pleaded complaint).

63. *See* Chapman, *supra* note 2, at 47–49.

existing criminal law, or her conduct was malum in se, the notice rationale does not support immunity."[64] However, assuming the truth of the plaintiff's allegations, a more practical question is whether a plaintiff will be able to allege the facts necessary for a judge to conclude that the defendant should be denied qualified immunity.

Chapman posits that the "fair notice" rationale supports denying defendants qualified immunity when they commit a criminal act, act in bad faith, or their conduct was *malum in se.*[65] Yet, it is far from clear that § 1983 plaintiffs would be able to meet even this new standard.

A. *Pleading Malice*

Chapman argues that courts should deny government officials qualified immunity when the defendants acted in bad faith. He explains, "[T]he plaintiff would have to show that, based on the uncontested facts, a reasonable official would not have done what the defendant did unless he was motivated by malice."[66] For the sake of brevity, Part A treats bad faith and *malum in se* as synonymous with one another and accepts Chapman's supposition that bad faith and *malum in se* are synonymous with malice.[67] In short, Part A considers the likelihood that § 1983 plaintiffs will be able to plead malice in their complaints successfully.

It is hard to establish malice. *County of Sacramento v. Lewis*[68] illustrates this point.[69] In *Lewis*, the plaintiffs filed a § 1983 suit against multiple defendants alleging they had deprived the decedent of his Fourteenth Amendment Substantive Due Process rights.[70] The plaintiffs' son was killed by police officers after the defendants ran him over with their police cruiser following a high-speed chase.[71] The plaintiffs alleged that the officers—who disregarded protocol—behaved with deliberate indifference or reckless disregard.[72] However, the Supreme Court held that to establish a substantive due process deprivation, a § 1983 plaintiff must prove the defendant acted with "improper or malicious motive."[73] It was not enough to prove deliberate indifference or reckless disregard.

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64. *Id.* at 47.

65. *Id.*

66. *Id*. at 49.

67. *See id.* at 49–51. Black's Law Dictionary defines malice as "[t]he intent, without justification or excuse, to commit a wrongful act." *Malice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

68. 523 U.S. 833 (1998).

69. *Id.* at 854–55 (finding defendants not liable under § 1983 and reasoning that "there is no reason to believe that they were tainted by an improper or malicious motive").

70. *Id.* at 837.

71. *Id.*

72. *See id.* at 836–38.

73. *Id.* at 855.

And, as Professor Schwartz has explained, maliciousness is a difficult standard to plead and prove:

> [T]hat standard is so rigorous . . . How is the plaintiff going to be able to show that the officer engaged in this pursuit acted with a purpose to cause harm? Typically, it is a tense situation, that is rapidly evolving, it happens very quickly, and the police officer has to make a split-second decision. . . . It is not enough to show the officer made an unwise, foolish or even stupid decision. The plaintiff must show that the officer's purpose was to harm the pursued driver.[74]

Lewis is somewhat reminiscent of *Corbitt v. Vickers*,[75] the case referenced in the third hypothetical in *Fair Notice*,[76] where a police officer attempts to shoot a barking dog but instead accidentally hits a child who is lying prone in the vicinity.[77] There is little question that discharging a service weapon in these circumstances—where the suspect was unarmed and compliant, and there were innocent bystanders, including children, in the immediate area—was "unwise, foolish, or even stupid,"[78] but it is not clear that it is malicious.

At the motion to dismiss stage, the court should accept the truth of the plaintiff's allegations. This simplifies but does not resolve the issue of pleading malice. On the one hand, based upon the plaintiff's complaint in *Corbitt*, a judge could reasonably find that intentionally shooting at a nonthreatening dog is malicious. On the other hand, the plaintiff has conceded that the officer accidentally shot the bystander.[79] While reconcilable, there is some inherent tension in the argument that an accidental shooting is malicious; malice, by its very definition, requires the intent to cause harm.[80] Here, the officer did not intend to harm the victim by shooting him.[81]

There is a strong argument that in situations like this, where there are two reasonable interpretations of the case, the non-moving party should

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74. Martin A. Schwartz, *Section 1983 Litigation - Supreme Court Developments*, 15 TOURO L. REV. 859, 867 (1999).

