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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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## editor's preface

This issue of *NLGR* begins with an exchange of views between scholar Corinna Mullin and Guild President-Elect Azadeh Shashahani, on one side, and Ebtisam Khalifa Bahar, writing on behalf of the Khalifa monarchy, on the ongoing Bahraini uprising. Dr. Mullin and Ms. Shashahani argue that numerous salient facts about the uprising should be the source of outrage and universal condemnation. They argue that, among other things, the regime tortures and murders protesters, discriminates against the nation's Shi'a population, and purchases arms from western nations such as the U.S. and Britain to continue its oppression of its own citizens. Ms. Bahar writes under the auspices of the King Hamad's Information Affairs Authority.

While the Fifth Amendment to the U.S. Constitution guarantees due process of law to all "persons" subject to the power of the United States, regardless of immigration status, it has always been the case that the government may enact laws that apply uniquely to immigrants and that these laws may, in some instances, apply with unique severity and inclemency to immigrants—and even more so to those without proper documentation. One of the less flattering narratives of American history is the cyclical rise and fall of xenophobic persecution of the "other" by the state. Contemporary xenophobia, puffed up beyond normal proportions since 9/11, primarily targets two large and distinct groups—those thought to be Muslims and those thought to be undocumented immigrants, primarily from Latin America. The hostility Americans feel toward the latter is such that these people are often called "illegals," as if criminality was an inherent part of their identity. Laura Horton's "Nowhere to Turn: Obstacles for Immigrants Seeking Government Disaster Assistance" chronicles the special difficulties immigrants face when in need of government help in the aftermath of natural disasters and other emergencies. Her article explains

*Continued inside the back cover*

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**Corinna Mullin &  
Azadeh Shahshahani**

**THE BAHRAIN ‘SPRING’:  
THE REVOLUTION  
THAT WASN’T TELEVISIED**

Despite the flurry of news coverage of the Bahrain Independent Commission of Inquiry (BICI) report’s release in December 2011,<sup>1</sup> the story of the Bahraini pro-democracy uprising has been one of the least reported amongst those of the “Arab spring.” This goes for the regional Arab media, whose cheerleading and persistent coverage of uprisings elsewhere in the region contributed to whatever successes have been achieved, as well as for the majority of the western press. This despite the fact that the violence and repression the Bahraini protesters met matched, if not exceeded in some instances, those elsewhere in the region.

The stunted Bahraini revolution also garnered much less rhetorical and material support from western governments. In Tunisia and Egypt, western governments supported, albeit belatedly, the expression of ‘people power’ against the repression and corruption of their former allies. In Syria, they publicly called for regime change, and in Libya they actively engaged in ending Gaddafi’s 42-year rule. By contrast, there have only been muted calls for political reform and an end to the violence of the repressive Khalifa regime. This is perhaps not surprising considering all that is at stake for western governments in Bahrain.

First and foremost is the fact that Bahrain is home to the U.S. Fifth Fleet, whose controversial stationing in the country’s port was the source of another pivotal anti-democratic moment in the island nation’s history. In August 1975, King Hamad bin Isa Al Khalifa’s father, Emir Isa bin Salman Al Kahlifa, formally dissolved the national assembly after it failed to ratify the extension of the lease for the U.S. naval units, essentially putting an end to the country’s short-lived experiment with a parliamentary monarchical system.<sup>2</sup>

It seems unlikely that Bahrain’s strategic importance to the U.S. will decline in the near future. As former U.S. Fifth Fleet commander vice admiral Charles Moore said recently, quoting the late Middle East force commander

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Corinna Mullin is a Lecturer in Comparative and International Politics at the School of African Studies (SOAS), with reference to the Middle East. Azadeh Shahshahani is a human rights attorney based in Atlanta, and is President-elect of the National Lawyers Guild. A version of this exchange originally appeared on the website <http://www.opendemocracy.net/>.

and chairman of the Joint Chiefs of Staff Admiral William Crowe, Bahrain is “pound for pound, man for man, the best ally the United States has anywhere in the world.”<sup>3</sup>

These double standards have not been lost on the Bahraini protestors. As Nabeel Rajab, president of the Bahrain Centre for Human Rights put it: “Democracy isn’t only for those countries the United States has a problem with.”<sup>4</sup>

### **U.S. and UK complicity in Khalifa regime’s crimes**

In yet another delayed response, the U.S. government announced in October that it would hold up a \$53 million arms sale to Bahrain. Yet as in cases of Egypt and Tunisia, many people in Bahrain viewed this step, as well as those undertaken by the British government to suspend arms exports licences to the repressive Khalifa regime, as “too little, too late.” In the months before the protests began in February, the U.S. sold more than \$200 million in weapons and equipment to Bahrain, including \$760,000 in firearms.<sup>5</sup>

Recent news that the former police chief of Philadelphia and Miami, John Timoney, has been recruited by Bahrain’s Interior Ministry to advise the Bahrainis on policing strategies, will come as no comfort to those in the opposition hoping that the next American intervention will be more constructive. They may be particularly sceptical considering his policing style was so notorious it came to be dubbed Timoney’s “Miami Model” by Jeremy Scahill, a journalist who covered the chief’s heavy-handed policing of protests around the Republican National Convention in Philadelphia in 2000 and the Free Trade Area of the Americas summit meeting in Miami in 2003. Timoney’s militarized crowd control strategy involved “the heavy use of concussion grenades, pepper spray, tear gas, rubber bullets and baton charges to disperse protesters.”<sup>6</sup>

Adding insult to injury, according to recent revelations,<sup>7</sup> a unit from Bahrain’s military was invited to the U.S. to receive tips on “crowd control” in a police training exercise called “Urban Shield 2011.” The training involved the collaboration of the Israeli Border Police unit, hardly known for their adherence to internationally recognized human rights standards, as well as the Oakland Police Department and the Alameda County Sheriff’s Department, which were involved in organizing a widely-condemned, violent raid on Occupy Oakland, part of the national/international protest movement against economic and social inequality.<sup>8</sup>

If they were expecting a more supportive stance from the UK, another stalwart ally of their government, the Bahraini opposition will have certainly been disappointed by the delayed response out of London. It took the British government months to suspend its arms exports licences to

the rights-violating Khalifa regime, and even after doing so, they saw no contradiction in inviting the King's representatives to the UK's Arms Fair in September, where everything from 'crowd control' weapons and tear gas to F16 planes and unmanned drones were sold to the regime.<sup>9</sup> If they were hoping the release of the BICI report would lead to a more proactive British position on the human rights situation in Bahrain, the opposition will take little comfort upon learning of the appointment of Former Metropolitan police assistant commissioner John Yates, who resigned from his post in the wake of the British phone-hacking scandal, to oversee reform of Bahrain's police force.<sup>10</sup>

### **BICI Report: too little, too late?**

The BICI was established by the King on 29 June 2011, pursuant to Royal Order No. 28, to "report on the events that took place in Bahrain from February 2011, and the consequences of those events." Despite its mandate, it is clear the audience for this report was never intended to be Bahrain's Shi'a majority citizens.

Had the Bahraini people figured in the King's planning, he would have ordered the remit of the Commission to include the underlying grievances that led to the protests in the first place, as demanded by many sectors of Bahraini civil society. These include the institutionalized discrimination against the Shi'a in jobs, housing, and education. They also include the systematic political discrimination against the Shi'a both via their exclusion from positions of power in government and defence institutions, and through the practice of sectarian-based gerrymandering of electoral districts and manipulation of Bahrain's demographic makeup through political naturalization of foreigners and extension of voting rights to Sunni citizens of other countries.<sup>11</sup> All of this amounts to sectarianism, not the primordial kind referred to in the fear-mongering exhortations of Saudi and western leaders, but rather elite-generated, for reasons of political expediency.

It seems unlikely from the report's focus on the responsibility of twenty low-level officers for the "incidents" that occurred between February and March, in which scores of pro-democracy protesters were murdered, tortured and imprisoned by state security apparatuses, that the opposition will be assuaged.<sup>12</sup> The attempt to place the blame on a few "bad apples" demonstrates the massive gap that remains between the narratives of the opposing sides, specifically on the issue of accountability. As stated in the draft shadow report released by several Bahraini human rights organizations on the same day as the BICI report, not only does the opposition want to see those responsible for the torture and killing put on trial, but they also want to see accountability for "those who ordered and authorized such acts." The Bahrain Centre for

Human Rights, one of the drafters of this report, says it has evidence of four members of the royal family “accused of personally torturing detainees,” in addition to “the names of over 50 officers” similarly partaking in torture.<sup>13</sup>

Continued allegations of Iranian involvement in the kingdom’s 10-month-old unrest, contradicting the BICI report’s own conclusions on the matter, show the King is still adhering to old diversionary tactics.<sup>14</sup> If the government were truly serious about promoting national reconciliation rather than merely appeasing its western backers, it would direct its energy instead towards re-entering into dialogue with the opposition. Dialogue would include those same sectors of society that it so abruptly shut out only three years after Hamad’s accession to the throne, when he went back on initial promises of political reform by unilaterally promulgating a new constitution in 2002. This did little to meet the democratic demands or aspirations of his people. The same disillusionment with the King’s cynical machinations is expressed by opposition leaders today. As Abdul Jalil Khalil, a senior member of the Al Wefaq, Bahrain’s largest opposition party has argued, the problem goes beyond the rights violations detailed in the Commission’s report and is fundamentally “a political one . . . . We will not solve the problem by the Bassiouni (BICI) report.”<sup>15</sup>

### **Addressing root causes of the Bahraini uprisings**

The gross human rights violations carried out by officers during the uprisings and which continue until today—with at least four individuals killed since the start of the BICI investigation, political repression continuing and excessive violence still being used against peaceful protestors<sup>16</sup>—did not occur in a vacuum. Bahrain is a western-backed dictatorship. In dictatorships, no policy is carried out without at least the knowledge and complicity of those in positions of power. Yet considering the geopolitics of the region, and Bahrain’s client status, one cannot merely look to the royal palace to explain the subtle ways in which power operates. Rather, one must look to Bahrain’s patrons, near and far, that provide economic, military, and diplomatic support to a country whose own limited natural resources and minority rule provide few other sources of legitimacy. Yet legitimacy acquired at the barrel of a gun, be it that brandished by their Saudi neighbors, bought from the British, or perched atop an American naval vessel, can never be anything but precarious.

The Bahraini people deserve a thorough and independent investigation into the real causes and consequences of their revolution. It is only then that they can get on with the hard work of healing societal cleavages and instituting structural changes that will allow for the development of a truly sovereign and democratic Bahrain, which the majority of its citizens appear so determined to achieve. If their much-touted “democracy promotion” rhetoric is to have

any real significance, western governments must help, rather than hinder this process. They can begin by suspending arms sales to the Khalifa regime until meaningful change has been achieved.

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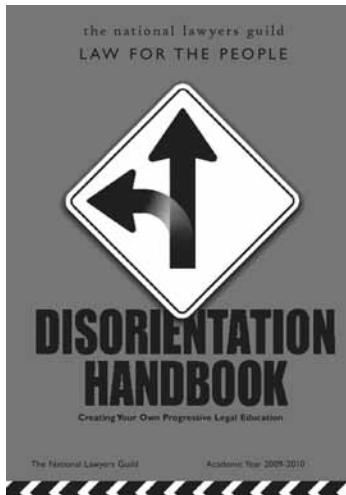
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**Ebtisam Khalifa Bahar**

## **DEFENDING BAHRAIN FROM CRITICISM: A RESPONSE**

While everyone agrees that Bahrain needs to work on restoring national unity, Corinna Mullin and Azadeh Shahshahani in their recent piece “The Bahrain ‘Spring’: The revolution that wasn’t televised” are wrong to refer to Bahrain’s efforts at democratic reform as “rhetoric.”

They are the ones who have fallen for the “rhetoric” of certain oppositional parties and NGOs. This is especially true if you think what happened in Bahrain is similar to what is taking place in the so-called “Arab spring” countries, and that “the violence and repression the Bahraini protesters met has matched, if not exceeded in some instances, those elsewhere in the region.” Bahrain sadly experienced thirty-five casualties during February and March, including protestors, policemen, ex-pats and innocent bystanders. But there is no way that this can be compared with what has happened in Libya or Syria, for example.

Bahrain’s diplomatic ties remain strong, as noted in the November 30 Op-Ed by Vice-Admiral Charles Moore in the *Washington Times*.<sup>1</sup> In a volatile region, with a potentially nuclear-armed Iran, hosting the Fifth Fleet is a win-win scenario. The United States sees it to their advantage to nurture the reforms that have taken place over the past ten years in Bahrain, and Bahrain can feel more secure against outside threats.

It’s not surprising that those who have been fed the rhetoric of the self-proclaimed victims in Bahrain look down on our attempts to learn from the Bahrain Independent Commission of Inquiry (BICI) and implement its recommendations.<sup>2</sup> Almost any effective policeman can expect to receive criticism from some quarters; nevertheless, John Timoney and John Yates have long, distinguished careers in law enforcement and will play a key role in retraining police and security forces.

To imply that there is institutionalized discrimination against Shi’a Bahrainis in all sectors of society is simply not true. The truth is that Bahrain is known for its religious coexistence and you will find people of all faiths in every segment of society. All Bahrainis know there are Shi’a Ministers, Shi’a politicians, and prominent Shi’a businessmen. As for the issue of immigration, it is important to note that many Shi’a Bahrainis themselves have benefited from and dominated naturalization processes during periods of Bahrain’s his-

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Ebtisam Bahar writes from the Information Affairs Authority in the Kingdom of Bahrain.

tory over the last 60 years. Most recently in 2001–2002, after the ascension of King Hamad Bin Isa Al-Khalifa to the throne, Shi'as of Iranian origin made up 81 percent of the naturalized citizens.

With regard to the BICI findings about Iran, it is important to note that the BICI findings stated:

Given that most of the claims made by the GoB related to allegations of intelligence operations undertaken by Iranian operatives, sources of which, by their nature, are not publicly available, the Commission has not been able to investigate or independently verify these allegations of Iranian involvement in the events of February and March 2011. (para 1584).

Furthermore, it states that,

The GoB has indicated to the Commission that it has further information in its possession that demonstrates involvement by the Islamic Republic of Iran in the internal affairs of Bahrain. Due to security and confidentiality considerations, however, the GoB has declined to share this information with the Commission” (para 1585).

Thus it is clear to anyone who reads with an open mind that the Commission could neither confirm or deny the involvement of Iran because of ongoing security issues.

Finally, the authors' attempts to disparage the BICI and cast aspersions on its distinguished panel of commissioners who have dedicated their lives to Human Rights and International Law, as well as stating the report is not meant for Bahrain's Shia citizens is both shameful and ludicrous. The BICI was established for ALL Bahrainis and its recommendations will benefit ALL Bahrainis. The authors' attempts to increase sectarian division is not worthy of a forum that is meant to promote democratic reforms.

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#### NOTES

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**Corinna Mullin &  
Azadeh Shahshahani**

**BAHRAIN: A RESPONSE TO  
THE PRESIDENT'S OFFICE**

We are writing in response to Miss Ebtisam Khalifa Bahar, of Bahrain's Information Affairs Authority. Though we agree with the sentiment expressed by Miss Khalifa Bahar that "restoring national unity" is paramount to ending the crisis in Bahrain, it appears that we disagree over the means of achieving this unity. As we have argued in our article, we believe that in Bahrain, as in all countries where serious social and political conflicts exist, real resolutions can only be achieved when the roots causes of the conflict are addressed. Though we did indeed discuss some of these root causes in the Bahraini context, the main purpose of our article was to draw attention to the role of western governments, the U.S. and UK in particular, in prolonging this conflict through the provision of military and other forms of "security" support." As history has shown, as in Tunisia and Egypt, economic and/or military support for repressive governments serves to exacerbate such underlying problems as gross inequality, a restricted public sphere, and state violence.

