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# From the Courtroom to the Street: Court Orders and Section 1983

by SHELDON NAHMOD\*

## I. Introduction

Suppose a judge orders a police officer to bring a lawyer to her courtroom immediately and to use whatever force is appropriate. The police officer uses excessive force in doing so.<sup>1</sup> Or suppose a judge holds a recalcitrant litigant appearing before her in contempt and orders a police officer to handcuff the litigant. Again, the police officer uses excessive force in complying.<sup>2</sup> Even if the judge in each case is protected against § 1983 liability<sup>3</sup> by absolute judicial

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1. See *Mireles v. Waco*, 502 U.S. 9 (1991), discussed *infra*. *Mireles* dealt only with the judge's immunity and found absolute judicial immunity applicable.

2. See *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), *reh'g and suggestion for reh'g en banc denied* (1997). Chief Judge Richard Arnold, and Judges Theodore McMillian and Morris Arnold would have granted the suggestion. *Hendren*, discussed *infra* at length, dealt with the police officer's immunity and found quasi-judicial immunity applicable. But see *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), *cert denied*, 535 U.S. 971 (2002), which disagreed with *Hendren* and ruled, with Judge Bauer dissenting, that quasi-judicial immunity was inapplicable. The author represented the plaintiff in the Seventh Circuit.

3. 42 U.S.C. § 1983 (2003) reads as follows:

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 . . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This statute is the subject of the author's two volume treatise, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983* (4th ed. 2002) [hereinafter NAHMOD, *CIVIL*

immunity,<sup>4</sup> what of the police officers? Are they protected by what has been termed quasi-judicial immunity<sup>5</sup> or are they protected only by qualified immunity?<sup>6</sup> Although such cases are relatively rare, one

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RIGHTS AND CIVIL LIBERTIES LITIGATION].

4. Judges are protected by absolute judicial immunity against § 1983 damages liability for their judicial acts. Absolute judicial immunity also protects against the need to defend. See *Pierson v. Ray*, 386 U.S. 547 (1967), discussed *infra* at 105. It is a very powerful defense for judges because it cuts off the litigation almost immediately, irrespective of the merits of the plaintiff's claim. For a discussion on judicial immunity, see NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION ch. 7.

5. Quasi-judicial immunity, when applicable, functions like absolute immunity to protect against the need to defend and against § 1983 damages liability. For the purposes of this Article, I use the term to characterize the kind of absolute immunity that sometimes protects officials who are not judges but whose acts, while not judicial in nature, are closely related to the judicial decision-making process.

This understanding of *quasi-judicial immunity* must be sharply distinguished from another kind of absolute immunity that is sometimes called *quasi-judicial immunity*: the latter protects executive officials who function as judges in administrative proceedings. Indeed, the Court's very first decision setting out a functional approach to immunities, *Butz v. Economou* 438 U.S. 478 (1978), discussed more fully in NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 7:25, held that federal executive officials who function as judges and prosecutors in connection with federal administrative proceedings are protected by absolute immunity. Subsequently using this functional approach in *Cleavinger v. Saxner*, 474 U.S. 193 (1985), the Court found that members of a federal prison's disciplinary committee who heard cases involving inmate rule infractions were protected by qualified immunity, not judicial immunity, because they were not functionally comparable to judges. Not surprisingly, this functional approach was later extended to state executives sued under § 1983 for their judicial conduct in state administrative proceedings as well and, as a result, many cases dealing with the possible application of absolute immunity to executive officials for their judicial conduct concern administrative agencies.

Thus, this Article focuses on quasi-judicial immunity issues of the kind raised by the hypotheticals at the beginning of this Article. Such issues typically arise in connection with the acts of court clerks, NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 7:29 (collecting cases); probation officers, *id.*; bailiffs, *id.*; court-appointed persons, *id.* at § 7:30 (collecting cases); and law enforcement officers who enforce court orders, *id.* at § 7:32 (collecting cases). See discussion *infra* at 627-36.

