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### **OBJECTING AT THE ALTAR: WHY THE *HERRING* GOOD FAITH PRINCIPLE AND THE *HARLOW* QUALIFIED IMMUNITY DOCTRINE SHOULD NOT BE MARRIED**

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*Response to: Jennifer E. Laurin, Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670 (2011)*

#### **INTRODUCTION**

Critics of the curtailment of the exclusionary rule worked by *Herring v. United States*<sup>1</sup> have denounced the decision as Supreme Court activism posing as derivation from settled law. Professor Jennifer Laurin agrees that *Herring* breaks with exclusionary rule doctrine<sup>2</sup> but disputes that it lacks any grounding in Court precedent. She says that *Herring* consummates a long courtship between the *Leon* good faith exception to the exclusionary rule<sup>3</sup> and the *Harlow* standard for qualified immunity.<sup>4</sup> Laurin premises her argument on an admittedly unorthodox depiction of qualified immunity that overstates the doctrine's protective scope. Ironically, one effect of this overstatement could be to enable a doctrinal distortion of precisely the type Laurin cautions against. For by positing a substantive equivalence between the *Harlow* rule and the significantly more protective *Herring* principle, Laurin invites judges to borrow from *Herring* to further restrict the availability of constitutional tort remedies.

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\* Professor, University of New Hampshire School of Law. Many thanks to John Jeffries and Dana Remus for their very helpful comments and suggestions, and to the staff of the *Columbia Law Review* for their excellent editorial assistance. Special thanks to Jennifer Laurin for writing such an excellent and provocative Essay.

1. 555 U.S. 135 (2009).

2. See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 *Colum. L. Rev.* 670, 671 (2011) (arguing *Herring* was a "significant and potentially sweeping reformulation" of precedent).

3. See *United States v. Leon*, 468 U.S. 897, 913 (1984) (recognizing good faith exception to Fourth Amendment exclusionary rule after balancing costs and benefits of suppressing evidence seized by officers reasonably relying on faulty warrant).

4. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (recognizing a qualified immunity for executive officials based on balancing the rights to remedies for citizens with the public interest in encouraging the "vigorous exercise of official authority").

Part I of this Response highlights some potential problems posed by Laurin's heterodox characterization of the qualified immunity doctrine. Part II defends the conventional description of the doctrine as more accurate and normatively desirable. Part III shifts gears and amplifies Laurin's warnings about the transsubstantive application of constitutional tort doctrine.

### I. THE PROBLEM

In *Herring*, the Supreme Court significantly limited the reach of the exclusionary rule by holding that it should not apply to police conduct involving a mere negligent disregard for Fourth Amendment rights; it should apply only to police conduct that is deliberate, reckless, or grossly negligent (or that can be traced to recurring or systemic negligence) with respect to such rights.<sup>5</sup> Commentators opposed to this restrictive formulation have expressed dismay at both the substance of the ruling and the fact that the Court presented it as being effectively "laid out in [its prior] cases."<sup>6</sup> For example, taking strong exception to the Court's suggestion that its holding was derivative, Professor Albert Alschuler has stated that "[n]o decision prior to *Herring* . . . had suggested or implied that the exclusionary rule should be limited in the way the Court proposed."<sup>7</sup> Similarly, Professor Wayne LaFave has characterized the Court's "efforts to find underpinnings for its holding in its prior decisions" as "no less than disingenuous."<sup>8</sup>

In her Essay, Professor Laurin disputes the claim that *Herring* is an unprecedented departure from prior law. She says that commentators should look not to the Court's exclusionary rule precedents, but rather to its constitutional tort law cases, to understand *Herring's* pedigree.<sup>9</sup> While acknowledging that *Herring* neither cites to any such cases nor mentions constitutional tort doctrine, Laurin contends that the rule adopted in *Herring* is functionally equivalent to the qualified immunity doctrine, which protects public officials from damages liability and the burdens of trial preparation when their conduct did not violate clearly established rights of which a reasonable person would have known.<sup>10</sup> Laurin says

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5. *Herring*, 555 U.S. at 144; see also *Davis v. United States*, 131 S. Ct. 2419, 2427–28 (2011) (quoting *Herring* and claiming deterrent value of exclusion is strongest and tends to outweigh costs when "the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights," as opposed to "when the police act with an objectively 'reasonable good-faith belief that their conduct is lawful'").

6. *Herring*, 555 U.S. at 144.

7. Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 488 (2009).

8. Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. Crim. L. & Criminology 757, 787 (2009).

9. See Laurin, *supra* note 2, at 724–39 ("*Herring* must be understood against the backdrop of not only the Court's exclusionary rule decisions, but also the constitutional tort jurisprudence upon which those decisions have both expressly and implicitly drawn.>").

10. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

that, as the Supreme Court has applied it, the qualified immunity doctrine mirrors *Herring*; it effectively requires a constitutional tort plaintiff to show that the defendant acted with recklessness or gross negligence with respect to the constitutionality of the conduct being challenged.<sup>11</sup> But Laurin also acknowledges that, in identifying this de facto marriage between the *Herring* recklessness principle and the qualified immunity doctrine, she parts company with scholars of constitutional remedies, who have described the showing a constitutional tort plaintiff must make to overcome an assertion of qualified immunity as “negligence with respect to [the] illegality” of the challenged conduct.<sup>12</sup> Laurin calls this the “bare negligence” position.<sup>13</sup> The principal theme of Laurin’s Essay is that doctrinal borrowing and convergence of the sort she identifies in *Herring* can lead to distortions and remedial inadequacies that have not been fully appreciated. There is considerable power to Laurin’s thesis, and I agree with her that there are aspects of *Herring*—particularly its individuation of fault and approach to systemic error—that strongly resonate with constitutional tort law. But as a commentator who has subscribed in print to what Laurin labels the “bare negligence” position,<sup>14</sup> I am concerned by the expansive description of qualified immunity featured in Laurin’s Essay. In particular, I fear that judges hostile to regulation through the constitutional tort regime might seize on Laurin’s depiction to support an expansion of the doctrine and a concomitant contraction of constitutional tort liability. Thus, ironically, Laurin’s Essay could support a distorting doctrinal “borrowing and convergence” that would run in the *opposite* direction from the one she identifies: one in which judges would borrow from *Herring* to reduce the remedies available in constitutional tort. In Part II, I elaborate why I believe the conventional description more accurately captures the Supreme Court’s qualified immunity jurisprudence than the “recklessness” formulation that Laurin prefers. But I first should explain why a disagreement over the mere *characterization* of the qualified immunity doctrine should matter at all. After all, does not the *Harlow* qualified immunity test speak for itself? Not really. Legions of appeals driven by disputes over how to apply the qualified immunity doctrine make clear that the analysis of whether a given set of facts describes a violation of “clearly established law” of which an “objectively reasonable” public official would have been aware is far from self-executing—even with the Supreme Court’s post-*Harlow* admonition that it be performed at a very high level of specificity.<sup>15</sup> But more importantly for present

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rights of which a reasonable person would have known.”).

11. Laurin, *supra* note 2, at 725–28.

12. See *id.* at 726 n.283 (noting disagreement with characterization of fault requirement provided in John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 89 (1999)).

13. *Id.*

14. See John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 *Const. Comment.* 189, 201 & n.55 (2008) [hereinafter Greabe, *Better Path*] (“[I use] the phrase ‘negligence with respect to illegality’ as shorthand for the kind of fault required to impose individual-capacity damages liability under section 1983.”).

15. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (stating “[t]he contours of the

purposes, the contours of the qualified immunity doctrine have been and continue to be particularly vulnerable to policy-driven judicial tinkering. And really, how could it be otherwise? The Supreme Court has admitted that it created and refined the qualified immunity doctrine, largely “for strong policy reasons,” by purporting to read a common law defense into a tort statute—42 U.S.C. § 1983<sup>16</sup>—that “on its face admits of no immunities.”<sup>17</sup> Thus, from its birth, the doctrine has seemed to flout the foundational principle that constitutionally enacted statutory text trumps conflicting common law.<sup>18</sup>

A doctrine rooted in an inversion of one of our legal system’s basic premises will inevitably test rule of law values as it grows and develops. Certainly, that has been the case with qualified immunity. Laurin depicts how the Supreme Court created the doctrine and then unabashedly expanded its scope between the 1960s and 1980s.<sup>19</sup> Of course, the story does not end in the 1980s; the Court’s policy-driven, freewheeling reformulation of doctrine continues to this day, most notably in its recent, albeit unacknowledged, creation of a heightened pleading standard to govern claims subject to defensive assertions of qualified immunity.<sup>20</sup>

Unsurprisingly, the Court’s lawmaking has inspired similar initiatives in the lower federal courts. Directed by the Court to resolve assertions of qualified immunity as early in a lawsuit as possible,<sup>21</sup> some federal appeals courts have rejected the usually applicable rules of federal civil litigation in applying the doctrine. For example, some courts have held that the Seventh Amendment does not confer a right to have a jury resolve mixed fact-law issues integral to a defendant’s entitlement to qualified immunity.<sup>22</sup> And others have decided that the burden of persuasion does

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[allegedly violated] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,” and “in the light of pre-existing law the unlawfulness must be apparent”).

16. Section 1983 authorizes tort remedies against a person who, under color of law, subjects another person, or causes another person to be subjected, to the deprivation of a right secured by federal (primarily constitutional) law. 42 U.S.C. § 1983 (2006).

17. *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992).

18. See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 317–19 (1981) (concluding since 1972 Amendments to Federal Water Pollution Control Act totally restructured existing water pollution legislation, Congress intended to establish a “self-consciously comprehensive program” that left “no room for courts to attempt to improve on that program with federal common law”).