As for the root causes of this conflict, though we never claimed to speak on behalf of the Bahraini opposition and/or Bahraini human rights organizations, as an academic and attorney interested in human rights, we have followed the release of the BICI report, the shadow human rights report, as well as investigations into the extensive rights violations committed by the Khalifa regime in the context of the February-March uprisings by various reputable human rights organizations, including Human Rights Watch<sup>1</sup> and Physicians for Human Rights.<sup>2</sup> We have also researched and critically assessed scholarly work as well as other reputable sources, including the U.S. State Department's annual human rights reports and international and regional news reports, on the causes and consequences of the 2011 uprisings.

Our research indicates that many Bahrainis and outside human rights experts agree that the causes of ongoing tensions in the country include many of the issues we raised in our article, including institutionalized discrimination against the Shi'a majority population, as well as their systematic exclusion from key positions of power in the government and the military. As such, we described this as a form of "elite-generated" sectarianism. Though the Shi'a population suffer from these forms of discrimination, they are certainly not the only sector of society to lack civil liberties and human rights protections under the Khalifa regime. According to the U.S. State Department's Annual Human Rights report, the human rights predicament for most Bahrainis in 2010 was dismal:

Citizens did not have the right to change their government . . . . Discrimination on the basis of gender, religion, nationality, and sect, especially against the Shi'a majority population, persisted. There were multiple allegations of mistreatment and torture, especially of Shi'a activists associated with rejectionist and opposition groups . . . . The government restricted civil liberties, including freedoms of speech, press, assembly, association, and some religious practices. . . . The Shi'a are underrepresented in positions of leadership in the civil service, police, and security forces.<sup>3</sup>

While we feel the death of any peaceful individuals attempting to exercise their political rights as a result of state violence is unacceptable, as Miss Khalifa Bahar has raised the issue of numbers, it is important to challenge her assertions. Even assuming that the number of Bahraini deaths she has provided is correct (though the shadow report total stands at 45), 35 deaths in a country of 1,235,000 would present a similar proportion of deaths relative to the population as that which occurred in the uprisings in both Tunisia (300 out of a population of close to 10.5 million), and Egypt (850 out of a population of around 81 million people), where state violence was similarly deployed against peaceful protesters. Furthermore, a statistical comparison including other areas of human rights violations (e.g. excessive use of force, arbitrary arrest, detention without due process, torture, impunity for perpetrators of rights violations, etc.) bears out our original claims.

As we have seen in many of the "Arab spring" uprisings, repressive regimes often attempt to de-legitimize the opposition by blaming protests on outside forces. In light of this, the burden of proof is on the Khalifa government to substantiate its accusations of Iranian involvement in the Bahraini pro-democracy uprisings in order to demonstrate that these are more than just diversionary tactics. This is especially the case considering the extremely sensitive geopolitical context in which these accusations are being made, including threats to Iranian sovereignty from states with recent histories of aggression, invasion, and occupation in the region, including the U.S., UK, and Israel. The validity of these claims must be evaluated in the context of recent revelations from Wikileaks, which seriously undermine past claims made by the Khalifa regime regarding Iranian intervention in Bahrain. According to a 2008 cable from the U.S. embassy in Manama:

Bahraini government officials sometimes privately tell U.S. official visitors that some Shi'a oppositionists are backed by Iran. Each time this claim is raised, we ask the GOB [Government of Bahrain] to share its evidence. To date, we have seen no convincing evidence of Iranian weapons or government money here since at least the mid-1990s . . . . In post's [embassy's] assessment, if the GOB had convincing evidence of more recent Iranian subversion, it would quickly share it with us.<sup>4</sup>

Furthermore, the regime's allegations of Iranian involvement in the pro-democracy uprisings of the '90s have been widely dismissed<sup>5</sup> and according to a report by the reputable International Crisis Group (ICG), there has been

no evidence of “direct Iranian involvement in the current Bahraini uprising so far.” The ICG report also states there that there has been “no credible indication of disloyalty or irredentism on the part of Bahrain’s Shiites. Indeed, there is little evidence that the Shiite community’s political objectives have been shaped by outsiders.”<sup>6</sup>

Far from seeking to foment tensions, our article was written with the intention of challenging the entrenched interests and power structures that both cause and prolong conflict in Bahrain, as well as elsewhere in the region.

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**NOTES**

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**Laura Horton**

**NOWHERE TO TURN:  
OBSTACLES FOR IMMIGRANTS  
SEEKING GOVERNMENT  
DISASTER ASSISTANCE**

**INTRODUCTION**

When disaster strikes in the United States, impacted communities experience devastating effects. One of the few comforts during these troubled times is the knowledge that federal, state and local governments are working to give citizens the help they need. These governments organize systems of food, water and supply distribution and set up shelter for disaster victims. But vulnerable populations such as the elderly, poor, and immigrant communities, who may not have the resources or ability to navigate government assistance programs, face special challenges. For instance, language differences can present significant barriers to receiving aid. Similarly, personal identification is often necessary for the disaster assistance process, which can be a problem for many disaster victims who are forced to leave behind important paperwork during a disaster, or who simply do not have the proper documents in the first place.

Weaknesses in the disaster assistance framework, including language barriers and identification requirements, present a unique set of problems under immigration law.<sup>1</sup> Undocumented immigrants as well as other categories of immigrants such as legal permanent residents, foreign students, intracompany transferees, or guest workers face difficulties given that “the loss of livelihood, habitat, and life itself has very specific implications for foreign nationals.”<sup>2</sup> Often times, confusion about whether deportation laws will be enforced in the aftermath of a disaster causes fear and anxiety among immigrants who are reluctant to expose themselves to the government, thus they are not afforded the comfort of knowing the government is there to help.

This paper explores the obstacles that immigrants face in receiving government aid after a disaster. Part I discusses background information on immigration laws and their interaction with disaster laws. Part II provides a survey of disaster response in the United States and its effect on immigrant communities. It begins with an assessment of Hurricane Katrina and highlights many of the issues immigrants faced during that time. It then examines the San Diego fires

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Laura Horton is a 2012 graduate of Golden Gate University School of Law in San Francisco. She has been an active Guild member throughout law school, and served as a co-Law Student Vice President of the Bay Area chapter. She would like to thank Rachel Van Cleave and Richael Faithful for their guidance on this article.

in 2007 and discusses subsequent California legislation that was intended to relax identification requirements after disasters. That Part then surveys the private disaster response to the 2010 BP Oil Spill in the Gulf of Mexico, and shows how the lack of adequate protection of Vietnamese-American fishers mirrors the problems with government disaster assistance programs. Finally, it examines more recent disasters including the hundreds of 2011 tornados in several different areas of the country and wildfires in the Southwest.

Last, Part III explores the implications under international human rights law of denying aid to victims of a disaster and displaced people. It suggests that applying the principles of the California law nationwide would avoid any potential human rights violations and allow immigrants and all victims of a disaster to have easier access to aid. That part is then followed by a brief conclusion.

## **I. Federal Disaster Laws and Immigration**

There are several phases in dealing with natural disasters: causation, emergency response, compensation, and rebuilding.<sup>3</sup> Many factors cause disasters and contribute to the vulnerability of some communities, such as climate change and economic status, respectively.<sup>4</sup> Those are broad issues, solutions to which are being researched in fields of science and policy. The disaster law framework primarily deals with emergency response, compensation and rebuilding.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is the statute that gives FEMA the authority to coordinate disaster relief efforts.<sup>5</sup> The Stafford Act allows for several different types of aid including immediate temporary shelter, cash grants for emergency needs, temporary housing assistance, home repair grants, unemployment assistance, emergency food, legal aid for low-income individuals, and crisis counseling.<sup>6</sup> Public aid is available to state, tribal and local governments and some nonprofits for the repair, reconstruction or replacement of infrastructure and other basic needs.<sup>7</sup> Additionally, there is hazard mitigation assistance available to help states avoid future losses.<sup>8</sup> Stafford mandates nondiscrimination in disaster assistance:

The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, or economic status.<sup>9</sup>

The equal protection language in the Stafford Act would appear to require that all federal assistance should be distributed evenly without regard to

citizenship, not just unrestricted programs. The conflicting themes between disaster and immigration laws can easily cause confusion, particularly to aid-workers who may not understand the complexities of the laws and what is available to immigrants who do not have proper identification.

There are several laws that address the general distribution of aid to immigrants. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act) is the statute that covers the rules for general federal assistance to noncitizens.<sup>10</sup> The Act denies most federal, as well as state and local, benefits to undocumented immigrants. These benefits include “(1) grants, contracts, loans, and licenses; and (2) retirement, welfare, health, disability, housing, food, unemployment, postsecondary education, and similar benefits.”<sup>11</sup> There is potentially an exception for disaster food stamps, where verification and eligibility rules for regular food stamp programs is sometimes waived by the United States Department of Agriculture, the agency that provides food relief after disasters.<sup>12</sup> Aside from relaxing eligibility standards for emergency food stamps, which is left to the discretion of the public employees distributing them, most of the services that are not accessible to undocumented immigrants through the Welfare Reform Act remain so after a disaster occurs.

After a disaster, there are generally two kinds of aid that are available to different categories of immigrants.<sup>13</sup> Restricted aid, which is only available to “qualified” immigrants with legal status, includes cash assistance, access to temporary housing programs, small business loans, and other long-term aid.<sup>14</sup> In the case of families with mixed statuses, restricted aid is only available to qualified family members. This can present a problem if families get separated and are unable to prove dependency because, “Most avenues for immigration require that aliens have a family member or employer who is eligible, able, and willing to sponsor them.”<sup>15</sup> The situation is exacerbated if qualified family members have lost identification documents in the hectic days after a disaster.

Another form of aid is unrestricted aid, which includes emergency food, water, shelter and first aid.<sup>16</sup> Unrestricted aid is available to anyone regardless of their status, but can be provided by nonprofit humanitarian organizations, community groups, and churches. FEMA also provides some unrestricted emergency aid in declared disaster zones.<sup>17</sup> Additionally, the Welfare Reform Act provides that noncitizens are eligible for counseling and other emergency services.<sup>18</sup> Although these services are technically available without identification requirements, there have still been problems with public employees or volunteer aid-workers asking for identification, as the paper later discusses.



## **II. Survey of Disaster Response in the United States**

### **A. Hurricane Katrina**

After Hurricane Katrina, a storm that killed more than 1,300 people and displaced two million,<sup>19</sup> many immigrants were reluctant to seek federal aid.<sup>20</sup> On the part of qualified immigrants, this is partly because of the public charge doctrine under immigration policy that encourages deportation when an immigrant becomes a public charge, i.e., reliant on public assistance for a substantial part of his livelihood, and thus the responsibility or charge of the public.<sup>21</sup> According to a report from the National Immigration Law Center, immigrants were concerned that receiving disaster assistance would cause them to be later penalized under the public charge doctrine.<sup>22</sup> The reluctance to come forward on the part of undocumented immigrants was also because it was not made clear that emergency assistance would be available at all. Consequently, immigrants avoided FEMA, Social Security and the Internal Revenue Service. This left non-governmental shelters run by Red Cross and religious groups as some of the few options that were available.<sup>23</sup> However, even some volunteers for those organizations blocked immigrants from receiving aid.<sup>24</sup> For instance, although immigrants should be able to access some kinds of emergency aid, Red Cross volunteers in Hattiesburg and Laurel, Mississippi asked storm survivors seeking aid who appeared to be foreign to produce a social security card or birth certificate before receiving emergency services.<sup>25</sup>

The concern over exposure to the government became particularly strong when the United States Department of Homeland Security announced that there would be no immunity from deportation when immigrants could not provide identification required for receiving aid.<sup>26</sup> This is contrary to the assurances against deportation that were provided to the immigrant community in New York after the attacks of September 11 as well as after Hurricane Charley in 2004.<sup>27</sup> Indeed after 9/11, James Ziglar, then commissioner of the Immigration and Naturalization Service, made repeated written and oral statements that immigration authorities would not seek status information if immigrants came forward.<sup>28</sup> And after Hurricane Charley, FEMA issued a press release in both Spanish and English encouraging immigrants to come forward for aid regardless of status.<sup>29</sup> There were no such assurances after Katrina. In fact, three undocumented evacuees were detained by immigration agents at an airport in El Paso, Texas, where they had been sent, and placed in deportation proceedings.<sup>30</sup> Such actions conflicted with encouragement from some political leaders to come forward,<sup>31</sup> sending a confusing message.

In yet another puzzling move after Katrina, laws requiring proper documentation to gain employment were relaxed. Under the Immigration and Nationality Act, employers face penalties for not verifying employment

eligibility, or for accepting documents that are not genuine.<sup>32</sup> The fines range from \$275 to \$2,200 per individual employee, or more for previous violations.<sup>33</sup> In early September 2006, DHS issued a statement saying they would not enforce the law against employers:

[T]he Department of Homeland Security will refrain from initiating employer sanction enforcement actions for the next 45 days for civil violations. . . with regard to individuals who are currently unable to provide identity and eligibility documents as a result of the hurricane. Employers . . . should note at this time that the documentation normally required is not available due to the events involving Hurricane Katrina.<sup>34</sup>

This was confusing for victims of Katrina who were told there were no assurances against deportation if they did not produce proper identification when seeking aid, while at the same time the government encouraged an immigrant workforce. Moreover, migrant workers who were offered employment experienced substantial problems with payment, amounting in some instances to wage theft.<sup>35</sup> The issue was so prevalent that the United Nations Human Rights Council issued a report about the treatment of migrant workers.<sup>36</sup> In essence, the message to immigrants was that the United States wanted migrant workers to come rebuild New Orleans cheaply, and with no wage protection, but if any immigrants who were victims of the hurricane wanted assistance without proper documentation, they would be denied aid and subject to deportation while their employer remained immune from any consequences. When the State of California was confronted with a similar situation after the San Diego fires, it found a more equitable solution, as discussed below.

Latino civil rights groups became increasingly concerned over the fact that many immigrant victims of the storm were not getting the help they needed, and that some faced deportation after getting caught up with authorities amidst the chaos.<sup>37</sup> Even for those immigrants with legitimate documentation, FEMA was not able to provide enough Spanish speakers to assist them, and some experienced problems with getting their information processed.<sup>38</sup> Services such as mail delivery, money for shelter, temporary trailer homes simply were not available to tens of thousands of immigrants.<sup>39</sup> The civil rights groups encouraged the government to grant humanitarian immigration status to those displaced, and to distribute sufficient aid to those in need.<sup>40</sup>

A few government officials listened to those groups and there were some attempts in the aftermath of Katrina by agencies to relax standards around the requirement for documentation for certain kinds of aid by issuing guidelines.<sup>41</sup> However, these guidelines were not administered properly and in the absence of actual laws allowing for the relaxation of standards, there may have been misunderstanding among public employees and aid-workers. There was also some discussion in the Senate to formally relax some of the specific rules

relating to immigrant victims of Hurricane Katrina, comparable to legislation enacted for families of victims of the 9/11 attacks.<sup>42</sup> That legislation never passed, as the bill was stalled in the Committee on Agriculture, Nutrition, and Forestry. The bill included a provision that would have treated “legal immigrants in the United States who are victims of Hurricane Katrina as refugees for the purposes of food stamps.”<sup>43</sup> For immigrants who lost identification or depended on family members who died or fled after Katrina, receiving aid or finding employment to support themselves became a real challenge.

Also, in mid-September, Senators Chuck Grassley and Max Baucus introduced the Emergency Health Care Relief Act of 2005, a bipartisan bill that would have provided medical care to low-income survivors, including those who might not have been eligible for Medicaid and who may have had difficulty producing proper documentation.<sup>44</sup> It would have also relaxed verification requirements and simplified the application process for Katrina survivors. But, objections raised by a few Republicans and a lack of support from the White House stalled the bill.

The failure of these legislative efforts reflects the inadequate support for the immigrant community after Katrina, a problem that has been duplicated in many disaster situations since then.