6. Qualified immunity, an affirmative defense, protects state and local government officials from § 1983 damages liability when their allegedly unconstitutional conduct was objectively reasonable in light of then-existing law. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity was originally intended to protect against liability but has to a considerable extent been transformed by the Supreme Court into the functional equivalent of absolute immunity which protects against even the need to defend. For example, a defense motion for summary judgment based on qualified immunity typically often stops discovery. *Id.* at 817-19. Also, a district court's denial of such a summary judgment motion is immediately appealable if an issue of law is thereby raised. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Despite this transformation, though, qualified immunity remains less protective than absolute immunity. See NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION ch. 8 for a general discussion on qualified immunity.

Another important aspect of qualified immunity, one that will emerge later in connection with growth-of-law considerations, is that district courts are required as part of the

circuit has already ruled that state and local government officials and employees who violate others' constitutional rights in such circumstances are protected by quasi-judicial immunity and escape even the need to defend against damages liability because they followed the orders of judges.<sup>7</sup>

I propose to criticize this circuit decision and to use it as a foil in order to make some important doctrinal and theoretical points about judicial orders and § 1983 liability. First, I argue that this decision does not make a crucial distinction between § 1983 challenges to the constitutionality of presumptively valid judicial orders and challenges to their implementation by law enforcement officers.<sup>8</sup> Second, I maintain that it is based on a serious misreading of Supreme Court judicial immunity and related case law<sup>9</sup> and is, further, inconsistent with the history and purposes of § 1983.<sup>10</sup> Finally, I contend that the decision is normatively unsound and is inconsistent with corrective justice<sup>11</sup> and the principle of individual responsibility for harm caused

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qualified immunity inquiry to determine at the outset whether the plaintiff has stated a cause of action. *See discussion infra* at 539-40.

7. *See Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), discussed *infra*. *But see Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2002), *cert denied*, 535 U.S. 971 (2002).

8. *See discussion infra* at 624.

9. *See discussion infra* at 627-30.

10. *See discussion infra* at 631-33.

11. Corrective justice, sometimes called "rectificatory justice," is Aristotelian in origin and refers to remedying the harm wrongfully caused by one person to another. In Book 5 of *THE NICOMACHEAN ETHICS*, Aristotle, in distinguishing corrective justice from distributive justice (which deals with "distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution") explains corrective justice as follows:

[Corrective justice] is a sort of equality indeed, and injustice a sort of inequality; not according to that kind of [geometrical] proportion, however [like distributive justice], but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one . . . ; the law looks only to the distinctive character of the injury and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; for in the case . . . in which one has received and the other has inflicted a wound . . . the suffering and the action have been unequally distributed; but the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant . . . . [C]orrective justice will be the intermediate between loss and gain . . . .

ARISTOTLE, *THE NICOMACHEAN ETHICS* 1131b4-1132a25 (David Ross trans & rev. by J.L. Ackrill & J.O. Urmson, Oxford Univ. Press 1991)(1925).

The basis moral premise of corrective justice is the equal dignity of persons. To put this in Kantian terms:

[A] person . . . is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity . . . by

by unconstitutional conduct;<sup>12</sup> that it unwisely sacrifices the interests of injured persons to the interests of the community without any compelling grounds for doing so; that it may retard the growth of constitutional law; and that it undermines important educational functions of § 1983 liability. The decision incorporates an approach that, if not forcefully repudiated, poses serious risks to § 1983's long-term viability.

This Article is divided into five parts. By way of background, Part II discusses judicial immunity and, in particular, *Mireles v. Waco*,<sup>13</sup> a ten-year old *per curiam* Supreme Court judicial immunity decision that deserves more attention than it has received to date.<sup>14</sup> Part III deals with those cases in which quasi-judicial immunity may be warranted as a policy matter because the challenged conduct is the very conduct prescribed in the *presumptively valid* court order itself.<sup>15</sup> Part IV analyzes the issue posed by the hypotheticals—the proper scope of immunity where the challenged conduct is different from that prescribed in the presumptively valid court order—and argues that only qualified immunity should be applicable.<sup>16</sup> This part also discusses certain aspects of § 1983 jurisprudence and the common law immunity background of § 1983. Part V considers the related “Nuremberg defense”-like question of the § 1983 liability of law enforcement officers whose challenged conduct complies with *presumptively invalid* court orders.<sup>17</sup> Finally, Part VI addresses

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which he exacts respect for himself from all other rational beings in the world.

IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 434-35 (Mary Gregor trans., Cambridge Univ. Press 1991 (1797)). For a very useful discussion, see Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859 (2000).

A great deal has been written about corrective justice, especially in connection with tort law. See generally PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995); Ernest J. Weinrib, *Symposium, Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992). On the relation between corrective justice and constitutional torts, see Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903 (2001) (criticizing position that there is no “persuasive non-deterrence rationale for forcing government to pay compensation to the victims of constitutional torts” taken in Darryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 402 (2000); arguing instead that corrective justice is applicable to harm-causing constitutional violations).

12. See discussion *infra* at 638.

13. 502 U.S. 9 (1991).

14. See discussion *infra* at 620.

15. See discussion *infra* at 624.

16. See discussion *infra* at 626.

17. See discussion *infra* at 633.

corrective justice, individual responsibility under § 1983 and the need to be sensitive to the dangers of allowing individual interests to be sacrificed for the interests of the community.<sup>18</sup> It also considers the effect of quasi-judicial immunity on the growth of constitutional law and the educational functions of § 1983 liability.

## II. Judicial Immunity

### A. The Supreme Court's Approach to Judicial Immunity in § 1983 Cases<sup>19</sup>

Although § 1983 on its face admits no immunities whatsoever, the Supreme Court has, since *Tenney v. Brandhove*,<sup>20</sup> a fifty-year-old legislative immunity case, interpreted § 1983's silence against a background of the common law immunity extant in 1871, when § 1983 was enacted. For this reason, when the Court addressed § 1983 judicial immunity for the first time in *Pierson v. Ray*,<sup>21</sup> it apparently had little difficulty concluding that a judge (a police justice) was absolutely immune from § 1983 damages liability for convicting the plaintiffs under a statute that was later held unconstitutional by the Court as applied to similar facts. It reasoned that judges should be absolutely immune from liability for damages:

for acts committed within their judicial jurisdiction . . . even when the judge is accused of acting maliciously and corruptly . . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. *Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.*<sup>22</sup>

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18. See discussion *infra* at 636.

19. It is necessary to explore the nature and scope of judicial immunity, if only briefly, in order to deal intelligently with quasi-judicial immunity.

20. 341 U.S. 367, 378-79 (1951) (holding that absolute legislative immunity protected state legislators accused of violating the plaintiff's First Amendment rights in the course of legislative hearings). The Court emphasized that holding hearings was a core legislative function. Justice Douglas dissented, arguing that "person" included legislators. *Id.* at 381-83.

21. 386 U.S. 547 (1967).

22. *Id.* at 554 (emphasis added). The Court relied on *Bradley v. Fisher*, 80 U.S. 335 (1871), for an all-important distinction between excess of jurisdiction and the clear absence of all jurisdiction. The former, as in *Pierson*, does not result in the loss of judicial immunity, while the latter does. *Id.* at 351-52.

Although it could be argued that the Court over-predicted the intimidation of judges, *Pierson* nevertheless made very clear that instrumental considerations relating to the need to promote independent judicial decision-making trump any normative, fault-based considerations of corrective justice<sup>23</sup> that would otherwise justify compensating plaintiffs who suffered constitutional harm at the hands of judges.