19. Laurin, *supra* note 2, at 695–99.

20. See generally John M. Greabe, *Iqbal, al-Kidd and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law*, 20 Wm. & Mary Bill Rts. J. 1 (2011) [hereinafter Greabe, *Pleading Past*] (discussing how, in *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), Supreme Court implicitly overruled *Gomez v. Toledo*, 446 U.S. 635 (1980), to require a constitutional tort plaintiff to plead facts negating the applicability of qualified immunity).

21. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (“[In order] to protect public officials from ‘broad-ranging discovery’ . . . we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of litigation.”).

22. See, e.g., *Curley v. Klem*, 499 F.3d 199, 208–09 (3d Cir. 2007) (stating “qualified immunity is a question of law reserved for the court” and “recent precedents say that the

not follow the burden of proof on qualified immunity issues.<sup>23</sup> There are many other examples as well, but these two suffice to illustrate that many judges forego restraint when it comes to the qualified immunity doctrine. Indeed, two Supreme Court justices who frequently self-identify as strong proponents of rule-of-law values—Justices Scalia and Thomas—are on record as stating that they see themselves as free to adopt a “legislative” approach to qualified immunity because they are in disagreement with the Court’s landmark ruling in *Monroe v. Pape*,<sup>24</sup> which held that § 1983 reaches the unauthorized conduct of state officials.<sup>25</sup> When it comes to qualified immunity, anything goes. Thus, even something as seemingly insignificant as a mischaracterization of the scope of the doctrine can become a tool of lawmaking—especially when it appears in a *Columbia Law Review* Essay that will deservedly be widely read and discussed.

## II. THE REACH OF QUALIFIED IMMUNITY: “RECKLESSNESS” WITH RESPECT TO LEGALITY?

So, has the Supreme Court’s expansion of the qualified immunity doctrine taken us to a point where, as Laurin argues, the terms “recklessness” and “gross negligence” better describe the type of disregard of constitutional obligations required for a plaintiff to state a viable constitutional tort claim? Or does what Laurin calls the “bare negligence” formulation remain a more accurate signifier of the borderline between immunity and potential liability?<sup>26</sup> “Bare negligence” is Laurin’s shorthand description of a characterization of the *Harlow* test offered by Professor John Jeffries: that “the kind of fault required [to overcome qualified immunity] is negligence with respect to illegality.”<sup>27</sup> Jeffries elaborates: “The usual formulation is that qualified immunity protects an officer defendant when a *reasonable* officer ‘could have believed’ his or her conduct to be lawful.”<sup>28</sup> The basic idea is that qualified immunity draws a line based on the negligence-rooted concept of reasonableness—

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court, not a jury, should decide whether there is immunity in a given case”).

23. See, e.g., *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) (“A qualified immunity defense alters the usual summary judgment burden of proof. . . . The plaintiff bears the burden of negating qualified immunity, but all inferences are drawn in his favor.” (citations omitted)).

24. 365 U.S. 167 (1961).

25. See *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., joined by Thomas, J., dissenting) (“We find ourselves engaged . . . in the essentially legislative activity of crafting a sensible scheme of qualified immunities . . .”).

26. Laurin, *supra* note 2, at 726 n.283.

27. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 89 (1999) [hereinafter *Jeffries, Right-Remedy Gap*]. Jeffries’s other writings strongly suggest that he would not embrace the “bare negligence” label as an accurate characterization of how *Harlow* is actually implemented in the lower federal courts. See John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 *Fla. L. Rev.* 851, 863–66 (2010) (discussing appellate cases in which defendants were afforded qualified immunity in circumstances where it is doubtful a reasonable officer could have thought the challenged conduct lawful).

28. Jeffries, *Right-Remedy Gap*, *supra* note 27, at 89 n.12 (citing *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam)).

reasonableness with respect to lawfulness—but imposes a heavy presumption that the hypothetical “objectively reasonable” officer who serves as the touchstone for the analysis could have believed the conduct lawful unless a court capable of “clearly establishing” the law has held similar conduct unlawful.<sup>29</sup> “Negligence with respect to illegality” thus connotes a binary analysis in which an official charged with knowledge of the line set by clearly established law has either stayed on the correct side of the line or strayed across it. If the official stays on the right side of the line, he or she is immunized. If not, immunity evaporates. There is no other possibility. Laurin frames this conventional account of the qualified immunity analysis as one that reduces down to a requirement that a constitutional tort plaintiff rebut an assertion of qualified immunity by showing that the defendant acted with a negligent “state of mind.”<sup>30</sup> She then pits against it a new account, one holding that the state of mind a constitutional tort plaintiff must actually show is recklessness (or its equivalent, gross negligence)<sup>31</sup> of the type adopted in *Herring*. Laurin suggests that the recklessness that must be shown in both situations is of the “subjective” variety—the type of recklessness with which the criminal law is typically concerned<sup>32</sup>—and not the “objective” recklessness that is more frequently at issue in civil cases.<sup>33</sup> This subjective form of recklessness requires evidence from which a fact finder could conclude that the defendant consciously disregarded a risk of harm of which he or she was aware.<sup>34</sup> In the context of this discussion, the “risk” is whether the defendant has acted unlawfully. Thus, although Laurin does not say so explicitly, her Essay effectively claims that, under current law, a defendant is entitled to qualified immunity unless the plaintiff plausibly alleges, and then proves, that the defendant actually was aware of the risk of crossing a constitutional line and consciously disregarded that risk. And the Essay