## **B. 2007 San Diego Fires**

On October 21, 2007, the Santa Ana winds caused several major wildfires to break out in the San Diego area.<sup>45</sup> The local government quickly began evacuating communities in the area and firefighters fought hard against the blaze.<sup>46</sup> The fires destroyed hundreds of homes, and fighting the fire alone consumed a significant amount of regional and state resources, leaving hardly any left for the city to use for evacuation and sheltering assistance.<sup>47</sup> Two high schools were set up as temporary evacuation centers by local officials. However, those sites, along with other shelters that were being used, were not adequate for the massive numbers of people in need, thus the Qualcomm Stadium in San Diego was established as the main large-scale evacuation facility.<sup>48</sup> The facility provided food, water, blankets and even massages and live entertainment.<sup>49</sup> Although the city’s post-fire report states that “No person was denied access or services and few questions were asked of the people coming to seek shelter,”<sup>50</sup> civil rights groups found that many immigrants seeking assistance had a different experience.<sup>51</sup> The Immigrant Rights Consortium (IRC) and the American Civil Liberties Union (ACLU) reported that immigrant evacuees were “ejected from and denied entrance to evacuation centers” and were intimidated by law enforcement and threatened with immigration enforcement. In at least one case several individuals were deported.<sup>52</sup> There were also concerns that there were not enough Spanish-

speaking aid workers or information in Spanish for immigrants to understand the process for receiving aid. In a report prepared by IRC and ACLU of San Diego titled *Firestorm: Treatment of Vulnerable Populations During the San Diego Fires*, the groups surveyed the government's disaster response and criticized the treatment of vulnerable populations.<sup>52</sup> The report documented many instances of harassment, racial profiling and discrimination suffered by the Latino population, which comprises 30 percent of San Diego County, as well as poor, homeless, and detained populations.<sup>54</sup> The issues covered by the report include the language barrier,<sup>55</sup> identification checks resulting in the ejection of those who could not produce such documentation,<sup>56</sup> and instances of intimidation by Border Patrol agents.<sup>57</sup>

According to the report, members of one extended family were detained by the San Diego Police at the Qualcomm Stadium after being accused of looting supplies.<sup>58</sup> They were then handed over to U.S. Border Patrol after it was discovered they could not produce documentation.<sup>59</sup> Interviews with witnesses and volunteers revealed that evacuees had been encouraged to take as many supplies as they could, and interviewees were surprised to see the family taken away.<sup>60</sup> The family, which included four adults and three children ages 13, 8, and 2 years old, was deported after an investigation.<sup>61</sup> In an interview with a local newspaper after being deported, one of the mothers insisted they had not stolen anything and indeed had been given the supplies which included puzzles and notebooks for the children.<sup>62</sup> Police in San Diego normally have a policy which requires them to actually make a formal charge before calling in Border Patrol, which was not done in that situation.<sup>63</sup> Another woman interviewed for the story said that immigrants had already been treated differently at the evacuation center by the volunteers.<sup>64</sup> She stated that when she asked volunteers for some diapers for her baby who had diarrhea, she was given three individual diapers, whereas she noticed an American woman was given a whole box.<sup>65</sup>

Indeed, the atmosphere of suspicion along with the deportation incident caused many immigrant families, some of mixed status, to leave the facility out of fear of being approached by deportation officials.<sup>66</sup> The report calls upon government leaders to ensure "that all victims, including immigrants, of fires and other disasters can access vital assistance without fear [or] apprehension [of] inspection, or disparate treatment."<sup>67</sup> Following the outrage over the treatment of immigrants and others seeking aid after the fires, many groups called for change. In 2008, Assembly Bill (AB) 2327 was introduced and passed in California. The bill requires all "entities providing disaster-related services and assistance to strive to ensure that victims receive the assistance they need and are eligible to receive, and would require public employees to

provide assistance without eliciting information or documents that are not strictly necessary to determine eligibility under state or federal law.<sup>768</sup> Supporters of the bill included civil rights groups and disaster aid organizations such as the American Red Cross.<sup>69</sup> The law is an example of how governments should respond to concerns over blocking certain populations from receiving aid in emergency situations or penalizing those without documentation for coming forward. Those kinds of situations are chaotic and frustrating for victims and aid workers alike, and the law could allow disaster response to run much smoother. Such a law could be applicable nationwide, and indeed should be in order to avoid violations of international human rights laws as discussed below.

### **C. BP Oil Spill**

The government's continuous failure to adequately protect immigrants in the wake of disasters was mirrored in the private sector after the BP oil spill. In April 2010, nearly five years after Katrina, a BP-owned deepwater oil drilling rig off the coast of Louisiana exploded and caught fire, finally capsizing after burning for hours.<sup>70</sup> The incident led to the largest accidental oil spill in history, spewing an estimated five million barrels of oil into the Gulf of Mexico over the course of 86 days.<sup>71</sup> The oil washed ashore on the coastal communities of Louisiana, Mississippi, Alabama, and Florida.<sup>72</sup> Lawsuits were subsequently filed against the company and BP took some responsibility for the incident by setting up a \$20 billion dollar emergency fund for those impacted by the spill.<sup>73</sup> Hundreds of thousands of people filed for payments out of the fund,<sup>74</sup> many of whom included fishermen and women (fishers) whose livelihoods depend on the health of the Gulf. Although BP promised to pay all legitimate claims, immigrant fishers found there were significant barriers to receiving aid.<sup>75</sup>

The Southeast Asian community in the Gulf region relied heavily on fishing and seafood processing to make a living.<sup>76</sup> About a third of fishers affected by the oil spill were Vietnamese, and others from Cambodia and other Southeast Asian countries,<sup>77</sup> many had come to the United States as political refugees. Their businesses were suffering intensely.<sup>78</sup> The difficulties faced by Southeast Asian fishers began with language barriers, then moved on to a quick-pay reimbursement option that would barely come close to covering the losses experienced by this close-knit community, and ended with a long confusing waiting period or even a denial of the claim.<sup>79</sup>

Language and cultural barriers were apparent from the beginning of the oil spill response, yet attempts to remedy the problem were weak.<sup>80</sup> When BP finally did set up a job training session specifically aimed at the Vietnamese fishers, the single interpreter employed by BP to train hundreds of fishers had

to quit twenty minutes into a four-hour session because he spoke the wrong dialect and none of the fishers could understand him.<sup>81</sup> Some politicians made efforts to assist immigrants affected by the spill. For instance, Louisiana Senator Mary Landrieu introduced the Oil Spill Claims Assistance and Recovery Act, which if passed would have provided \$20 million for nonprofits to assist claims seekers, including language services and assistance preparing documentation for claims.<sup>82</sup> The bill never made it past the Committee on Environment and Public Works.<sup>83</sup> Kenneth Feinberg, the man who administered the September 11th Victim Compensation Fund, was selected to administer the BP fund.<sup>84</sup> Feinberg promised a quick response, and modeled some of the recovery techniques after the September 11th fund, including town meetings and outreach programs to Gulf fishers.<sup>85</sup> However, eligibility requirements and proof of losses were complex and difficult for fishers to understand, even though Feinberg insisted the burden on fishers was minimal.<sup>86</sup>

Shortly after the spill, BP began hiring fishers to use their boats in the cleanup efforts, often paying them well but then deducting money from their compensation packages, thus effectively receiving free labor from the fishers.<sup>87</sup> And even if a fisher decided that he or she did want to participate in this employment program, some could not because they did not own their own boats.<sup>88</sup> Additionally, for the Vietnamese fishers who were able to sign up for the program, only about 10 percent were actually being called to work for BP.<sup>89</sup> Further, there were various media reports of inadequate health protection for the fishers hired as cleanup workers by BP, and similarly to September 11th response workers, fishers did not have proper equipment to prevent inhalation of toxic fumes.<sup>90</sup> This kind of treatment does not lend itself to building trust with the community that BP is trying to help.

A year later, Asian fishers are still having difficulty recovering from the oil spill disaster.<sup>91</sup> The claims process proved to be a long struggle, and fishers who actually received payments during those first few months are no longer getting checks in the mail.<sup>92</sup> In both the private sector and the federal government, disaster response lacks the necessary elements needed to adequately assist the most vulnerable victims; those who have difficulty communicating with aid administrators and understand the process, and often are in a tricky position because of immigration status.

#### **D. 2011 Natural Disasters**

More recent disasters confirm that disaster assistance programs in the United States do not work as they should for immigrant communities. In the spring of 2011, hundreds of tornados ripped through the Southeast, Northeast, and Midwest United States, causing billions of dollars of damage, killing hundreds of victims, and destroying thousands of homes.<sup>93</sup> The deadliest

tornado during that time killed 151 in Joplin, Missouri alone.<sup>94</sup> Aid was organized immediately by government, non-profit, and religious organizations that helped families apply for assistance programs, remove debris and begin rebuilding their lives.<sup>95</sup> FEMA set up disaster recovery centers and distributed financial assistance to affected homeowners and businesses who met eligibility requirements.<sup>96</sup>

However, families and towns alike were faced with rejection based on ineligibility for reasons of insufficient damage, preexisting conditions, and non-necessity.<sup>97</sup> Victims hit hardest by the storms were the low-income minority communities in areas such as Northern Minneapolis, where poor black families were denied assistance from FEMA, and in states like Alabama, where undocumented immigrants fear exposure to governments that are increasingly hostile towards immigration.<sup>98</sup>

In Alabama, immigrant families were reluctant to apply for government assistance or even speak with police about missing friends and family out of fear of arrest or deportation.<sup>99</sup> Many would arrive at makeshift community shelters to accept food and sometimes spend the night, but they would quickly return to their damaged homes in order to avoid local authorities who were overseeing local recovery operations.<sup>100</sup> Although some local police showed sympathy towards undocumented immigrants, many Southern states were beginning to impose strict immigration laws similar to Arizona, sending the general message that undocumented immigrants are not welcome.<sup>101</sup>

In an ironic twist, several of the states imposing strict immigration laws were finding that those laws harmed recovery efforts by forcing undocumented workers to flee the state.<sup>102</sup> What Alabama Governor Robert Bentley called the “strongest immigration bill in the country” was impacting the ability of the state to rebuild because of the strong presence of undocumented workers in masonry, concrete, framing, roofing, and landscaping and other trades that are essential to recovery efforts.<sup>103</sup>

In Springfield and West Springfield, Massachusetts, where there are many refugees from Somalia, Nepal, Burma, Iraq and countries in the former Soviet Union, there were language barriers but the state made a strong effort to reach this population and Governor Deval Patrick reached out with interpreters and encouraged the immigrant victims to utilize the recovery centers.<sup>104</sup> Also, volunteer networks in the area worked to assist refugees who still remained homeless a week after the storm.<sup>105</sup> That kind of organized and focused outreach to immigrant communities is what should be done across the United States after disasters.

Natural disasters continue to plague the country, including an above-average wildfire season in the Southwest where the immigration debate is the

most heated.<sup>106</sup> Indeed, Arizona Senator John McCain even suggested several of the wildfires had been started by undocumented immigrants, stating at a press conference,

We are concerned about, particularly, areas down on the border where there is substantial evidence that some of these fires are caused by people who have crossed our border illegally. The answer to that part of the problem is to get a secure border . . . . They have set fires because they want to signal others. They have set fires to keep warm and they have set fires in order to divert law enforcement agents and agencies from them.<sup>107</sup>

The claim, which Senator McCain later argued was misinterpreted, was refuted by the United States Forest Service as not having any supporting evidence.<sup>108</sup> Regardless of how they started, the wildfires blazed through the state causing millions of dollars in damages and put several other states at risk.<sup>109</sup> There is a large Hispanic population in Arizona and in other Southwestern states,<sup>110</sup> and with an already hostile environment, aid workers and governments should be sensitive to the needs of immigrant communities. This is especially important during a time of open political hostility towards immigrants, with one representative even calling for the end of disaster relief for United States-born children of undocumented immigrants.<sup>111</sup> Immigrant communities should be able to trust that the government will be on their side when they lose everything. The failure to protect these communities can have strong ramifications under human rights laws, and the government needs to remedy the problem in order to avoid violations under international law, because if one thing is for sure it is that natural and man-made disasters will continue to occur.

### **III. Violations of international human rights law**

Human rights advocates criticized the response after both Katrina and the San Diego fires as being significantly inadequate to fulfill obligations under human rights law to which the United States is accountable. More than 34,000 naturalized immigrants, 72,000 immigrants with different kinds of visas, and an undetermined number of undocumented migrants were affected by Katrina, according to some estimates.<sup>112</sup> Although the government attempted to clarify some of the assistance that immigrants without proper documentation could receive, this did not prevent many from being afraid of deportation.<sup>113</sup> The confusion among aid workers and authorities who asked for identification was most likely the result of inadequate communication between those entities and government officials who know the law. Similarly, after the San Diego fires, there were hundreds of reports of human rights abuses in the form of denial of basic emergency assistance, as volunteers as well as public employees at the evacuation center were asking for identification at the door.<sup>114</sup>



In 2006, the International Human Rights Law Clinic at Boalt Hall (Clinic) and other advocacy groups petitioned the primary human rights body in our region, the Inter-American Commission on Human Rights (IACHR), to conduct a public hearing on human rights issues after Katrina.<sup>115</sup> The hearings took place on March 3, 2006, where several community leaders and Katrina survivors gave presentations about their experiences on the ground after the hurricane.<sup>116</sup> A subsequent report prepared by the Clinic highlighted the failure of the United States to adequately protect immigrant populations after Katrina and found that the human rights of those individuals are significantly impacted.<sup>117</sup> It requested that the IACHR urge the United States to incorporate human rights concerns into disaster planning and response.<sup>118</sup> It also discussed obligations under The International Covenant on Civil and Political Rights (ICCPR), which was adopted by the United Nations General Assembly in 1966 and ratified by the United States in 1992.<sup>119</sup> ICCPR affords many protections and rights that “derive from the inherent dignity of the human person.”<sup>120</sup>

The Clinic report emphasized several of the articles in the ICCPR in relation to immigration and receipt of assistance after a disaster.<sup>121</sup> Of particular concern are Articles 2.1 and 26. Article 2.1 states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Aside from the response after those disasters, human rights advocates also criticized the inadequate planning by the United States that did not take potential human rights issues into account.<sup>122</sup> For instance, one activist shared a story about Katrina’s impact on contracted workers, such as housekeepers (mostly undocumented), who were abandoned by their contractor employers when the storm hit.<sup>123</sup> Government officials would not assist the abandoned people, and the activist had to deal with language barrier issues because the workers came from many different countries.<sup>124</sup> After persisting in contacting authorities, the activist finally got the abandoned workers some help,<sup>125</sup> but the situation illustrates the lack of planning on the part of the government which resulted in the unwillingness or inability of authorities to do anything.

Emphasis on planning was also included in the United Nations Human Rights Council (UNHRC) report from 2006, which stated that, “Normally, situations affecting the human rights of persons affected by natural disasters are not consciously planned and implemented, but result from inappropriate policies or simple neglect. The vulnerability of the people affected is often the result of inadequate planning and disaster preparedness.”<sup>126</sup> Proper planning could prevent many problematic situations that would rise to the level of human rights violations, which can be neglected in the confusing days and weeks after a disaster, such as lack of accessible assistance, aid distribution discrimination, and loss of documentation on the part of government workers.<sup>127</sup> The UNHRC also addressed the potential human rights challenges to dealing with victims of a disaster in the *Guiding Principles on Internal Displacement*.<sup>128</sup> Those Principles stress the duty of national officials to protect and provide humanitarian assistance for displaced people, regardless of their legal status, and seek to preserve the “rights to life, dignity, liberty and security of those affected”.<sup>129</sup> They also declare the right for displaced people to ask the government for assistance, without being “persecuted or punished” for doing so,<sup>130</sup> which addresses the fear-based response among the immigrant community in avoiding seeking aid. The Principles emphasize the need for all response entities to comply with international human rights law, such as the ICCPR.<sup>131</sup> Another UNHRC document, titled *Protecting Persons Affected by Natural Disasters*, reiterates the responsibility of national officials to protect disaster victims, regardless of citizenship.<sup>132</sup> Protection of rights means not just survival and safety, but civil, political, economic, social and cultural rights as well.<sup>133</sup> Some of these rights include due process for non-citizens in United States deportation proceedings, the ability to challenge the legality or length of detention, and protection against racism towards immigrants in the United States.<sup>134</sup> The importance of these issues is often forgotten after a disaster resulting in the inability of the government to afford full protection of disaster victims within its jurisdiction. Relevant for immigrants and others adversely affected by identification requirements, the guidelines recommending that “[h]umanitarian action should be based on assessed need and provided to all persons affected by the natural disaster without adverse distinction of any kind other than that of differing needs.”<sup>135</sup>

## Conclusion

Disaster response for immigrants and other vulnerable groups has long been inadequate. Challenges faced by these disaster victims reveal a deeper lesson on society’s views of the value that should be placed on them. After Katrina, immigrant victims both undocumented and legally present within the United States lived in fear of deportation and did not receive adequate

assistance. Similarly, after the San Diego fires of 2007, the 2010 BP oil spill, and the 2011 tornados and wildfires, immigrants faced the same problematic approach to distribution of aid which often resulted in discrimination against the large immigrant communities living in those areas. These experiences have raised concerns that the United States does not adequately protect disaster victims within its borders, as required by international human rights law to which the United States is accountable. Treaties such as the ICCPR and guidance such as the Principles demand equity and decency in disaster response, and the United States must incorporate such a policy into its own disaster planning models in order to fully integrate the basic needs of victims.