75. 929 F.3d 1304 (11th Cir. 2019).

76. Chapman, *supra* note 2, at 56.

77. *Corbitt*, 929 F.3d at 1308. In *Corbitt*, police entered Corbitt's yard in an attempt to apprehend a criminal suspect. *Id.* At the time, there were six children and one adult in Corbitt's yard. *Id.*

78. Schwartz, *supra* note 74, at 867.

79. *See Corbitt*, 929 F.3d at 1308.

80. A shooting can be both malicious and accidental if one accepts that intent to cause harm does not dissipate simply because it hits an unintended target. In this way, it is analogous to the doctrine of transferred intent.

81. Corbitt v. Vickers, 929 F.3d 1304, 1308 (11th Cir. 2019). Although, one might argue he intended to harm the victim by shooting his dog.

prevail.[82] Yet, by incorporating a plausibility standard, *Twombly* and *Iqbal* complicate pleading disputes by giving judges more discretion to dismiss the plaintiff's claims at the 12(b)(6) stage.[83] As the Court explained in *Iqbal*, "[d]etermining whether a complaint states a plausible claim . . . [is] context-specific . . . [and] requires the reviewing court to draw on its judicial experience and common sense."[84] Plausibility provides judges with a basis for dismissing a complaint even when the plaintiff has alleged facts that, if true, state a claim for relief because judges may dismiss them as implausible. Claims involving intent seem especially vulnerable to dismissal at the pleading stage. Bad behavior may be attributable to a number of different motives and causes—mistake, stupidity, misjudgment—and the plausibility standard provides judges with cover to "disregard" the plaintiff's theories of malice and intent in favor of less malignant motives.[85]

The problem of pleading a viable claim is compounded by the fact that federal courts generally do not allow for pre-complaint discovery.[86] Accordingly, constricting qualified immunity to cases where officials act in good faith hardly means that § 1983 plaintiffs will be able to plead that the defendant acted in bad faith successfully.[87]

B. *Pleading Criminal Conduct*

While maliciousness is somewhat amorphous, criminal codes (at least those that do not involve subjective intent) are fairly well-delineated. Chapman suggests that state criminal law "would be sufficient to guide an official's conduct, such that it would not be unfair to subject the official to constitutional litigation and liability."[88] If courts were to adopt this standard, § 1983 plaintiffs could overcome a motion to dismiss on the basis of qualified immunity by alleging facts that, if true, showed a

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82. The non-moving party will almost always be the plaintiff in qualified immunity disputes.

83. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 33 (2010) ("Although judicial discretion--and its potential for inconsistency--is hardly a novel aspect of Rule 12(b)(6) motion practice, the invocation in *Twombly* and *Iqbal* of highly subjective factors may have made it the determinative factor in deciding whether a plaintiff will be allowed to proceed to discovery.") (emphasis added).

84. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

85. *Corbitt*, 929 F.3d at 1322. To determine whether a complaint states a plausible claim that is context specific, the reviewing court must draw on its judicial experience and common sense. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. *Id.*

86. *See* FED. R. CIV. P. 27(a) (allowing putative plaintiffs to depose persons "before an action is filed" in very limited circumstances only).

87. Without discovery, plaintiffs are less likely to have access to evidence that establishes bad faith or malice (e.g., internal department communications and deposition testimony).

88. Chapman, *supra* note 2, at 50.

violation of state criminal law. In practice, this would create an additional basis to overcome qualified immunity: whether the defendant violated state criminal law. Chapman suggests this is a reasonable extension of the doctrine because "state criminal law, which threatens similar or greater liability than constitutional liability, would be sufficient to guide an official's conduct such that it would not be unfair to subject the official to constitutional litigation and liability."[89] Fairness, here, is premised on notice—notice of a criminal wrong.[90]

This approach, however, ignores the plain language of *Harlow*. In *Harlow*, the Court held that qualified immunity should be available to government officials "insofar as their conduct does not violate clearly established *statutory or constitutional rights of which a reasonable person would have known*."[91] The Court reasoned that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[92] Viewed against the backdrop of *Harlow*, the qualified immunity standard seems very much premised on the idea of fair notice. However, it is important to ask: "notice of what?"