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29. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing objective standard for reasonableness of officer’s conduct “measured by reference to clearly established law”). I use the term “heavy presumption” because “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); see also *id.* at 739 (“This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))). Yet the unlawfulness of the conduct in question must be apparent in the light of preexisting law. *Hope*, 536 U.S. at 739 (citing *Anderson*, 483 U.S. at 640).

30. Laurin, *supra* note 2, at 726 n.283.

31. See *id.* at 725 n.274 (citing *Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994), for proposition that recklessness and gross negligence may be regarded as functionally identical).

32. See *id.* at 725, 726 & n.283, 727 & n.287, 728 & n.294 (describing varying culpability standards in criminal law).

33. See *Farmer*, 511 U.S. at 836–37 (distinguishing subjective, criminal law recklessness and objective, civil law recklessness).

34. *Id.* at 837; see also Laurin, *supra* note 2, at 726 n.283, 727 n.287 (citing to relevant portion of Model Penal Code stating criminal recklessness involves “conscious[] disregard[]” of harm); *id.* at 728 & n.294 (citing to provision of Model Penal Code distinguishing between “purposeful” and “knowing” conduct and suggesting showing required to rebut qualified immunity requires a demonstration that defendant acted “knowingly”).

does state explicitly that the qualified immunity analysis is not binary, but trinary; it immunizes not only conduct that fails to cross the line set by clearly established law, but also conduct that crosses this line but not a second line demarking the boundary between a negligent and reckless state of mind with respect to illegality. The Essay makes this clear when it indicates that a defendant's mere departure from clearly established law is insufficient to trigger liability; rather, qualified immunity principles "require that the departure be great."<sup>35</sup>

If this description of the qualified immunity doctrine were accurate—if the Supreme Court's cases implicitly supported the view that some violations of clearly established law do not trigger constitutional tort liability because the defendant cannot be thought to have acted in a criminally reckless manner with respect to constitutional boundaries—the connection that Laurin has drawn between *Herring* and qualified immunity would be highly persuasive. Indeed, it would be a great mystery why the Court did *not* refer to the qualified immunity doctrine in *Herring* to defend and explain itself. After all, the Court presents *Herring* as a descendant of *Leon*,<sup>36</sup> and it has explicitly equated the *Leon* good faith principle with the qualified immunity analysis in the past.<sup>37</sup> Yet the Court's failure to mention qualified immunity in *Herring* is not only entirely understandable; it also is telling. As Laurin demonstrates, *Herring* constitutes an abrupt break from the Court's *Leon* good faith jurisprudence,<sup>38</sup> and its failure to mention qualified immunity even as it professes to be derivative of prior good faith rulings only serves to highlight the rupture. More to the present point, Laurin's heterodox analysis positing a convergence between the *Herring* recklessness principle and qualified immunity significantly overstates the showing a constitutional tort plaintiff must make to overcome immunity.

At the outset, the recklessness argument confronts the sticky fact that the Supreme Court consistently cites *Harlow's* binary, objective inquiry into whether the defendant has breached a duty to refrain from infringing clearly established rights as the standard for assessing the defendant's

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35. Laurin, *supra* note 2, at 728; see also *id.* at 726–27 (“In asserting that constructive notice of illegality would suffice where such wrongfulness was flagrant, the Court strongly implied the *insufficiency* of negligence in the ordinary case.”).

36. See *Herring v. United States*, 555 U.S. 135, 139–47 (2009) (repeatedly citing *United States v. Leon*, 468 U.S. 897 (1984)). *Leon* held that the exclusionary rule does not apply to evidence obtained in a search conducted in objectively reasonable reliance on an invalid warrant. 468 U.S. at 922.

37. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (“[T]he same standard of objective reasonableness that [was] applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.” (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986))); see also Laurin, *supra* note 2, at 710–11 (describing “[t]he path taken by the Court’s qualified immunity and exclusionary rule jurisprudence following *Leon*” leading to “[t]he good faith exception and the good faith defense . . . becom[ing] functionally indistinguishable”).