After the San Diego fires, California took a step in the right direction and passed a law which requires public employees to provide emergency services without asking for identification documents. This more accessible and open approach should be applied nationally as part of an ongoing effort to provide much needed assistance to victims of disasters, regardless of their status. Other issues such as fear of deportation and language barriers should also be addressed in federal disaster law, such as the Stafford Act. Specifically, disaster laws should include assurances that immigrants can come forward to receive aid after a disaster without fear of arrest and deportation by immigration officials, and provide language assistance at every step of the process. Immigrants are only one group of many who face challenges to survival after disasters, and with the understanding that disasters will continue to impact our nation; many of those problems should be addressed with effective planning and incorporation of human rights concerns.

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**IS QUALIFIED IMMUNITY AN AFFIRMATIVE  
DEFENSE IN NAME ALONE?  
WHY COURTS SHOULD SHIFT AWAY  
FROM PLACING THE BURDEN  
TO REFUTE QUALIFIED IMMUNITY  
ON § 1983 PLAINTIFFS**

“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”

*Marbury v. Madison*, 1 Cranch 137, 147 (U.S. 1803).

**Introduction**

Evidentiary burdens are powerful. The allocation of the burden of production to one party and not the other could keep a justified remedy out of reach. In actions under 42 U.S.C. § 1983, an elusive remedy might mean that a plaintiff’s constitutional rights will go unvindicated. When citizens are abused by state government actors who violate their constitutional rights, their predominant recourse is to pursue civil action under 42 U.S.C. § 1983.<sup>2</sup> This provision of the Civil Rights Act hold liable those individuals who, under color of law, deprive any person of rights or privileges afforded in the United States Constitution.<sup>3</sup> At times, state actors violate citizens’ rights. A classic example is when state actors ransack citizens’ homes in unlawful searches.<sup>4</sup> Other examples include state actors engaging domestic abusers in casual conversation while they are supposed to be responding to a call for help<sup>5</sup> or state actors removing children from their parents’ custody under questionable circumstances.<sup>6</sup> When these events happen, citizens look for a remedy under § 1983.

Currently, a majority of federal circuits improperly allocate evidentiary burdens so that § 1983 plaintiffs never see a remedy because they are unable to overcome the threshold of summary judgment.<sup>7</sup> A defendant in a § 1983 action may be protected by the affirmative defense of qualified immunity.<sup>8</sup> This immunity is available if the allegedly violated right was constitutional in nature, and was not so clearly established that a reasonable official would have been aware of it.<sup>9</sup> Many federal circuit courts have required § 1983 plaintiffs to refute qualified immunity instead of requiring defendants to make a showing that their case merits qualified immunity.<sup>10</sup> This practice requires of plaintiffs what any other affirmative defense requires of defendants, and

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Elinor R. Jordan is clerking for Hon. David W. McKeague of the United States Court of Appeals for the Sixth Circuit.

thus it has rendered qualified immunity an affirmative defense in name alone. In fact, this practice thwarts the intent of Congress, as expressed in the Civil Rights Act, and the text of the Federal Rules of Civil Procedure.<sup>11</sup> Those federal circuit courts that place the burden of production for both prongs of qualified immunity analysis on plaintiffs should shift that burden back where it belongs—on § 1983 defendants.

This essay discusses the operation of qualified immunity in § 1983 suits—how some circuits have misapplied this doctrine, and how it can be restored. Part I describes the process of evidentiary burden-shifting required by well-established precedent and the Federal Rules of Civil Procedure, and presents a survey of the federal circuit courts' approaches to qualified immunity analysis. This survey demonstrates that the majority of circuits inappropriately place the burden of production for both prongs of qualified immunity analysis on plaintiffs. Part II explores three separate lines of reasoning and reliance that have prompted some courts to shift the burden of production onto plaintiffs, and explains why none of the reasoning that has given rise to this alteration warrants the sea change it represents for § 1983 plaintiffs. In addition, Part II explains the ways in which this burden-shifting process violates both the intent of Congress and the will of the drafters of the Federal Rules of Civil Procedure. This essay concludes that, in order to give meaning to the nature of qualified immunity as an affirmative defense, the burden of showing that an allegedly violated right was not clearly established should be placed on § 1983 defendants.

## **I. Qualified immunity and burden shifting in § 1983 jurisprudence**

Litigation of § 1983 claims is characterized by tension between the need to protect individuals' constitutional rights and the "specter" of a government disabled by frivolous lawsuits.<sup>12</sup> Qualified immunity, which is available to state actors based on their discretionary acts under pertinent circumstances,<sup>13</sup> is meant to allow the clashing interests of injured plaintiffs and functioning state actors to come together without one overtaking the other.<sup>14</sup> Where absolute immunity<sup>15</sup> would be inappropriate, qualified immunity protects the state actor "as long as [her] conduct does not violate clearly established constitutional or statutory rights."<sup>16</sup> This protection prevents state actors from being inhibited in discretionary tasks by a fear of litigation.<sup>17</sup> One may conclude that, at its best, the doctrine of qualified immunity works to legitimize § 1983 litigation by ensuring that only the most meritorious claims go forward and by keeping unnecessary claims from disabling the effectiveness of government actors.

Qualified immunity is an outgrowth of absolute immunity.<sup>18</sup> Absolute immunity is considered a "functionally mandated incident of the President's unique office, [and] rooted in the constitutional tradition of the separation of

powers.”<sup>19</sup> The general consideration undertaken with regard to immunity is practicality; the long-term public interest in governmental freedom of action takes precedence over the immediate interest of the plaintiff.<sup>20</sup> This consideration relates to the constitutional requirement of separation of powers, in that power is distributed to particular actors to function with some level of discretion.<sup>21</sup> In *Harlow v. Fitzgerald*, the Supreme Court stated that public policy mandated qualified immunity for certain insubstantial claims.<sup>22</sup> Thus, the relationship between the constitutional doctrine of separation of powers and qualified immunity is predicated on the connection between qualified immunity and absolute immunity.<sup>23</sup> Because it is vital to allow state actors to use reasonable judgment in performing discretionary tasks, qualified immunity could be considered a functional mandate of the Constitution.<sup>24</sup>

Certain procedures have evolved to encourage the use and effect of qualified immunity.<sup>25</sup> A state actor may assert qualified immunity by pleading it as an affirmative defense in her answer.<sup>26</sup> Most defendants in § 1983 actions find that qualified immunity is their best defense, and it is nearly always invoked in § 1983 claims.<sup>27</sup> Once invoked, the district court, in its discretion under Federal Rule 7(a)(7), may require the plaintiff to file a “*Schultea* reply” in response to the answer.<sup>28</sup> Plaintiffs provide a *Schultea* reply in order to expound upon the original complaint.<sup>29</sup> The reply is specifically tailored to respond to the defendant’s claim of qualified immunity and is permitted in order to provide the court with all the information necessary to rule on the question of qualified immunity.<sup>30</sup> The Supreme Court has determined that state actors are best protected when immunity is settled before significant litigation,<sup>31</sup> so immunity is frequently considered at the summary judgment level.<sup>32</sup> In addition, courts allow interlocutory appeals when immunity is denied at the district level.<sup>33</sup> This encourages the policies underlying qualified immunity by ensuring the question is resolved definitively before a full trial takes place.

In keeping with its purposes to preserve government productivity and to attract qualified people to government work, courts consider qualified immunity to be “immunity from suit, rather than a mere defense to liability.”<sup>34</sup> Qualified immunity’s benefits are considered lost if a case where the immunity should have been upheld is permitted to go to trial.<sup>35</sup> In this aspect, absolute, governmental, and qualified immunity are unique among affirmative defenses.<sup>36</sup> Significantly, the Supreme Court has found that this is accomplished through dismissal at the summary judgment stage.<sup>37</sup>

Once the defendant asserts the qualified immunity defense, courts adjudicate that defense by first evaluating whether a constitutional right is at stake.<sup>38</sup> In addition, the court generally bases its decision on whether “the contours of the right [are] sufficiently clear that a reasonable official would

understand that his or her conduct violates that right.”<sup>39</sup> Until recently, the Supreme Court mandated that the former question be resolved before the latter.<sup>40</sup> However, in *Pearson v. Callahan*,<sup>41</sup> the Court overturned so-called “sequencing,” favoring the lower court discretion.<sup>42</sup> Hence, if a court finds that a right was not clearly established, it may dismiss based on qualified immunity, and need not decide whether that right was constitutionally protected. Likewise, a court may dismiss the case if it finds that no violation of a constitutional right has been alleged.<sup>43</sup>

### **A. Evidentiary Burden Shifting at the Summary Judgment Level**

The majority of qualified immunity questions in § 1983 claims are handled at the summary judgment level.<sup>44</sup> Summary judgment provides a method through which cases can be promptly dismissed if there is “no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”<sup>45</sup> The purpose of summary judgment procedure is to expedite litigation, but a court’s decision to grant summary judgment should never be predicated solely on saving time or expense.<sup>46</sup> In considering a motion for summary judgment, a district court should consider the evidence on the record to determine whether there is a genuine dispute of material fact rather than focus on efficiency gains.<sup>47</sup>

In *Celotex Corp. v. Catrett*,<sup>48</sup> the Supreme Court ruled that, at the summary judgment level, each party bears the burden of making out the *prima facie* elements that they will have the burden of proving at trial.<sup>49</sup> The Court held “the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>50</sup> The moving party may satisfy its burden on summary judgment by demonstrating that the opposing party cannot establish an essential element of its claim.<sup>51</sup>

Defendants bear the burden of proof for any affirmative defense they assert.<sup>52</sup> With regard to affirmative defenses, the Supreme Court has stated that it is “[o]rdinarily incumbent on defendant to plead and prove such a defense.”<sup>53</sup> In asserting an affirmative defense, a defendant normally introduces new facts and draws a conclusion from them that, if true, overcomes the plaintiff’s claim, despite the truth of all elements in the complaint.<sup>54</sup> For example, although a plaintiff may establish all the elements of contract formation, a defendant may plead the affirmative defense of duress. Such a defendant might plead additional facts which lead to the legal conclusion that, although a contract was seemingly entered into, one of the parties behaved in such a way as to overcome the free will of the other party.<sup>55</sup> Even though a plaintiff may be

able to make out the elements of his or her claim, a defendant may assert the affirmative defense of qualified immunity and argue that, although the facts alleged in the plaintiff's complaint may have taken place, the conduct was objectively reasonable under the circumstances, and a reasonable officer would not have believed she was violating the Constitution.<sup>56</sup>

Evidentiary burdens represent a necessary hurdle to the courtroom for claims and defenses.<sup>57</sup> In order to proceed, parties must meet a particular standard.<sup>58</sup> In pleading an affirmative defense in a civil case, a defendant must at a minimum produce sufficient evidence to support the notion that the underlying facts of the defense are true.<sup>59</sup> This lesser burden is known as the burden of production.<sup>60</sup> When considering most affirmative defenses, the burden of production rests on the defendant to make a minimum showing that the foundational facts that form the affirmative defense are true.<sup>61</sup> However, with regard to the affirmative defense of qualified immunity, the majority of circuits instead require the plaintiff to meet a burden of production that the basic facts of the affirmative defense are untrue to avoid the defense.<sup>62</sup> This essay is concerned with the allocation of the burden of production in the context of qualified immunity determinations at the summary judgment level.

### **B. Contrary to the procedure for any other affirmative defense, the burden of production for qualified immunity is frequently placed on § 1983 plaintiffs**

To illustrate the process of burden-shifting in different civil actions, it is helpful to consider two simple hypothetical cases.<sup>63</sup> In the first case, assume that Plaintiff is standing on a street corner when his friend, Defendant Citizen, hits him in the stomach with a baseball bat.<sup>64</sup> In the second case, assume that the same unfortunate Plaintiff is standing on the same ill-fated street corner when a police officer, Defendant Officer, hits him in the stomach with a baton.<sup>65</sup> Plaintiff, who now has a very sore stomach, chooses to bring suit against both defendants. In response to Plaintiff's complaint, Defendant Citizen files a motion for summary judgment, asserting the affirmative defense of consent. Defendant Citizen's theory is that Plaintiff urged Defendant Citizen to hit him in the stomach to show off how much he had been working out. Defendant Officer also files a motion for summary judgment, asserting the affirmative defense of qualified immunity. Defendant Officer's theory is that, because the officer reasonably felt that Plaintiff was about to attack her after she had ordered Plaintiff to clear the area pursuant to an anti-loitering law, she acted in good faith.

In the case of *Plaintiff v. Defendant Citizen*,<sup>66</sup> the court would consider whether Defendant Citizen was entitled to summary judgment based on his affirmative defense of consent. Because Defendant Citizen was asserting the affirmative defense of consent, he would be given the burden of demonstrat-

ing that Plaintiff consented to the action.<sup>67</sup> Drawing all factual inferences in favor of Plaintiff, the court would determine whether there is a genuine issue of material fact as to whether Plaintiff, indeed, consented to be hit with a baseball bat.<sup>68</sup> Therefore, if Defendant Citizen fails to allege any facts which show Plaintiff consented to being hit with a baseball bat,<sup>69</sup> summary judgment would be improper.

The case of *Plaintiff v. Defendant Officer*<sup>70</sup> would be quite different. In order for the court to grant qualified immunity, a defendant state actor must plead the defense in her answer.<sup>71</sup> At that point, once a defendant moves the court for summary judgment, the court is left to apply the two-part test for qualified immunity,<sup>72</sup> that is, whether a constitutional right is at stake and whether the right allegedly violated was clearly established.<sup>73</sup>

When courts consider whether a constitutional right is at stake in the violation that has been alleged, they are united in placing the burden of production on plaintiffs.<sup>74</sup> Thus, in the case of *Plaintiff v. Defendant Officer*, Plaintiff would have the burden to show that he had a constitutional right not to be hit in the stomach with a baton.<sup>75</sup> Importantly, this prong of the qualified immunity test is also part of the test for the § 1983 action itself.<sup>76</sup> Therefore, because alleging the violation of a constitutional right is part of a plaintiff's case in chief, placing the burden of production on the plaintiff is really just an application of the standard for summary judgment under Rule 56 that was articulated in the seminal case *Celotex Corp. v. Catrett*.<sup>77</sup> The plaintiff must make a showing regarding the essential elements of his claim.<sup>78</sup>

When courts turn to the second prong of the qualified immunity determination—whether the right allegedly violated was clearly established—the circuits are split as to the allocation of the burden of production. The Supreme Court has not specifically held which party should bear the burden of production for making a showing of the “clearly established” prong on summary judgment.<sup>79</sup> There is a split between the Second, Fourth, Eighth, Ninth, and Eleventh Circuits, which generally put the burden of production on the defendant with regard to the second prong, and the First, Third, Fifth, Sixth, Seventh, and Tenth Circuits, which generally place the burden of production on plaintiffs.<sup>80</sup> The burden allocation by those circuits that generally place the burden of production on § 1983 defendants remains truer to the Federal Rules of Civil Procedure, Supreme Court precedent, and the intent of Congress.<sup>81</sup>

There are three different approaches that federal circuit courts have used in considering this matter.<sup>82</sup> In the Second, Fourth, Eighth, and Ninth Circuits<sup>83</sup> the state actor in *Plaintiff v. Defendant Officer* would need to make a showing that, based on the clearly settled law at the time of the alleged violation, she

could have been unaware that her actions violated any right.<sup>84</sup> Courts in the Eleventh Circuit engage in a more intricate burden-shifting process for the “clearly established” prong.<sup>85</sup> First, the burden is placed on the defendant to show that her actions were within her discretionary duty.<sup>86</sup> Once she has done that, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.<sup>87</sup> The state actor in *Plaintiff v. Defendant Officer* would thus have to come forward with information that showed that part of her job was to keep people from loitering on the street corner. If she could do that, then the burden would shift back to Plaintiff. Plaintiff would need to show that, although Defendant Officer was charged with clearing people from street corners, it was clearly established that doing so by using force under the circumstances violated Plaintiff’s rights.