In *Harlow*, the Court makes clear that government officials must have notice that their behavior deprives the plaintiff of a statutory or constitutional right.[93] When government officials violate criminal laws, they, in most instances, are not violating the Constitution. Thus, they may know they are committing a crime, but this does not mean they know they are violating the Constitution. The Court makes a similar point in *Davis v. Scherer*.[94] There, the plaintiff argued that the defendants were not entitled to qualified immunity because they had violated explicit agency regulations.[95] Rejecting that argument, the Court held, "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[96] The qualified immunity inquiry is not concerned about some generic wrongfulness; it is concerned about unconstitutional conduct. Chapman acknowledges that whether conduct is criminal and is unconstitutional are separate legal questions.[97] Yet, Chapman proposes

89. *Id.* Yet, Chapman is careful to make clear that notice of any wrong is not sufficient. *See id.* at 51.

90. *See id*.

91. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

92. *Id*.

93. *See id*. at 818–19.

94. 468 U.S. 183 (1984).

95. *See id.* at 187.

96. *Id.* at 194.

97. Chapman, *supra* note 2, at 50–51.

disconnecting qualified immunity from its constitutional mooring.[98] In the past, the Court has explicitly rejected this approach.[99] The relevant inquiry in qualified immunity inquiries is not simply whether the defendant has notice of liability; the question is whether the defendant has notice of *constitutional* liability.

CONCLUSION

Chapman explores one important rationale underlying the qualified immunity defense—fair notice. The framework Chapman outlines in Part I of his article using six different hypotheticals is especially useful for thinking through qualified immunity. Through these hypotheticals Chapman concludes that there is "a baby in the bathwater" and that at least some aspects of the qualified immunity defense should be preserved.[100]

Yet, this limited view of qualified immunity is exactly that—a narrow examination of qualified immunity. I counter that by focusing on just one of the doctrine's rationales, Chapman seems to ignore the "elephant in the dark room."[101] Qualified immunity is multi-dimensional. It is not simply a question of fair notice. The Court designed the defense to accommodate "competing values" and, in so doing, has fused the substance and procedure of qualified immunity to one another.[102] By focusing on just one aspect of qualified immunity, Chapman skims over the complexities of qualified immunity inquiries. It is difficult to get a clear picture of qualified immunity when constitutional rights and procedural rules are cropped out of the picture.

Chapman sets forth six hypotheticals across various municipal settings and suggests that fair notice distinguishes between those situations where the defendant should be liable from those in which qualified immunity should shield the defendant from monetary damages.[103] Chapman notes whether the defendant is a government

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98. *See id.* at 51.

99. *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 194 (1984) (rejecting the plaintiff's declaration seeking relief under § 1983, contending that his rights had been violated under the Due Process Clause of the Fourteenth Amendment); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 842–43 (1998) (similar); Mullenix v. Luna, 577 U.S. 7, 12 (2015) (similar).

100. Chapman, *supra* note 2, at 64.

101. In another parable, six people are invited to feel a different part of an elephant but their exploration is restricted to a particular part of the massive mammal. *See* James Baldwin, *The Blind Men and the Elephant*, AM. LITERATURE (Mar. 10, 2019), https://americanliterature.com/author/james-baldwin/short-story/the-blind-men-and-the-elephant [https://perma.cc/S5VU-ELX3]. Each person makes an assessment based upon their limited understanding of the animal. *Id.* The moral of that story is that while each viewpoint may be correct, one can only understand the truth through a broad range of perspectives. *See id.*

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

103. Chapman, *supra* note 2, at 12–14.

official or private actor but other than this, largely ignores the defendants' identities. Yet, it is noteworthy that three of these six hypotheticals involve police officials.[104] Additionally, the three hypotheticals that involve police officials are the very same that Chapman argues the defendants should be denied qualified immunity.[105] This is telling.

Police misconduct is a special kind of wrong. Not only is police misconduct common, but, unlike almost every other governmental wrong, it has the potential to deprive a person of liberty and life. There is just something different about police misconduct. Perhaps civil rights litigation should reflect this difference. My forthcoming article expounds upon this idea. Building upon the functional approach the Court has adopted to structure absolute immunities, I consider how police differ from other executive officials and whether Congress should eliminate qualified immunity for police.

104. *Id.* at 12.
105. *Id.* at 14.