38. See Laurin, *supra* note 2, at 679–86 (analyzing *Herring* and concluding that “[c]ontrary to the *Herring* majority’s insistence, its analysis was premised upon significant enlargement of or departure from the very precedents invoked”).

entitlement to qualified immunity.<sup>39</sup> Thus, the argument faces the formidable threshold burden of demonstrating the incorrectness (or at the very least incompleteness) of the Court's many indications that a defendant official ipso facto lacks immunity for a violation of clearly established rights. Laurin forthrightly acknowledges this, but says that two aspects of the Court's qualified immunity decisions since *Harlow* "reveal that, in application, [the *Harlow*] standard has forayed into increasingly culpability-focused terrain that has challenged conventional distinctions between objective and subjective legal inquiries."<sup>40</sup>

First, in *Malley v. Briggs*, the Court described qualified immunity as "provid[ing] ample protection to all but the plainly incompetent or those who knowingly violate the law."<sup>41</sup> Then shortly thereafter, in *Anderson v. Creighton*, the Court mandated that courts conducting a qualified immunity analysis define the allegedly infringed right at a very high level of specificity in determining whether it was clearly established.<sup>42</sup> Second, the Court has recognized that, notwithstanding *Harlow's* insistence that the qualified immunity analysis be objective, the knowledge actually possessed by the defendant officer—including knowledge of the content of policies and training actually received regarding legal obligations—can be a relevant part of that analysis.<sup>43</sup> Laurin provides the following explanation of how these two facets of the Court's post-*Harlow* case law combine to lead her to reject the traditional formulation<sup>44</sup> and to conclude that a plaintiff must show "recklessness with respect to illegality" to evade qualified immunity:

Hence, after announcing what appeared to be a negligence standard for qualified immunity in *Harlow*, the Court progressively ratcheted the showing that it would demand to demonstrate that official conduct was unreasonable. The decisions continued to reject any return to the pre-*Harlow* regime of assessing malice or bad motive. At the same time, however, the Court embraced a highly particularized conception of notice of illegality as the touchstone of official liability, which approached a standard sounding more in gross negligence or

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39. Just this past Term, the Court simply cited the binary *Harlow* test in describing the applicable qualified immunity standard. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

40. Laurin, *supra* note 2, at 725.

41. 475 U.S. at 341.

42. 483 U.S. 635, 639–40 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); see also Laurin, *supra* note 2, at 725–26 ("[T]he [*Anderson*] Court asserted that its qualified immunity precedents demanded a far more particularized showing that a constitutional right was 'clearly established' at the time of the alleged illegality." (citation omitted)).

43. Laurin, *supra* note 2, at 726.

44. See *id.* at 726 n.283 ("I part company with prominent scholars of constitutional remedies and the Fourth Amendment, who have characterized the state of mind required to rebut qualified immunity as bare negligence.").



recklessness. In asserting that constructive notice of illegality would suffice where such wrongfulness was flagrant, the Court strongly implied the *insufficiency* of negligence in the ordinary case.<sup>45</sup>

I do not see how Laurin's conclusion follows from the evidence she cites. As an initial matter, Laurin's use of the phrase "state of mind require[ment]" to describe *both* her recklessness formulation and Jeffries' "negligence with respect to illegality" descriptor confuses more than it clarifies. While Laurin's recklessness formulation does refer to what she sees as a criminal recklessness state of mind requirement that is implicit in the qualified immunity analysis, Jeffries offers his "negligence with respect to illegality" characterization only to describe the "kind of fault" (and not the state of mind) a plaintiff must show to evade qualified immunity. Indeed, the conventional view—which accepts at face value *Harlow's* mandate that the analysis be objective—is that a constitutional tort plaintiff need not establish that the defendant acted with *any* particular state of mind; such a plaintiff must only show that the defendant breached a duty to honor clearly established rights. Thus, Laurin's disagreement is not with a conventional view holding that a constitutional tort plaintiff must show that the defendant acted with a merely negligent state of mind. Rather, it is with one holding that there is *no* state of mind element to the qualified immunity analysis. On this point of disagreement, the conventional position is far stronger. *Malley* and *Anderson*, alone or in combination, certainly do not introduce a state of mind requirement—let alone one approaching criminal recklessness—into the qualified immunity analysis. *Anderson* merely elaborates how courts are to go about the wholly objective process of deciding what rights are clearly established, and *Malley's* description of the universe of public officials who are not protected by qualified immunity (the "plainly incompetent" and "those who knowingly violate the law") is just that: a description of a group of people. The Court may have overstated matters in suggesting that *everyone* who violates clearly established law without knowingly intending to do so is "plainly incompetent," but that is nothing more than a quibble about the aptness of an adjectival phrase. While clearly intended to emphasize the protective sweep of the qualified immunity doctrine, *Malley's* description of those who fall outside the doctrine's protection does not purport to amplify, refine, or limit the application of the *Harlow* qualified immunity standard in any way. In fact, the Court frequently presents both the *Harlow* standard and the *Malley* description of those who are unprotected by qualified immunity together, as if they are perfectly compatible.<sup>46</sup> That leaves the cases in which the

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45. *Id.* at 726–27 (citations and internal quotation marks omitted).