The First, Third, Fifth, Sixth, Seventh, and Tenth Circuits make it the plaintiff’s burden to make a showing for both prongs of the qualified immunity test.<sup>88</sup> These courts say that “[a]lthough [it is] nominally an affirmative defense, the plaintiff has the burden to negate the assertion of qualified immunity once properly raised.”<sup>89</sup> In one of these circuits, the plaintiff in *Plaintiff v. Defendant Officer* would have the burden to make a showing at the summary judgment level that, by striking him with a baton, Defendant Officer violated a constitutionally protected right. Beyond that, Plaintiff would be required to show that the existing law at the time of the alleged violation was so clear that Defendant Officer must have been aware that she was violating such a right.<sup>90</sup>

The role of qualified immunity as an affirmative defense helps to strike a vital balance in § 1983 litigation between the vindication of plaintiffs’ rights and the interest in governmental efficiency.<sup>91</sup> However, the burden-shifting procedure followed by the majority of circuits undercuts the nature of qualified immunity as an affirmative defense.<sup>92</sup> The justifications relied upon by the circuit courts to further this procedure are not sufficiently compelling to merit continuation, and the best practice would be to restore the burden of production for the second prong of qualified immunity analysis to the defendant.<sup>93</sup>

## **II. Qualified immunity should not be treated as an affirmative defense in name alone**

Absent any special justification, an application of Rule 56 places the burden of production regarding the affirmative defense of qualified immunity on defendants.<sup>94</sup> This is true because the very nature of an affirmative defense (one that, if proven, would require the dismissal of the claim) requires the burden to make a showing regarding that defense to be placed on the defendant.<sup>95</sup> Furthermore, an affirmative defense is not part of a plaintiff’s case in chief.<sup>96</sup> Thus, causing a plaintiff to bear the burden of making a showing regarding



an affirmative defense is in clear contradiction of the standard laid out by the Supreme Court in *Celotex*.<sup>97</sup> *Celotex* requires each party to bear the burden of production for its own claims and defenses on summary judgment, as opposed to the party opposing a claim or defense being forced to prove a negative.<sup>98</sup> Because placing the burden of production for qualified immunity on plaintiffs departs from the requirements of the Rules and *Celotex*, the circuit courts must demonstrate a compelling reason for the change. However, the courts' attempts to justify the shift are insufficient.

The approach followed by the majority of federal circuits undermines the nature of qualified immunity as an affirmative defense by placing the burden on the plaintiff to show both prongs of qualified immunity analysis.<sup>99</sup> Thus, not only must a plaintiff make his *prima facie* case, showing that the right he alleges was violated by a government actor was constitutional in nature,<sup>100</sup> but he must also demonstrate that clearly-established law at the time of the violation would have given the defendant notice that she had a duty to uphold that right.<sup>101</sup> It is aptly stated that this procedure renders qualified immunity only "nominally an affirmative defense."<sup>102</sup> In doing so, a majority of circuits have departed from Supreme Court precedent stating that qualified immunity is an affirmative defense.<sup>103</sup>

### **A. Qualified immunity can best serve its purpose when viewed as an affirmative defense**

The Supreme Court has articulated three central goals for qualified immunity. One goal is to guard the public's strong interest in efficient functioning of government against the cost of needless litigation and damages.<sup>104</sup> Another goal is to achieve fairness for the public official.<sup>105</sup> Finally, the doctrine seeks to prevent consideration of the subjective intent of the state actor on summary judgment.<sup>106</sup> The Court has explained that qualified immunity was the balance struck between the needs of plaintiffs and these compelling goals.<sup>107</sup> All of these objectives are best served when qualified immunity is considered an affirmative defense.

An affirmative defense can be pled at the outset of litigation in order to allow the court to consider additional facts necessary in deciding whether a claim should proceed.<sup>108</sup> Placing the consideration of qualified immunity at this early stage of litigation is conducive to striking the balance that is valued by the Court in § 1983 cases because it allows plaintiffs to seek relief, but also ensures that frivolous claims will be dismissed at the earliest possible moment. This saves the public funds from paying needless attorneys' fees and prevents the defendant from ongoing anxiety over meritless claims. At the same time, if properly applied, the affirmative defense would still preserve plaintiffs' interest in gaining relief for meritorious claims. Finally, if defen-

dants meet the burden of production, an objective analysis of good faith can be fairly treated through an affirmative defense because no examination of credibility would be required.<sup>109</sup> Therefore, qualified immunity is best situated as an affirmative defense.

**B. Placing the burden regarding the first prong of the qualified immunity test on § 1983 plaintiffs could be in keeping with the federal rules if considered as part of the summary judgment determination**

Requiring a § 1983 plaintiff to make a showing regarding the constitutional nature of the allegedly violated right does not necessarily go outside the requirements of Rule 56. This is because the first prong<sup>110</sup> of the qualified immunity analysis is also part of the plaintiff's case in chief.<sup>111</sup> Therefore, according to *Celotex*, the plaintiff should bear the burden of making a showing regarding this prong at the summary judgment levels because he will have the burden of proving this at trial.<sup>112</sup>

At the summary judgment level, most courts place the burden on the plaintiff to make a showing that the allegedly violated right was constitutional in nature, and state that this is part of the courts' analysis of the affirmative defense of qualified immunity.<sup>113</sup> In doing so, the nature of qualified immunity as an affirmative defense is overcome. Courts should change the way in which they articulate this approach. On summary judgment, this prong should not be considered as part of the qualified immunity analysis, but instead should be part of a general analysis of the plaintiff's ability to survive summary judgment by presenting a *prima facie* case with regard to each element of its case in chief.<sup>114</sup>

**C. The motivations that have prompted a majority of circuits to shift the burden for the second prong of qualified immunity analysis to plaintiffs are not justified**

In *Harlow v. Fitzgerald*, the Supreme Court articulated that “[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”<sup>115</sup> Importantly, the party that is to bear the burden of demonstrating that a right was clearly established at the time of the alleged violation is left unclear.<sup>116</sup> The burden-shifting structure that is most common in federal circuit courts, in which the burden to show the second prong of the test for qualified immunity is placed on the plaintiff, has evolved through three major channels.<sup>117</sup> These channels incorrectly construe the objective of qualified immunity to be “immunity from suit,” and focus on the objective that qualified immunity should allow state actors to exercise their discretion without inhibition due to fear of civil liability.<sup>118</sup> This Section explores each of these channels and explains their weaknesses.

**1. Justification Number 1: An assumption that if qualified immunity is to be an “immunity from suit,” the burden for both prongs must be placed on plaintiffs**

Some Circuits that place the burden on plaintiffs to show the second prong of the qualified immunity test work under the assumption that because qualified immunity is freedom from suit, it is also freedom from the burdens that go with any level of litigation.<sup>119</sup> Thus, courts in these circuits allow plaintiffs who did not allege a clearly established right in their complaint to do so through a so-called “*Schultea* Reply,” or amended complaint.<sup>120</sup> After the amended pleadings, if a plaintiff has not alleged facts that show the status of the law at the time of the alleged violation and that show why the right allegedly violated was clearly established, the case cannot go forward.<sup>121</sup> In *Poe v. Haydon*, the Sixth Circuit said that a case could continue only if the plaintiff showed that the allegedly violated “rights were so clearly established when the acts were committed that any officer in the defendant’s position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.”<sup>122</sup>

The Supreme Court first used the phrase “immunity from suit” in *Mitchell v. Forsyth*.<sup>123</sup> There, the defendant sought to immediately appeal a district court decision that he was not entitled to qualified immunity.<sup>124</sup> The gravamen of that case was that a decision not to grant qualified immunity is a final decision for the purposes of appeal, because the purpose of the immunity would be “effectively lost if a case is erroneously permitted to go to trial.”<sup>125</sup>

In many ways, qualified immunity is comparable with state sovereign immunity, which is also “immunity from suit.”<sup>126</sup> Sovereign immunity precludes the institution of a suit against a sovereign government without its consent.<sup>127</sup> Like qualified immunity, sovereign immunity is rooted in the concept that those in power hold great responsibility and must, for practicality’s sake, be shielded from liability.<sup>128</sup> Like qualified immunity, sovereign immunity is an affirmative defense the defendant must raise.<sup>129</sup> Because states are entitled to immunity in the federal courts, plaintiffs generally bring their cases against an agency or office.<sup>130</sup> To determine whether a party may assert sovereign immunity, the court must decide whether the party is an “arm of the state.”<sup>131</sup> Significantly, the Sixth Circuit has held that “the entity asserting Eleventh Amendment Immunity has the burden to show that it is entitled to that immunity, [that is] that it is an arm of the state.”<sup>132</sup> In doing so, the Sixth Circuit Court relied on precedent from the Fifth, Third, and Seventh Circuits.<sup>133</sup> None of these circuits articulated any concern that placing an evidentiary burden on the defendant at the summary judgment level for making out the contours of its affirmative defense would defeat the nature of sovereign immunity as immunity from suit.<sup>134</sup>

The practices of the Third, Fifth, Sixth, and Seventh Circuits in applying sovereign immunity illustrate that immunity from suit does not translate to immunity from any burden.<sup>135</sup> In considering sovereign immunity, courts in these circuits follow the procedure set out in the Rule 56 and *Celotex* requiring defendants to make a showing regarding the affirmative defense of sovereign immunity.<sup>136</sup> If courts are able to strike a balance between immunity and basic evidentiary burdens for sovereign immunity it is illogical that the same balance could not be struck in the case of qualified immunity.<sup>137</sup>

The Supreme Court called qualified immunity an “immunity from suit” in order to ensure that a denial of the immunity at the summary judgment level could be immediately appealable.<sup>138</sup> In doing so, the Court gave no indication that it intended defendants to be free from making any kind of showing.<sup>139</sup> When put into its proper context, this language does not imply that § 1983 defendants should be free to evade the very nature of an affirmative defense. Instead, where a defendant makes an inadequate showing, which leads the court to rule against him or her on the question of qualified immunity, she will have the right to treat that as a final decision and appeal.<sup>140</sup> Furthermore, the Court has not articulated that immunity from suit necessarily shifts the burden of production for the second prong of the qualified immunity test onto plaintiffs. Even if taken literally, the phrase “immunity from suit” would not mean that the party invoking immunity should not have to say why she is immune.<sup>141</sup> Thus, placing the burden of production for the second prong of the qualified immunity test on § 1983 defendants would merely require defendants to explain the contours of that affirmative defense and would not take away their immunity from suit.

## **2. Justification Number 2: An out-of-context interpretation of language used by the Supreme Court**

Courts sometimes take portions of cases out of context and apply their language to situations predecessor courts did not intend. The Seventh Circuit’s practice of placing the burden for refuting qualified immunity onto § 1983 plaintiffs seems to have sprung from this type of situation.<sup>142</sup> The Seventh Circuit’s application of language in *Davis v. Scherer*<sup>143</sup> has caused it to engage in burden-shifting that mirrors the First, Third, Fifth, and Tenth Circuits.<sup>144</sup>

In a 1984 case, *Davis*, a former Florida highway patrolman sued the State after allegedly being forced to leave his job.<sup>145</sup> At trial, the district court granted the requested relief of a declaration that his rights had been violated and an award of money damages.<sup>146</sup> However, five days after that ruling, the constitutionality of the Florida Civil Service Statute that Defendant violated came into question.<sup>147</sup> The Supreme Court took up the question of how to apply the qualified immunity standard where state law as well as constitutional law is at

stake in the allegedly violated right.<sup>148</sup> In answering that question, the Court held that, “A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant state actor’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”<sup>149</sup>

In 1987, the Seventh Circuit picked up the language in the holding from *Scherer in Abel v. Miller*.<sup>150</sup> That case involved a prisoners’ rights group that sought access to prisoners at an Illinois penitentiary.<sup>151</sup> In reviewing the District Court’s decision to grant relief, the Court of Appeals stated that plaintiffs had failed to show a clearly-established constitutional right to visit people in prisons.<sup>152</sup> The court further held that the District Court had erred in not granting summary judgment to the defendant based on the plaintiff’s failure to meet this burden.<sup>153</sup> In 1988, this reasoning was repeated on an appeal after another trial in *Rakovich v. Wade*, where the court quoted *Scherer’s* holding that a plaintiff must show an allegedly violated right was clearly established.<sup>154</sup> The court granted summary judgment for the defendant because the plaintiff had not met the burden of production to overcome the defense of qualified immunity.<sup>155</sup>

The Seventh Circuit extended the language in *Scherer* to the summary judgment level more decisively in *McGrath v. Gillis*, a 1995 case.<sup>156</sup> The court stated that “whether a right is clearly established is a question of law . . . and plaintiff bears the burden of establishing the existence of a clearly[-] established constitutional right.”<sup>157</sup> Ensuing cases in the Seventh Circuit continued to place the burden on plaintiffs to make a showing for the second prong of the qualified immunity test.<sup>158</sup>

As demonstrated here, the primary basis for the Seventh Circuit’s procedure in determining qualified immunity sprang out of its interpretation of the *Scherer* decision. However, in *Elder v. Holloway*, the Supreme Court clarified the analysis in *Scherer* by saying the language<sup>159</sup> was only intended to answer the question of whether “qualified immunity [is] defeated where a defendant violates *any* clearly established duty, including one under state law, or [whether] the clearly established right be the federal right on which the claim for relief is based.”<sup>160</sup> Hence, the *Scherer* Court had intended to emphasize the “only by showing those rights were clearly established” portion of the quote.<sup>161</sup> Therefore, the Court decided that simply because a plaintiff’s brief failed to mention a case that clearly demonstrated the right in question, the lower court should not have granted summary judgment without considering the additional case.<sup>162</sup> This holding suggests that the *Scherer* line of cases incorrectly pushes the burden of production on the plaintiff.

The line of Seventh Circuit cases that builds on *Scherer* took a questionable second turn by taking language from the *Scherer* court that was addressing a final judgment rendered after a trial and extending this procedure to an appeal from denial of summary judgment.<sup>163</sup> Particularly considering the tenuous connection between the original intent behind the wording in *Scherer* and the purpose for which it is used in current cases,<sup>164</sup> the leap to applying that interpretation to a different stage of litigation is not warranted. Therefore, when put into context, the Seventh Circuit's basis for placing the burden of production for the second prong of qualified immunity analysis on plaintiffs is highly questionable.

### **3. Justification Number 3: An Assumption that Allowing the Burden for Either Prong to Be Placed on Defendant Would Chill Official Discretion**

A third line of logic is that plaintiffs should bear the burden of production for the "clearly established" prong in order to prevent public officials from being forced to guess about constitutional developments at their peril.<sup>165</sup> The assumption that, without access to qualified immunity, state actors will be deterred from making split-second decisions important to their work is ever-present in § 1983 litigation.<sup>166</sup> In *Harlow*, the Court emphasized that qualified immunity was important because, without it, discretionary action would be inhibited and good people may be deterred from public service.<sup>167</sup>

While it is clear that uninhibited, reasonable official action is one justification for the overall doctrine of qualified immunity, it is less clear why this public policy concern necessitates putting the burden on plaintiffs to make a showing for the second prong of qualified immunity assessment.<sup>168</sup> The Fifth Circuit articulated this approach, as did the Seventh Circuit in a secondary line of argument.<sup>169</sup> However, the connection is clear enough to the courts that utilize this reasoning.<sup>170</sup> For example, one such court reasoned "[s]ince the purpose of qualified immunity is to protect public officials from guessing about constitutional developments at their peril, the plaintiffs have the burden of showing that the constitutional right was clearly established."<sup>171</sup>

State actors should be aware that, while it is possible they will face litigation over some actions they take in furtherance of their employment, they will only be held liable if they act in bad faith.<sup>172</sup> However, courts in the Fifth and Seventh Circuits connect the importance of discretion and the shifting of production burdens without articulating the tie between the two concepts.<sup>173</sup>

In fact, it is impossible to be certain whether most state actors, in the normal course of carrying out their duties, would be aware of this particular type of shift. The courts may mean to imply that if qualified immunity is perceived as difficult to obtain, then state actors would be inhibited in their work. However, even if defendants had to show that an allegedly violated

right was not clearly established, those defendants would still have access to qualified immunity before having to endure a trial.<sup>174</sup>

Moreover, it stands to reason that § 1983 defendants are in a unique position to demonstrate that the right they are accused of violating would not have been clearly established to someone like them because defendants can produce their own perspective more readily than plaintiffs.<sup>175</sup> It is the defendant, not the plaintiff, who is most likely to be in a favorable position to access departmental materials describing proper official conduct. In turn, any perceived boon to § 1983 plaintiffs in shifting the burden of production back to defendants would be minimal; if an objectively reasonable state actor would have been justified in acting as the defendant did then she could easily explain what prompted her to act in the manner that gave rise to litigation.

From a public policy standpoint, a shift in that burden could serve to increase rights-based education among state actors. This would encourage departments to keep appropriate materials that are necessary to explain policies available, should the need for them arise. Such procedures would enhance the transparency of government by allowing the public to have a sense of what training their public servants are receiving.<sup>176</sup> Although the likelihood that placing the burden to show the second prong for qualified immunity on defendants would have any effect on official action is small, any such effect would likely be positive for the state agencies involved because actors would be refraining from legally questionable behavior.<sup>177</sup> Therefore, disposal of § 1983 claims at the summary judgment level after a defendant satisfies the burden of production for the second prong provides sufficient protection to avoid chilling official discretion. Federal circuit courts should approach the process in this way instead of placing the burden of production on plaintiffs.

The motives described in this Section have become the reasoning behind the practice of shifting the burden of showing that an allegedly violated right was clearly established for the purpose of determining qualified immunity to the plaintiff.<sup>178</sup> This burden-shifting has become the norm in the majority of federal circuits.<sup>179</sup> In fact, it has become so common to place this burden on § 1983 plaintiffs that some legal encyclopedias actually suggest this process.<sup>180</sup>

**D. In placing the burden to refute an affirmative defense on § 1983 plaintiffs, the majority of federal circuit courts inappropriately flout the intent of Congress as expressed in 42 U.S.C. § 1983 and the intent of the drafters of the Federal Rules of Civil Procedure**

In passing the Civil Rights Act of 1871, Congress indicated that it intended to provide a remedy for plaintiffs whose rights were violated by state actors.<sup>181</sup> Where a remedy is placed out of reach without compelling reason, the intent of Congress in this respect is thwarted. In addition, Congress delegated the

power to formulate the Federal Rules of Civil Procedure to the Supreme Court and the Judicial Conference.<sup>182</sup> Through its power to officially promulgate the rules suggested by the Judicial Conference, the Supreme Court expresses its support for the Rules and the will of the drafters.<sup>183</sup> In penning Rule 56, the Judicial Conference saw fit to say that the party moving for summary judgment must show that the “movant is entitled to judgment as a matter of law.”<sup>184</sup> In order to be “entitled to judgment as a matter of law,” a defendant who claims an affirmative defense must meet the burden of production with regard to that defense.<sup>185</sup> Thus, unless the practice of placing the burden for refuting the second prong of qualified immunity with plaintiffs is mandated by the higher authority of the U.S. Constitution, there is no authority for the current practice by the majority of courts. This is not the case, and thus this burden-shifting process is erroneous.

Even if, hypothetically, there was significant public support for heightened protection of state actors, any change that is made to the burden required for bringing a § 1983 claim would require an amendment to the Federal Rules.<sup>186</sup> Judicial interpretation would not be the appropriate means for such an amendment. Instead, any alteration would more properly be undertaken by the Judicial Conference itself or a change in §1983 legislation by Congress.<sup>187</sup>

Despite the demands of a crowded docket, courts lack the authority to create special standards for civil rights actions.<sup>188</sup> Where local rules have required more from plaintiffs in § 1983 suits, they have been held invalid.<sup>189</sup> For example, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, homeowners brought suit against their local municipality, alleging damage to their persons and property during a search.<sup>190</sup> The plaintiffs complained that local authorities violated their Fourth Amendment rights when the authorities illegally entered the plaintiffs’ homes, allegedly assaulting one plaintiff and killing another plaintiff’s dogs.<sup>191</sup> The plaintiffs asserted that the officers involved in the incident were inadequately trained by the municipality, which had failed to formulate a policy for the execution of search warrants, prompting the officers to behave inappropriately.<sup>192</sup>

Prior to this action, the Fifth Circuit Court of Appeals had established a heightened pleading standard for § 1983 cases against municipalities in order to manage the dockets of courts in that jurisdiction.<sup>193</sup> That heightened standard required § 1983 complaints to state particularized descriptions of each claim, instead of the lower threshold demanded by the notice pleading requirement in the Federal Rules of Civil Procedure.<sup>194</sup> The U.S. District Court for the Northern District of Texas dismissed the case because the complaint did not provide sufficient information about the alleged training failures to meet the heightened standard.<sup>195</sup> The Supreme Court reversed, finding it



“impossible to square the ‘heightened pleading standard’ with the liberal system of ‘notice pleading’ set up by the Federal Rules.”<sup>196</sup> Thus, the Court struck down the heightened pleading standard and stated that courts should await discovery to uncover the details of the claims included in § 1983 complaints.<sup>197</sup> Courts that place the burden of making a showing regarding both prongs of the qualified immunity test on plaintiffs are engaging in a similar practice to the heightened pleading standards in *Leatherman*. These courts require § 1983 plaintiffs to meet a more scrupulous standard by shifting the burden of production without proper justification.

Even though the doctrine of qualified immunity is arguably of constitutional import, the Constitution provides no justification for placing a more significant burden on plaintiffs to refute it.<sup>198</sup> The roots of qualified immunity in the concept of absolute immunity indicate that it could be considered functionally required by the Constitution.<sup>199</sup> That is, qualified immunity must be available on some level so state actors may function as the Framers intended.<sup>200</sup> However, there is nothing in the text of the Constitution that mandates any particular procedures regarding qualified immunity. Based on this analysis, it follows that an application of qualified immunity that violates the Federal Rules of Civil Procedure could not be protected on constitutional grounds.

Nevertheless, qualified immunity doctrine evolved out of a recognition that state actors require discretion to deal “fearlessly and impartially with the demands of [their] office.”<sup>201</sup> That need is fulfilled by the existence of qualified immunity, combined with defendants’ right to immediate appeal upon its denial. The functionality mandate may necessitate the doctrine itself, but it would not mandate an extra layer of protection, which is created when courts place the burden of production on § 1983 plaintiffs to show that qualified immunity is unwarranted.

Furthermore, even if the Constitution had an implicit, functional requirement that qualified immunity be “immunity from suit,” that requirement would be satisfied by a defendant’s immediate appeal upon its denial.<sup>202</sup> Such a functional requirement would not necessitate an additional burden on the plaintiff. This is demonstrated by the fact that sovereign immunity, which is also considered “immunity from suit,” applies the same burden-shifting structure that is applied to other affirmative defenses.<sup>203</sup> Without an action by the Judicial Conference to amend the Federal Rules, this practice should not be allowed to continue.

## **Conclusion**

Without a remedy a right becomes meaningless.<sup>204</sup> It was Congress’ recognition of this truth that gave rise to the Civil Rights Act of 1871, creating a right of action under 42 U.S.C. § 1983.<sup>205</sup> Civil rights, those that protect the

people of the United States from state repression, are of particular societal import, as every member of the public has an interest in not being abused by state actors. When civil rights plaintiffs are required to carry a heftier burden than their counterparts who seek relief under different theories, the remedy that breathes life into their rights may be unattainable.

In cases under 42 U.S.C. § 1983, a majority of federal circuit courts risk rendering rights meaningless by giving plaintiffs the burden of showing both that the allegedly violated right was constitutional in nature and that the right was clearly established at the time of the alleged violation.<sup>206</sup> These courts are unjustifiably placing additional obstacles in the way of a potential remedy, and rendering qualified immunity an affirmative defense in name alone.<sup>207</sup> This error could be corrected if all federal circuit courts would look to the example of those circuits that require defendants to bear the burden of production in demonstrating that they are entitled to qualified immunity.

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#### NOTES)

1. See, e.g., *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland Hills*, 406 F. 3d 375, 380 (5th Cir. 2005); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 362 (6th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007).
2. Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 667 (2009).
3. 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”).
4. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 637 (1986). In that case, FBI agents conducted a forcible, warrantless search of a home in the mistaken belief that a robbery suspect would be found, allegedly punched Plaintiff in the face, kicked him, and chased his young daughters down, shaking them and causing injuries. *Id.* In dissent from the opinion granting summary judgment based on qualified immunity to the officers, Justice Stevens described the protection provided by qualified immunity as a “double standard of reasonableness” because the Court decided that the officers in question had been reasonable, or acted in good faith when acting unreasonably. *Id.* at 647 (Stevens, J., dissenting).
5. See, e.g., *Okin v. Village of Cornwall*, 577 F.3d 415, 420 (2d Cir. 2009). In that case, Plaintiff alleged that officers who responded to her call for help when she was being physically abused by her boyfriend on several occasions delayed response, responded ineffectively, and then on one occasion discussed football with her abuser before leaving the house. *Id.*

6. See, e.g., *Mueller v. Auker*, 576 F.3d 979, 983 (9th Cir. 2009). In that case, Plaintiffs' child was removed from their custody without a pre-deprivation notice. *Id.*
7. See *infra* Parts I, II, and Conclusion.
8. See Leong, *supra* note 2, at 667.
9. *Crawford-El v. Briton*, 523 U.S. 574, 587 (1998).
10. See, e.g., *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland Hills*, 406 F. 3d 375, 380 (5th Cir. 2005); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 362 (6th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007).
11. See *infra* Section D.
12. See David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W.L. REV. 201, 201 (1994) (discussing the goals of qualified immunity and the balance required to reach them, and presenting the complications with reconciling these issues at the summary judgment level).
13. *Schuer v. Rhodes*, 416 U.S. 232, 247 (1974).
14. See Ignall, *supra* note 12, at 201.
15. Absolute immunity is a type of immunity available to officials performing particularly important duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
16. *Id.*
17. *Pearson v. Callahan*, 555 U.S. 223, 235 (2009).
18. See, e.g., JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW* 214 (5th ed., 2006) (discussing absolute immunity, qualified immunity, and the underlying case law for each doctrine).
19. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).
20. CHOPER, *supra* 18, at 213.
21. See *Id.*
22. 457 U.S. 800, 813 (1982).
23. See CHOPER *supra* note 18, at 214.
24. See, e.g., *id.* at 213-14 (discussing the functional mandate of absolute immunity and connecting absolute and qualified immunity).
25. See *infra* notes .
26. See *Crawford-El v. Briton*, 523 U.S. 574, 587 (1998).
27. See *Waeschle v. Dragovic*, 576 F.3d 539, 543 (6th Cir. 2009).
28. *Id.* at 596; *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1185 (5th ed. 2009) [hereinafter WRIGHT & MILLER]; Fed. R. Civ. P. 7(a)(7).
29. *Schultea*, 47 F.3d at 1427. The requirement of a *Schultea* reply does not reflect upon the quality or sufficiency of the plaintiff's complaint because the plaintiff is only required to lay out the contours of his own claims in the complaint. Fed. R. Civ. P. 7(a)(7). See *Craft v. City of New Orleans*, No 03-0671, WL 193134 (E.D. La. Jan. 30, 2004); *Henrise v. Horvath*, 94 F. Supp. 2d 765, 767 (N.D. Tex. 2000) (explaining that courts are given very narrow discretion to decide that a *Schultea* reply is not necessary in a particular case when greater detail might be of assistance, and the presumption is that a reply will be helpful and is necessary). On the other hand, a *Schultea* reply will not be required if the original complaint contained sufficient detail to overcome the defendant's claim of qualified immunity, or in cases where thorough

- discovery into the issue of qualified immunity has already taken place. *Safford v. St. Tammany Parish Life Protection Dist. No. 1*, No. 02-0055 2004 WL 614498 (E.D. La. Mar. 26, 2004); *Jenkins v. Delapaz*, No. 03-0810, 2004 WL 555510 (N.D. Tex. Mar 17, 2004); *Roche v. City of Dallas*, No. 02-0938, 2004 WL 358073 (N.D. Tex. Jan 27, 2004).
30. *Schulte*, 47 F.3d at 1427.
  31. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).
  32. See Teresa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment when Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 185 (2007) (asserting that, because qualified immunity is a question of the application of law to facts, the Supreme Court should not direct lower courts to resolve the question at the summary judgment stage but instead through a motion to dismiss for failure to state a claim under Federal Rule 12(b)(6)). Although compelling, Prof. Ravenell's discussion is beyond the scope of this Article, which focuses on how decisions are being made at the summary judgment level rather than whether they should be made at that level at all.
  33. Ignall, *supra* note 12, at 205.
  34. *Pearson*, 555 U.S. at 236.
  35. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).
  36. Governmental Immunity refers to a state or foreign nation's immunity from suit in federal court. BLACK'S LAW DICTIONARY (8th ed. 2004).
  37. See, e.g., *Mitchell*, 472 U.S. at 526; *Van Cauwenberghe v. Baird*, 486 U.S. 517, 523 (1988).
  38. *Pearson*, 555 U.S. at 236.
  39. *Crawford-El v. Britton*, 523 U.S. 574, 586 (1998).
  40. See *Saucier v. Katz*, 533 U.S. 194 (2001).
  41. 555 U.S. 223 (2009).
  42. *Id.* at 818.
  43. At times throughout this Article, the prong of the test for qualified immunity that deals with whether the allegedly violated right was constitutional is referred to as the first prong, whereas the prong that deals with whether the allegedly violated right was clearly established is referred to as the second prong. These references are made for clarity's sake and are not meant to reference in any way the *Saucier* sequencing that was done away with under *Pearson*.
  44. See *Pearson*, 555 U.S. at 236.
  45. Fed. R. Civ. P. 56.
  46. WRIGHT & MILLER, *supra* note 28, at § 2712.
  47. *Federal Labs., Inc. v. Barringer Research, Ltd.*, 696 F.2d 271, 271 (1982).
  48. 417 U.S. 317, 324 (1988).
  49. 477 U.S. 317, 322-23 (1986).
  50. *Id.*
  51. *Id.* at 323-24. The hypothetical case of *Plaintiff v. Defendant* may help illustrate. Suppose that Plaintiff complains that Defendant committed battery, alleging that Defendant swung a baseball bat, striking Plaintiff in the stomach. Also suppose that Defendant files a motion for summary judgment, claiming that he did not intend to hit Plaintiff, and the parties agree that Plaintiff walked into the swing of Defendant's baseball bat as Defendant was trying to hit a ball. Defendant would have the burden

to point out that Plaintiff had failed to create a dispute of material fact as to intent, an essential element of battery. On the other hand, Plaintiff would have the burden of showing that Defendant did intend to hit him, perhaps by alleging the pitcher had taken a break and there was no reason for Defendant to swing at the moment Plaintiff passed.