46. See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 228–29 (1991) (per curiam) ("The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley*, 475 U.S. at 343, 341)); *Burns v. Reed*, 500 U.S. 478, 494–95 & n.8 (1991) (citing both *Harlow* and *Malley* in discussing evolution of qualified immunity); *Anderson*, 483 U.S. at 638–39 (using both *Harlow* and *Malley* to explain how the Court has "generally provid[ed] government officials performing discretionary functions with a qualified immunity").

Court has regarded evidence bearing on the defendant's actual knowledge at the time of the challenged action to be relevant. Obviously, there is no inconsistency as a general matter between looking at evidence concerning what the defendant knew at the time of the action and a proper application of the *Harlow* standard. *Harlow* frequently requires analysis as to whether the defendant's response to a reasonably perceived set of facts violated clearly established law, so what a defendant saw, heard, thought, and knew is often highly relevant.<sup>47</sup> But Laurin focuses particularly on two cases where the Court found it pertinent that training manuals and policy guidelines available to the defendant spoke to the lawfulness of the challenged conduct. In the abstract, treating such information as probative of the defendant's entitlement to qualified immunity seems odd if, as the conventional account holds, the qualified immunity analysis is to ask only whether an objectively reasonable officer could have thought the challenged conduct lawful. But a closer look at the cases reveals that they do not bear the weight of the recklessness argument.

The first case, *Wilson v. Layne*, held that it was unconstitutional for arresting officers to permit members of the media to enter the plaintiffs' home and observe the execution of a warrant.<sup>48</sup> *Wilson* further held, however, that the unconstitutionality of the challenged conduct was not clearly established when the officers had acted, and that the officers therefore were entitled to qualified immunity.<sup>49</sup> In the course of so holding, the Court stated that it was "important to [its] conclusion" that the defendants had relied on "a ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests."<sup>50</sup> But the Court then immediately made clear that this fact was "important" only in that it supported the justness of the outcome, for it added: "Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law [holding the policy unconstitutional]."<sup>51</sup> In other words, a violation of clearly established law would strip the violators of immunity, even if the policy had led them to incorrectly believe in the lawfulness of their conduct.

The second case, *Groh v. Ramirez*, held that a federal agent who conducted a search of a home had acted pursuant to a warrant that was so facially deficient under clearly established law that he was not entitled to qualified immunity.<sup>52</sup> Here again, the Court made reference to a departmental policy guideline; but this time, it was to a guideline that put

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47. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution."), overruled on other grounds by *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

48. 526 U.S. 603, 614 (1999).

49. *Id.* at 614–18.

50. *Id.* at 617.

51. *Id.*

52. 540 U.S. 551, 557–66 (2004).

the defendant on notice that he faced liability for exceeding his authority in executing the warrant.<sup>53</sup> The Court then followed up the reference with a footnote containing the following explanation for the guideline reference: “We do not suggest that an official is deprived of qualified immunity whenever he violates an internal guideline. We refer to the [guideline] only to underscore that petitioner should have known that he should not execute a patently defective warrant.”<sup>54</sup> But this footnote should not be read to suggest that the defendant’s subjective knowledge of the law was the pivot point in the qualified immunity analysis. In fact, in both the same paragraph to which the footnote was appended, and in the paragraph that immediately followed, the Court analyzed the defendant’s entitlement to qualified immunity based on what a “reasonable officer” could have believed about clearly established law, and not what the defendant subjectively believed.<sup>55</sup>

All of this is not to say that there is a complete lack of support in federal precedent for the proposition that a defendant’s subjective state of mind about the lawfulness of the challenged conduct can be relevant to the qualified immunity inquiry. There is, for example, *Harlow’s* mysterious “extraordinary circumstances” dictum, which immediately followed its announcement of the qualified immunity test, but which has not appeared in a majority opinion issued by the Court since *Harlow*. In this dictum, the Court stated that “if the official pleading [qualified immunity] claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the [claim] should be sustained. But again, the [claim] would turn primarily on objective factors.”<sup>56</sup> Several federal appeals courts treat this dictum as good law, notwithstanding its immediate disappearance from the Court’s pronouncements about qualified immunity and the Court’s many subsequent indications that the qualified immunity analysis is wholly objective.<sup>57</sup> A full blown analysis whether there is room for a public official to argue for immunity on the basis of subjective good faith even where the official violated a plaintiff’s clearly established rights is beyond the scope of this response. But even a positive answer to this question would fall far short of establishing that a constitutional tort plaintiff must establish that the defendant acted in a subjectively reckless manner with respect to illegality in order to negate qualified immunity.<sup>58</sup>

Thus far, I have been making only descriptive arguments. But as a

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53. Id. at 564.