52. BLACK'S LAW DICTIONARY 160 (8th ed. 2004); WRIGHT & MILLER, *supra* 28, at § 1270. For example, when a defendant asserts the affirmative defense of estoppel, that defendant must bear the burden of production. *E.g.*, *Edmunds v. U.S.*, 148 F. Supp. 185 (E.D. Wis. 1957). When a defendant asserts the affirmative defense of illegality of contract, that defendant must carry the burden of production. *E.g.*, *Intercontinental Promotions, Inc. v. McDonald*, 367 F.2d 293 (5th Cir. 1966). When a defendant asserts the affirmative defense of *res judicata*, that defendant must carry the burden of production for that defense. *E.g.* *Nat'l Lead Co. v. Nulsen*, 131 F.2d 51 (8th Cir. 1942). Also, the pleading defendant bears the burden of production for the affirmative defense of statute of limitations. *E.g.*, *Exxon Corp. v. Oxford Clothes, Inc.*, 109 F.3d 1070 (5th Cir. 1997).
53. *Taylor v. Sturgell*, 128 S.Ct. 2161, 2179 (2008).
54. BLACK'S LAW DICTIONARY 160 (8th ed. 2004).
55. JAMES F. HOGG ET AL., *CONTRACTS* 649 (Thompson West 2008).
56. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
57. RONALD J. ALLEN, *EVIDENCE* 699 (4th ed. 2006) (providing a thorough discussion of burdens of proof in civil cases, which is helpful for understanding the relationship between burdens of production and persuasion).
58. *Id.*
59. *Id.*
60. *Id.* at 699.
61. ALLEN, *supra* note 57, at 702.
62. *See, e.g.*, *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland Hills*, 406 F. 3d 375, 380 (5th Cir. 2005); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 362 (6th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007).
63. *See supra* Section A. (describing the hypothetical case of *Plaintiff v. Defendant*).
64. Defendant Citizen is an ordinary civilian.
65. Defendant Officer is a state actor.
66. *See supra* Section A (describing the hypothetical case of *Plaintiff v. Defendant Citizen*).
67. ALLEN, *supra* note 57, at 702.
68. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
69. Or if Plaintiff alleged material facts to show that he never urged Defendant Citizen to hit him with the bat.
70. *Supra* Section A (describing the hypothetical case of *Plaintiff v. Defendant Officer*).
71. *Brumfield v. Hollins*, 551 F.3d 322 (5th Cir. 2008).
72. *See supra* Part I (explaining the two part test for qualified immunity, which includes a determination of whether the allegedly violated right was constitutional in nature, as well as whether the allegedly violated right was clearly established, so that a reasonable official would realize he or she was violating that right). *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

73. See *Crawford-El*, 523 U.S. at 586.
74. *Id.* at 589.
75. *Supra*, Section A.
76. The Civil Rights Act creates “liability for those individuals who, under color of law, deprive any person of rights or privileges afforded in the U.S. Constitution.” 42 U.S.C. § 1983 (2006).
77. See *Celotex Corp. v. Catrett*, 417 U.S. 317, 324 (1988).
78. *Id.*
79. See *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) (although the Court mentioned that “the burden is on the official claiming immunity to demonstrate his entitlement.” *Id.*).
80. See *infra* Section B.
81. See *infra* Part II.
82. See *Palmer v. Richards*, 364 F.3d 60, 67 (2d Cir. 2004); *Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007); *Shockensy v. Ramsey County*, 493 F.3d 931, 948 (8th Cir. 2007); *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).
83. *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).
84. *Id.*
85. *Terrell v. Smith*, 688 F.3d 1244, 1250 (11th Cir. 2012).
86. *Estate of Keisinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004).
87. *Id.*
88. See, e.g., *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland Hills*, 406 F. 3d 375, 380 (5th Cir. 2005); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 362 (6th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007). Although it is not entirely clear which test the Circuit Court of Appeals for the District of Columbia applies, it would appear from the language in *Crawford-El v. Briton* that the burden in that Circuit is on the plaintiffs as well. 93 F.3d 813, 821 (D.C. Cir. 1996), rev’d 523 U.S. at 574. It is interesting to note that the First and Sixth Circuits also occasionally impose a third prong on plaintiffs, requiring a showing that the defendant did not behave in an objectively reasonable manner given the circumstances, even if she violated a clearly established right. *Bergeron v. Cabral*, 560 F.3d 1, 12-13 (1st Cir. 2009); *Haynes*, 474 F.3d at 362.
89. *Barfield v. La. ex rel. La. Dept. of Justice*, 325 Fed. App’x 292, 294 (5th Cir. 2009).
90. See, e.g., *Hegarty*, 53 F.3d at 1375-76.
91. See *infra* Section II.A.
92. See *infra* Part II.
93. See *infra* Section II.C.
94. See *supra* Section II.A.
95. ALLEN, *supra* note 57, at 702.
96. See WRIGHT & MILLER, *supra* note 28.
97. See *Celotex Corp. v. Catrett*, 417 U.S. 317, 324 (1988).
98. *Id.*
99. See *supra* Section A.
100. See, e.g., *Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland*

- Hills, 406 F.3d 375, 380 (5th Cir. 2005); Haynes v. City of Circleville, Ohio, 474 F.3d 357, 362 (6th Cir. 2007); Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007); Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007).
101. *See id.*
102. *See* Barfield v. La. ex rel. La. Dept. of Justice, 325 Fed. App'x. 292, 294 (5th Cir. 2009).
103. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).
104. Crawford-El v. Briton, 523 U.S. 574, 575 (1998) (discussing the reasons “implicit in *Harlow's* holding” described in note).
105. *Id.*
106. *Id.*
107. *Id.* The Court stated, however, that the considerations made in striking this balance should not be considered in evaluating the merits of a plaintiff's case. *Id.*
108. *See* ALLEN, *supra* note 57, at 702.
109. *See* Crawford-El, 523 U.S. at 575 (mentioning what it perceived as the *Harlow* Court's implicit desire to avoid subjective considerations regarding official behavior).
110. That is, whether there is a constitutional right at stake. *See, e.g.,* Pearson v. Callahan, 555 U.S. 223, 236 (2009).
111. *See supra* Subsection II.B.1.
112. *See Celotex*, 417 U.S. 317, 324 (1988).
113. *See, e.g.,* Hegarty v. Somerset County, 53 F.3d 1367, 1375 (1st Cir. 1995); Wilson v. Russo, 212 F.3d 781, 786 (3d Cir. 2000); Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 380 (5th Cir. 2005); Haynes v. City of Circleville, Ohio, 474 F.3d 357, 362 (6th Cir. 2007); Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007); Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007).
114. *Accord* WRIGHT & MILLER, *supra* note 28 (describing the proper process for consideration of motions for summary judgment).
115. *Harlow*, 457 U.S. at 818.
116. *See id.*
117. *See, e.g.,* Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987); Gonzales v. City of Elgin, 578 F.3d 526, 540 (7th Cir. 2009); Poe v. Hayden, 853 F.2d 418, 425 (6th Cir. 1988) (expressing an understanding of the phrase “immunity from suit” to mean essentially that the burden of production for both prongs of the qualified immunity question must be on the plaintiff).
118. *See id.*
119. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Poe v. Hayden, 853 F.2d 418, 425 (6th Cir. 1988).
120. Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995).
121. *Poe*, 853 F.2d at 425.
122. *Id.*
123. 472 U.S. 511, 512 (1985).
124. *Id.* at 511.
125. *Id.* at 512.
126. *See* WRIGHT & MILLER, *supra* note 28, at § 3524.2; Central Vir. Comm. College v. Katz, 546 U.S. 356, 372 (2006).
127. *Id.*

128. *See Id.* However, sovereign immunity is distinguishable from qualified immunity in that it is considered a quasi-jurisdictional matter, which urges courts to consider it a threshold issue. *Lapides v. Bd. of Regents Univ. Sys. Ga.*, 535 U.S. 613 (2002).
129. *Tritchler v. County of Lake*, 358 F.3d 1150, 1153-54 (9th Cir. 2004). Although case law exists to refute this assertion, saying that it is purely a jurisdictional question that can be raised at any point, even after the entering of a judgment, sovereign immunity is “correctly” considered an affirmative defense, even though a waiver should not be taken lightly due to the constitutional import of the immunity. *WRIGHT & MILLER, supra* 28, at § 3524.4.
130. *See WRIGHT & MILLER, supra* note 28, at § 3524.2.
131. *Gragg v. Kentucky Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002).
132. *Id.*
133. *Id. See also ITSI TV Prods., Inc. v. Agric. Ass’ns*, 3 F.3d 1289, 1291 (9th Cir.1993); *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000); *Christy v. Pa. Turnpike Comm’n*, 54 F.3d 1140, 1144 (3d Cir. 1995); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 n.5 (7th Cir. 1994).
134. *See Baxter*, 26 F.3d at 734 n.5.
135. That is, to place the burden of production on the entity asserting sovereign immunity. *See, e.g., ITSI TV Prods., Inc.*, 3 F.3d at 1291; *Skelton*, 234 F.3d at 297; *Christy*, 54 F.3d at 1144; *Baxter*, 26 F.3d at 734 n.5; *Gragg*, 289 F.3d at 963.
136. *See supra* Subsection II.B.2.
137. Qualified immunity arguably is a functional mandate of the Constitution, whereas sovereign immunity derives directly from the language of the Eleventh Amendment. *See infra* Section D.
138. *See Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985); Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 870 (1998). Ms. Eskow and Mr. Cole state that qualified immunity is “designed to protect officials from broad-ranging discovery and protracted litigation.” *Id.*
139. *Mitchell*, 472 U.S. at 512.
140. Eskow & Cole, *supra* note 138.
141. *Id.*
142. *See infra* Subsection 2.
143. 468 U.S. 183, 183 (1984); *See Fla. Stat. § 110.061* (1977) (discussing the rules referred to here).
144. *See, e.g., Hegarty v. Somerset County*, 53 F.3d 1367, 1375-76 (1st Cir. 1995); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *Estate of Davis v. City of N. Richland Hills*, 406 F. 3d 375, 380 (5th Cir. 2005); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 362 (6th Cir. 2007); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007).
145. *Davis*, 468 U.S. at 183. Plaintiff Scherer had been working an additional job with permission, and he continued to work at that job in violation of a new dual employment policy after permission was withdrawn. *Id.* Plaintiff Scherer alleged that he was forced to leave his position as a highway patrolman due to “harassment . . . over his employability,” which violated his Fourteenth Amendment right not to be deprived of his property interest in his job without a “formal pre-termination or prompt post-termination hearing.” *Id.* at 187.



146. *Id.*
147. *Id.* at 189.
148. *Davis*, 468 U.S. at 190.
149. *Id.* at 197. Notably, this is simply a re-articulation of the second prong of qualified immunity as applied to the state.
150. 824 F.2d 1522, 1534 (7th Cir. 1987).
151. *Id.*
152. *Id.*
153. *Id.*
154. 850 F.2d 1180, 1210 (7th Cir. 1988).
155. *Id.*
156. 44 F.3d 567, 570 (1995). In *McGrath*, the court granted summary judgment to a defendant against an Assistant State’s Attorney from Illinois who brought an action for deprivation of continuing interest in employment without due process of law. *Id.*
157. *Id.*
158. *See, e.g., Zemple v. Cygan*, 916 F. Supp 889, 893 (E.D. Wis. 1996).
159. That is, the language used by the Supreme Court: “A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant state actor’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.” *Davis v. Scherer*, 468 U.S. 183, 183 (1984).
160. *Elder v. Holloway*, 510 U.S. 510, 515 (1994) (emphasis added).
161. *See id.*
162. *Id.*
163. *See McGrath*, 44 F.3d 567, 570 (1995) (applying the language used in *Scherer* that “[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant state actor’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue” to the summary judgment level).
164. *See supra* Subsection I.B.2.
165. *See, e.g., Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1059 (1994); MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES 513 (1991).
166. *Johnston*, 14 F.3d at 1059.
167. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).
168. *Crawford-El v. Briton*, 523 U.S. 574, 575 (1998) (discussing the reasons for qualified immunity that are “implicit in *Harlow’s* holding”).
169. *See Johnston*, 14 F.3d at 1059; *Gonzales v. City of Elgin*, 578 F.3d 526, 540 (7th Cir. 2009).
170. *See Gonzales*, 578 F.3d at 540.
171. *Id.*
172. *See Harlow*, 457 U.S. at 815 (setting forth the test for the objective legal reasonableness of official action). *See also Malley v. Briggs*, 475 U.S. 335, 343 (1986) (noting that “if officers of reasonable competence could disagree on [a discretionary issue] immunity should be recognized”).
173. *See Harlow*, 457 U.S. at 815.
174. *Eskow & Cole, supra* note 138.

175. Such defendants could theoretically produce local rules, handbooks, and policy memoranda that would tend to show what they reasonably should have been aware of at the time of the alleged violation. This does not suggest a return to the subjective standard overruled by *Harlow* as applied in *Gomez v. Toledo*. 446 U.S. 635, 639-41 (1980).
176. See *Anderson v. Creighton*, 483 U.S. 635, 666 (1987) (Stevens, J., dissenting) (urging that better-trained officers would “eliminate the necessity for the Court to distinguish between the conduct that a competent officer considers reasonable and the conduct that the Constitution deems reasonable”).
177. See *id.*
178. See *supra* Subsections 1, 2, 3.
179. See *supra* Subsection II.B.1.
180. See, e.g., 15 Am. Jur. 2d Civil Rights § 121 (“Once a defendant has raised the issue of qualified immunity, the burden shifts to the plaintiff to come forward with allegations showing that the right allegedly violated by the defendant was a clearly established right for the purposes of the qualified immunity doctrine.”); 61 A.L.R. FED. 7 (“Once qualified immunity to § 1983 . . . claim is invoked, plaintiff bears burden of showing existence of clearly established constitutional right.”)
181. 42 U.S.C. § 1983 (2006).
182. STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES AND OTHER MATERIALS xi (Aspen Publishers 2008) [hereinafter YEAZELL FRCP]; 28 U.S.C. § 2072 (2006). By amending Title 28 of the United States Code in 1988, Congress formalized the rule-making process that had already been occurring by virtue of the Supreme Court’s delegation of its power, granted by the Rules Enabling Act. YEAZELL FRCP at xi.
183. *Id.*
184. Fed. R. Civ. P. 56.
185. See *supra* Subsection II.B.
186. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). For more on the aftermath of *Leatherman* and the different approaches to heightened pleading standards among circuit courts, see Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267 (2002). Professors Korb and Bales argue that circuit courts should “follow the Supreme Court’s lead and completely abrogate heightened pleading requirements in § 1983 cases.” *Id.* at 270.
187. *Id.*
188. See, *Leatherman*, 501 U.S. at 167.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Leatherman v. Tarrant County Narcotics Intelligence and Coord. Unit*, 755 F. Supp. 726, 728 (N.D. Tex. 1991).
193. In doing so, the Fifth Circuit required that “[i]n cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff’s complaints state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.” *Elliot v. Perez*, 751 F.2d 1472, 1472 (5th Cir.

- 1985). This decision was later extended to § 1983 actions in *Palmer v. City of San Antonio*. 813 F.2d 514 (5th Cir. 1987).
194. *Leatherman*, 755 F. Supp. at 731; Fed. R. Civ. P. 8(a)(2).
195. *Leatherman*, 755 F. Supp. at 731.
196. *Leatherman*, 503 U.S. at 168; Fed. R. Civ. P. 8(a)(2). The Court pointed out that Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This Rule was interpreted by the Court in *Conley v. Gibson*, where it articulated that great deal was not required to give the defendant notice of the claims against him or her. 355 U.S. 41 (1957). Further, the Court noted that that Rule 9 specifically calls for heightened pleading in complaints alleging fraud or mistake, prompting it to conclude *expressio unius est exclusio alterus*, the drafters did not intend other claims to require a heightened standard. Fed. R. Civ. P. 9.
197. *Leatherman*, 503 U.S. at 168. The Court also pointed out that municipalities are not entitled to qualified immunity simply because they are free from the *respondeat superior* standard, because freedom from liability is not to be equated with immunity from suit. *Leatherman*, 507 U.S. at 166 (citing *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)).
198. *See supra* Part II.
199. *Id.*
200. *Id.*
- 201.
202. *See Eskow & Cole, supra* note 138.
203. *See supra* Subsection II.B.2.
204. *Cf. CHOPER, supra* note 18, at 215; Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-91 (1991) (discussing the effect of immunity on the provision of remedies, concluding that while the Constitution demands an “adequate structure of remedies,” this is an “aspiration, not a promise,” and where compelling values exist, they may put a remedy out of reach).
205. *See WILLIAM N. ESKRIDGE, ET. AL, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 957 (2007).
206. *See supra* Part I.
207. *Barfield v. La. ex rel. La. Dept. of Justice*, 325 Fed. App’x. 292, 294 (5th Cir. 2009); *See supra* Part II.



**David Gesspass**

**THE BRADLEY MANNING CASE:  
EXECUTIVE POWER VS. CITIZENS' RIGHTS**

The epic Bradley Manning prosecution—now involving two years of pretrial confinement during which the Constitution presumes him innocent while the administration, the Army and the media do all they can to render that presumption null and void—is emblematic of the changes that the United States has undergone during my sentient lifetime. Sad to say, current trends do not bode well, as the balance between “national security” and the people’s right to know the machinations of government is tipping ever more precipitously in favor of the former.

It is almost inevitable that, once one president asserts some claim of executive privilege, however bogus, succeeding presidents, regardless of pledges of openness and transparency, will seek to expand it. Richard Nixon unsuccessfully claimed privilege in refusing to turn over his White House tapes, but that did not stop Bill Clinton from raising similar claims when trying to quell the storm over Monica Lewinsky.

But those claims had to do with personal wrongdoing on the parts of the presidents. Following 9/11, the claims have had to do with the work of government. The assertions of privilege by George W. Bush and Barack Obama reflect efforts to keep citizens from being informed of the most important functions of government. President Obama, following his promise of a more open and transparent administration, has taken the assertion of executive privilege to unprecedented lengths. Attorney General Eric Holder claimed, in the wake of the assassination of American citizen Anwar Al-Awlaki, that “The Constitution guarantees due process, not judicial process”<sup>1</sup> and that the secret process whereby the President decides who should live and who should die, with neither explanation nor review, is all that is now due.

That such a claim can even be made with a straight face and given any measure of credence demonstrates how far from constitutional values and the rule of law the United States has drifted over the past 40 years. Even worse, perhaps, is that the resistance to such assertions of executive authority is almost absent in the media and has not been taken up as a cause célèbre among broad swaths of the population. That is not to say that no one has spoken out. Rather, presidential claims of such unrestricted authority, which not that long

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David Gesspass is the president of the National Lawyers Guild, and a founding member of its Military Law Task Force. An attorney in private practice in Birmingham, Alabama, he is also an adjunct professor at University of Alabama School of Law.

ago would have been given no credence, now enjoy broad appeal and are questioned with distressing infrequency.

Take, for instance, the case of PFC Manning, who is facing charges tantamount to treason for allegedly releasing classified information often embarrassing to the government and which, in some cases, has provided evidence of possible war crimes. Manning is facing life in prison with no end in sight to his pretrial confinement, several months of which were in solitary. Because of the problems his defense lawyers have had getting relevant information from the prosecution, no trial date can even be set, much less assured. While many of us have defended the things Manning is alleged to have done, there has hardly been a wellspring of support for him. Worse, there has been little condemnation of the government for the things he is alleged to have revealed.

By contrast, when the Pentagon Papers were revealed in 1971 and published in *The New York Times*, the men who shone the light on them, Daniel Ellsberg and Anthony Russo, enjoyed widespread support that made their prosecutions difficult. Ultimately, the espionage cases against them were dismissed because of government misconduct, but it cannot be gainsaid that the favor in which they were held by many, if not most, Americans was a major factor in their ultimate victory.

Even more remarkable is the case of the unknown burglars who exposed the FBI's notorious Counter-Intelligence Program (COINTELPRO). The few members of this band broke into a small FBI office in Media, Pennsylvania. They found evidence of illegal FBI surveillance and dirty tricks which they promptly turned over to the news media. The ensuing scandal was not about people who unquestionably acted illegally, but over the greater illegality of COINTELPRO. No serious effort was ever made to identify the burglars, much less to prosecute them. All the fire was directed at the FBI.

One must ask, why has Bradley Manning been treated so differently? Any number of factors may be at play. First, he allegedly turned over his information, not to established media giants like *The New York Times* and *The Washington Post*, but to Wikileaks. Could it be possible that the mass media did not assign as much significance to his case because they were not directly affected or subject to government response? After all, the *Times* had to defend its publication of the Pentagon Papers up to the Supreme Court.

Moreover, times have changed. While government is under attack as being bloated and intrusive in so many areas, its authority to wage war, legally or otherwise, following September 11, has not been questioned. There was hardly a peep from the mass media questioning the claim that Saddam Hussein had weapons of mass destruction, including nuclear weapons, even though those

claims were disputed by weapons inspectors and, as to a nuclear arsenal, deemed unfounded by the International Atomic Energy Agency.

For too many, fear of “terrorism” has overcome devotion to civil liberties. In the highest echelons of government, “terrorism” has become the bogeyman that justifies anything, however illegal and antithetical to fundamental human rights standards. It is the ace that trumps all criticism. If patriotism, as Samuel Johnson said, is the last refuge of the scoundrel, then the sham justification of every infringement on liberty as “defense of the homeland from terrorism” is the foundation on which that refuge is built in today’s United States. And that refuge is a political Club Med, where wealth and power meet to make themselves wealthier and more powerful at the expense of the rest of the world.

Bradley Manning is not being prosecuted because his alleged actions damaged the United States, but because they exposed the damage being done to the United States and its people by those who purport to act on their behalf. The government can blithely ignore, or pay blood money for, the death and destruction it wreaks around the world, but since sunlight is the best disinfectant, it will do all it can to keep its infectious practices in a dark cellar.

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#### NOTES

1. Attorney General Eric Holder, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, March 5, 2012, at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>



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**Brett DeGroff**

**BOOK REVIEW: CONVICTING  
THE INNOCENT: WHERE CRIMINAL  
PROSECUTIONS GO WRONG**

**By Brandon Garrett, Harvard University Press, 2011, 376 pp.  
(paperback edition, Harvard University Press, 2012, 376 pp.)**

In the 1990s, America was startled by the cold reality of innocent people locked away in prisons. The advent of DNA evidence conclusively proved, in case after case, that people found guilty beyond a reasonable doubt could not possibly have committed the crimes they were convicted of. The first 250 DNA exonerations demonstrated the fallibility of our system of justice and vindicated some of the wrongfully convicted. But those 250 exonerations also showed much more.

In *Convicting the Innocent: Where Criminal Prosecutions go Wrong*, Brandon Garrett painstakingly analyzes the first 250 DNA exonerations and teases out the common causes of wrongful conviction. Garrett finds that, while DNA evidence may provide a safeguard in a certain class of crimes, the causes of wrongful conviction extend far beyond that small class. Consequently, DNA exonerations are only the tip of the wrongful conviction iceberg, and the “submerged bulk of that iceberg lurks ominously out of view.”<sup>1</sup> Garrett weaves together careful research with powerful narratives to illustrate how wrongful convictions occur.

Garrett takes us back to before DNA testing, when there was a widespread assumption that wrongful convictions simply did not happen in the American system of justice. This assumption had been voiced by no less than United States Supreme Court Justice Sandra Day O’Connor and Judge Learned Hand who said “the ghost of the innocent man convicted” was no more than an “unreal dream.”<sup>2</sup> This assumption was at work in the first of Garrett’s illustrative narratives—the story of Ronald Jones.

Jones had been convicted of the 1985 brutal rape and murder of a young mother of three. DNA testing was not available at the time of Jones’ trial, but was available in 1993 as he awaited execution. Nonetheless, a county judge denied Jones’ request for the testing, exclaiming “What issue could

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Brett DeGroff is an Assistant Defender with the Michigan State Appellate Defender Office. He also serves as Managing Editor of *National Lawyers Guild Review*. He worked as a student attorney at the Michigan Innocence Clinic while earning his J.D. from the University of Michigan Law School.

possibly be resolved by DNA testing?”<sup>73</sup> The question would go unanswered for another four years until the Illinois Supreme Court reversed the ruling and ordered Jones’s DNA be compared with a sample found on his supposed victim. The samples did not match. Jones had been wrongfully convicted.

The book walks through the most common factors in wrongful convictions, each illustrated by the story of an exonoree. The problem of contaminated confessions is illustrated by the story of Jeffrey Deskovic who told police he wanted to help solve the murder of his high school classmate. Deskovic was interrogated for hours at a time, several times over a number of weeks. Eventually, after a sham polygraph examination, Deskovic was left “curled up on the floor of the polygraph room in a fetal position and crying.”<sup>74</sup> He explained that he thought he was trying to catch his classmate’s murderer, but the interrogations had made him realize “that guy was him.”<sup>75</sup>

DNA testing was available at Deskovic’s trial, and showed he was not a match for semen found on the victim. But details about the crime Deskovic had provided during his interrogations were convincing, and he was convicted. Deskovic would serve 16 years in prison before another DNA test would lead to the real murderer, a man named Steven Cunningham who had committed another murder while Deskovic was in prison. Police are trained to withhold the types of details Deskovic revealed during his interrogation, but a post-exoneration inquiry in Deskovic’s case suggests police might have communicated details to Deskovic through their questioning, or that the information had leaked into the greater community. Deskovic has sued for civil rights violations and alleges police disclosed the supposedly secret details which sealed his fate.

The most common factor in wrongful convictions, Garrett found, is eyewitness misidentification. Garrett notes United States Supreme Court Justice William Brennan’s observation that “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”<sup>76</sup> And yet, in 76 percent of the first 250 DNA exonerations, a witness had done just that.

Garrett illustrates the most common causes of eyewitness misidentification with the story of Habib Abdal. Months after a young woman was blindfolded and raped in a Buffalo, New York park, police came to her with a photo array containing a photo of Abdal. The victim failed to identify Abdal at that critical first opportunity, but police were undeterred. Through suggestive procedures and overt pressure from the police the victim would still not say Abdal was her attacker. Nonetheless, by the time Abdal went trial, the victim was convinced he was her attacker and testified in detail about features she had not been able to recall in the wake of her attack. Abdal was convicted, but DNA evidence would later show he did not commit the crime.



Abdal's story is rife with the problems that plague eyewitness testimony, and Garrett exposes each of them. From the inherent, and counterintuitive, unreliability in all eyewitness identifications, to the problems introduced by flawed and suggestive police procedures, Garrett discusses each with data gleaned from his sample of 250 exonerations as well as social science data from outside studies.

Garrett also fleshes out the problems of junk science and jailhouse informant testimony in wrongful convictions. Ironically, while faith in science and the revelation of DNA exonerations are waking up the country to the problem of wrongful convictions, that same faith can be a core cause of wrongful convictions when the underlying science is faulty. From bite mark comparison, to shoe print comparison, to hair comparison, so much of the "science" offered in courtrooms is little more than a technician with minimal training looking at objects and eyeing up whether they "match." And police don't stop gathering evidence once a defendant makes it to a holding cell. Fellow inmates have strong incentives to provide testimony that a cellmate confessed to their crime. Prosecutors are happy to deal with relatively minor criminals to gather evidence of more serious crimes. The problem with this arrangement, as Garrett points out, is that a cellmate has an incentive to provide testimony of a confession whether one was given or not.

In each of the cases in Garrett's analysis, DNA evidence was available to eventually exonerate the wrongfully convicted. But, as Garrett points out, there are many types of crimes which simply do not produce evidence susceptible to DNA testing. Yet, because the flawed procedures which cause wrongful convictions are used in most all criminal prosecutions, there is no telling how many have been caught up in their icy trap.

Garrett suggests a host of reforms which would begin to address the root causes identified by his careful study. Recording all interrogations in their entirety would keep police from intentionally disclosing supposedly secret details, and reveal when they had done so unintentionally. Standardizing identification procedures and requiring that all live and photo lineups be "double blind," with neither the person conducting the procedure nor the person making the identification knowing who the suspect is, would remove some of the subtle bias suggestive procedures can introduce, and allowing expert testimony about the reliability of these procedures would put their probative value in perspective. Taking crime labs out of the control of law enforcement agencies and putting them under the control of scientists would remove the incentive to build a case and create the incentive to seek the truth. Recording the subtle interrogation by jailhouse informants would remove the opportunity to fabricate confessions.

Garrett's *Convicting the Innocent* dissects with careful precision the first 250 DNA exonerations, analyzes what went wrong, and opines on reforms to correct these systemic flaws. The message is an important one because this first group of exonerations is only the tip the iceberg. And there is no telling who could be frozen beneath the waves next.

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NOTES

1. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 11 (2011).
2. *Id.* at 5 (quoting *Herrera v. Collins*, 506 U.S. 390, 420 () (O'Connor, J. concurring)).
3. *Id.* at 1 (quoting Ken Armstrong, *Part 6: The Far Limb of the Law*, CHICAGO TRIBUNE, Dec. 18, 2002).
4. *Id.* at 15.
5. *Id.* (quoting Trial Transcript, 1186, *State of New York v. Jeffrey Deskovic*, No. 192-90 (N.Y. Sup. Ct. Dec. 4, 1990)).
6. *Id.* at 48 (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting)).



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why current policies and practices are inadequate and sometimes worse. She also examines their compatibility with international human rights law.

Elinor R. Jordan's "Is Qualified Immunity an Affirmative Defense in Name Alone? Why Courts Should Shift Away from Placing the Burden to Refute Qualified Immunity on § 1983 Plaintiffs" is a scholarly treatment of an alarming trend. Federal civil rights statutes, born in large part of the dire need to protect newly manumitted African Americans still living in southern states, exist to protect individuals from violations of their constitutional liberties by state actors. To allow for the smooth functioning of government, in certain instances state actors are immune from suit. However, traditionally this immunity has only applied after the state actor has met a substantial burden of production demonstrating its suitability. Ms. Jordan argues that, despite the manifest will of congress, many federal circuit courts have been shifting the burden of production onto plaintiffs, compelling them to show that the defendant is not immune from suit and making it significantly more difficult for cases against the government to survive dismissal on summary judgment. This is a tendency, she argues, that must be reversed if civil rights are to be fully vindicated.

In releasing classified information to Wikileaks PFC Bradley Manning has embarrassed the U.S. government by exposing official crimes and skullduggery. For the unpardonable sin of revealing unflattering truths about America's foreign policy to the people in whose name the policy has been enacted, the Obama administration has targeted Manning with an extraordinary and sometimes extra-legal ferocity mirroring the treatment given to accused al-Qaeda detainees—forced nudity, protracted social isolation, an aggressive public vilification campaign, and an interminable pre-trial detention period that belies the presumption of innocence. In "The Bradley Manning Case: Executive Power vs. Citizens' Rights" Guild President David Gespass compares Manning and the treatment he's receiving to the plight of famous whistleblowers of the past, identifying unique reasons for the unprecedented vehemence animating the young soldier's persecution.

The issue ends with Brett DeGroff's review of Brandon Garrett's *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, a book which, with a scholar's attention to detail and a lawyer's flair for advocacy, attempts to explain the many hard lessons hundreds of DNA exonerations have taught us about our criminal justice system.

ERRATUM: The preface of the last issue of NLGR originally suggested that the Guild's first convention met in New York's City Club. It in fact met in the Hotel Washington in Washington, D.C. a few months after the planning meetings at the City Club. This error was fixed quickly but not altogether quickly enough. We regret any confusion.

—Nathan Goetting, *Editor in chief*

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