54. Id. at 564 n.7.

55. Id. at 563–64.

56. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

57. See, e.g., *Amore v. Novarro*, 624 F.3d 522, 535 (2d Cir. 2010) (citing *Harlow’s* “extraordinary circumstances” dictum); *Dodds v. Richardson*, 614 F.3d 1185, 1207 n.13 (10th Cir. 2010) (discussing “extraordinary circumstances” in which defendant can prove she neither knew nor should have known legal standard).

58. See, e.g., *Amore*, 624 F.3d at 535 (emphasizing knowledge of clearly established law “ordinarily” is imputed to defendant); *Dodds*, 614 F.3d at 1207 n.13 (observing it will rarely be possible for a constitutional tort defendant to establish it was objectively reasonable to violate clearly established law).

normative matter as well, I far prefer *Harlow* (as I perceive it to operate) to a regime in which Laurin's recklessness formulation would drive the qualified immunity analysis. (I suspect that Laurin does too, given the concerns she expresses about how the "hydraulics" of borrowing and convergence can work to constrict the availability of constitutional remedies).<sup>59</sup> Space limitations preclude development of a defense of the premises of my normative position, which are that constitutional tort law has an important role to play in the enforcement of constitutional rights, and that courts should not expand the qualified immunity doctrine to protect all but those who are subjectively reckless with respect to their constitutional obligations. So for purposes of this response, I will leave it at this: As implemented by today's judiciary, qualified immunity really does protect all but the plainly incompetent and those who knowingly violate the law. In my view, that is sufficient protection for those who wield government power.

That said, there is one additional normative problem with any move to a recklessness regime. Consider how such a regime might skew incentives with respect to the education and training of government actors. As matters presently stand, the doctrine recognized in *Bivens*<sup>60</sup> does not authorize damages claims against the United States,<sup>61</sup> and § 1983<sup>62</sup> does not authorize damages claims against a state or any of its subdivisions other than a municipality.<sup>63</sup> Thus, municipalities are the *only* government entities that are potentially liable for a damages judgment in a constitutional tort action.<sup>64</sup> Moreover, establishing municipal damages liability is extremely difficult in that it requires a plaintiff to show that municipal custom or policy caused the harm.<sup>65</sup> That is why most constitutional tort actions are brought against individuals in their capacities as such.<sup>66</sup> As a practical matter, then, a lawsuit against an individual public official acting in an individual capacity is usually the only

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59. E.g., Laurin, *supra* note 2, at 721–24.

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

61. See *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994) (“[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the government was not available.”).

62. 42 U.S.C. § 1983 (2006).

63. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989) (“[W]e reaffirm today . . . that a State is not a person within the meaning of § 1983.”).

64. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167, 187–91 (1961), to hold that municipalities are subject to suit under § 1983).

65. See *id.* at 690–91 (“[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ . . .”); see also Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 463 (2002) (noting difficulty of proving a custom or policy claim against a municipality); Jeffries, *Right-Remedy Gap*, *supra* note 27, at 93 (same).

66. See Greabe, *Better Path*, *supra* note 14, at 193 & n.23 (“Civil rights damages claims almost always target individuals because the Supreme Court has held that states and their subdivisions are not ‘persons’ subject to suit under section 1983.”).

way a constitutional tort plaintiff can obtain retrospective relief.

The reality, however, is that the government agencies for which public officials work usually bankroll the defense of these individual capacity claims and indemnify their employees against liability.<sup>67</sup> It is therefore a fiction to view these agencies as lacking a financial interest in the outcomes of individual capacity lawsuits. As a consequence, government agencies presently have a financial incentive to train and educate their employees about the requirements of clearly established law. But what might happen if employees could avoid liability by showing that they were subjectively unaware of their constitutional requirements? Would not the financially interested agencies that employ these individuals—and that do not themselves face potential liability for a failure to educate or train—suddenly have a financial incentive to, at the very least, redirect resources that presently are targeted for such education and training? After all, a constitutional tort plaintiff would have a harder time showing that an untrained employee has been reckless—i.e., has consciously disregarded a known risk of crossing a constitutional line—if there is no evidence that the employee has been trained. The overall consequences for the enforcement of constitutional norms would likely be negative if courts were to adopt the recklessness position.

In sum, Laurin overstates the breadth of qualified immunity under current Supreme Court precedent in arguing that it contains a tacit state of mind requirement that tracks the recklessness principle adopted in *Herring*. Of course, this does not mean that qualified immunity should play no role in a critical evaluation of *Herring*. To the contrary, the asymmetry between the new *Herring* principle and *Harlow* could provide grounds for a powerful critique of *Herring*, given that *Herring* derives from *Leon* and the Court's previous equation of *Leon* and *Harlow*. Moreover, rejection of the claimed union between *Herring* and qualified immunity in no way compromises the other excellent points Laurin makes about the doctrinal dangers posed by the converging trajectories of the Court's exclusionary rule and constitutional tort jurisprudence. Indeed, before concluding, I highlight my agreement with Laurin's broader position by briefly sketching an argument that builds on one of her key insights, which is that constitutional tort law is a dubious source of doctrine to be uncritically applied in other constitutional contexts.

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67. See Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 Sup. Ct. Rev. 139, 158 n.75 (2010) (discussing statutes requiring local government representation and indemnification of officials); Greabe, *Better Path*, supra note 14, at 193 n.23 ("It is common for the government to insure against the costs of defending individual-capacity claims . . . and to indemnify their employees against individual-capacity judgments."); Jeffries, *Right-Remedy Gap*, supra note 27, at 92–93 ("[S]tates and localities routinely defend their employees against damage actions and indemnify them against adverse judgments.").

### III. A BRIEF STRUCTURAL CAUTION AGAINST BORROWING DOCTRINE FROM CONSTITUTIONAL TORT LAW

Although I disagree with Laurin's characterization of the qualified immunity doctrine, I share her concerns about borrowing from constitutional tort law. Laurin observes that commentators have tended to be supportive of borrowing doctrine for purposes of applying it between and across domains in which constitutional law is made.<sup>68</sup> But Laurin is "less sanguine" than these scholars about the phenomenon insofar as constitutional tort law is the source of the borrowed doctrine, given the important underlying policy differences between tort and other regimes in which constitutional law is forged.<sup>69</sup> I agree; constitutional tort's focus on the fault of the individual government actor and the compensation of the victim makes it, at the least, a questionable source of doctrine to be uncritically applied in the realm of, say, criminal law, where deterrence concerns predominate.<sup>70</sup> But there is an additional problem with borrowing doctrine made in the constitutional tort context that the emerging literature has not yet discussed. The problem is that there are significant *structural* differences between many lawsuits sounding in constitutional tort and the adjudicatory contexts in which other constitutional law is created. These differences also should counsel strong caution about the transsubstantive usage of constitutional tort doctrine. Indeed, these structural differences are so significant that I believe constitutional tort doctrine should be effectively "quarantined"; it should presumptively be treated as binding precedent *only* in the context of constitutional tort cases, and even then only if the government was afforded an opportunity to fully litigate the constitutionality of its conduct in the precedent case.

This is a major claim that requires development in a longer paper. For now, it will suffice to observe that, in the adjudicatory contexts where most constitutional law is made—e.g., an appeal from a criminal judgment, a habeas corpus action, or an action for injunctive relief against a government agency—the governmental unit that is the alleged constitutional violator is a party to the case and is represented by a government attorney sworn to uphold the Constitution and to do justice.<sup>71</sup>

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68. See Laurin, *supra* note 2, at 742 (citing Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459, 462, 464 (2010)); see also Nancy Leong, *Making Rights*, 91 B.U. L. Rev. (forthcoming 2011) (manuscript at 49) (discussing benefits of "constitutional borrowing").

69. See Laurin, *supra* note 2, at 742–43 ("[T]his Essay affords a rare systematic glimpse at the longer-term trajectory of doctrinal change that extends from an initial borrowing act, and . . . through that lens emerges a less sanguine account of borrowing than previous commentators have provided.").

70. See *id.* at 703–04 (discussing lack of "fit" between deterrence goals of criminal procedure remedies and compensation of victims in cases of constitutional tort).

71. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (calling a government attorney "a servant of the law" and "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all").

Thus, although principles of restraint counsel that constitutional law typically should be made only as a matter of last resort,<sup>72</sup> it is fair to treat constitutional rulings made in such contexts as precedent in future actions to which the government is a party, and it is reasonable to assume that the precedent has been fashioned in an adjudicatory environment that is structurally appropriate for the making of constitutional law. By contrast, in the typical constitutional tort damages action against an individual public official, the government is *not* a party to the lawsuit, and the individual defendant often is represented not by a government attorney, but by an insurance defense attorney who is not bound by the advocacy duties incumbent upon government counsel.<sup>73</sup> There is considerable reason for courts to regard constitutional doctrine made in such a context with far greater caution in future cases where a similar issue arises but the government is a party and a government attorney is available to provide the court with the benefit of the government's views.

#### CONCLUSION

In sounding a cautionary note about the transsubstantive application of constitutional tort doctrine, Laurin has made a valuable contribution to the emerging scholarship on doctrinal borrowing. Laurin goes too far, however, in claiming that the Supreme Court's ruling in *Herring* constitutes a tacit adoption of the qualified immunity doctrine established in *Harlow*. It would be a shame if Laurin's Essay were invoked in support of a future ruling that *Herring's* recklessness principle is coextensive with *Harlow's* qualified immunity standard. For now, at least, it is not. Moreover, such a ruling would render qualified immunity far too protective of unconstitutional conduct.

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72. See, e.g., *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.").

73. See Greabe, *Pleading Past*, *supra* note 20, at 26–28 & n. 163–170 ("In such an action, the plaintiff seeks to recover damages from an individual, human defendant—i.e., from a jurial entity that is entirely distinct from the government.").