The decision in *Pierson* has been severely criticized as inconsistent with the clear legislative history of § 1983. As Justice Douglas pointed out in his dissent, the legislative history demonstrates unequivocally that judges and judicial misconduct were among the targets of § 1983 because “certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied.”<sup>24</sup> In light of this history, there was, in his view, no good reason to interpret § 1983’s statutory silence as preferring adoption of the common law judicial immunity rule over its rejection. Along similar lines, others have pointed out an equally serious interpretive problem with *Pierson*: § 1983 was clearly modeled on a criminal statute, now 18 U.S.C. § 242, which was aimed primarily at judicial behavior and thus abrogated judicial immunity.<sup>25</sup> *Pierson*’s reliance on *Tenney*’s common law immunity approach has further been criticized because in *Tenney*, unlike *Pierson*, there is “the obvious parallel between state and federal legislators, the latter constitutionally immune from suit for acts done in their legislative capacity [under the Speech or Debate Clause].”<sup>26</sup>

This questionable support in § 1983’s language and legislative history for the ruling in *Pierson*, combined with the obvious adverse impact of judicial immunity on those injured by unconstitutional judicial misconduct, suggests that the Court should have been

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23. I have argued at length elsewhere that wrongdoing is inherent in official behavior that falls below constitutional norms and hence, whenever a § 1983 defendant is found to have acted unconstitutionally and to have caused damage to a § 1983 plaintiff, the defendant is normatively responsible to compensate the plaintiff for foreseeable harm. See Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990) (responding to, and disagreeing with, John Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989)). Corrective justice considerations implicated in quasi-judicial immunity are further addressed in the discussion *infra* at 637.

24. *Pierson*, 386 U.S. at 563.

25. Don Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. U. L. REV. 615 (1970).

26. Comment, *Liability of Judicial Officers Under § 1983*, 79 Yale L. J. 322, 324 (1969). See U.S. CONST. art. I, § 6 (Speech or Debate Clause).

somewhat cautious in later judicial immunity cases. But the Court has been anything but cautious.<sup>27</sup> For example, in *Stump v. Sparkman*,<sup>28</sup> an important and considerably harder case than *Pierson*,<sup>29</sup> the Court, over strong dissents,<sup>30</sup> found absolute immunity applicable to a judge who, on a mother's *ex parte* petition, ordered the sterilization of a fifteen-year-old girl without her knowledge or consent. It determined that even though it was debatable whether the judge had jurisdiction under state law to order the girl's sterilization, the judge did not act in the clear absence of all jurisdiction, but only in excess of it. Significantly, the Court also went on to find that the challenged conduct was a judicial act despite the informality of the proceedings and their *ex parte* nature. It stated:

[t]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.<sup>31</sup>

Here, according to the Court, both factors were present.<sup>32</sup>

Read together, then, *Pierson* and *Stump* indicated rather clearly that, despite the Court's subsequently articulated functional approach to immunities,<sup>33</sup> judicial immunity afforded very broad protection for

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27. In reality, this is not surprising, since the Justices of the Supreme Court could be expected to empathize with their fellow judges, at least when personal liability is at issue. See Sheldon Nahmod, *The Restructuring of Narrative and Empathy in § 1983 Cases*, 72 CHI.-KENT L. REV. 819 (1997) (arguing that the Court's substantive and procedural changes in qualified immunity doctrine have promoted a pro-defendant posture of empathy and mercy).

28. 435 U.S. 349 (1978).

29. *Pierson* was easier on its facts than *Stump* because the judge (a police justice) in *Pierson* had found the plaintiffs guilty of violating a statute that was only held unconstitutional as applied to similar facts by the Supreme Court *four years later*. *Pierson*, 386 U.S. 547.

30. Justices Stewart, Marshall and Powell dissented. *Stump*, 435 U.S. at 364 (arguing that the normal attributes of a judicial proceeding were not present). Justice Powell in particular maintained that judicial immunity was inapplicable because of the judge's "preclusion of any possibility for the vindication of [plaintiff's] rights elsewhere in the judicial system." *Id.* at 368-69.

31. *Id.* at 362.

32. *Id.*

33. The Court has adopted a functional approach to immunities under which absolute immunity does not protect persons but functions. For example, the Court held in *Forrester v. White*, 484 U.S. 219 (1988), that absolute immunity did not protect a judge accused of firing a probation officer because of her sex in violation of equal protection. Such conduct, according to the Court, was administrative in nature. *Id.* The Court in *Forrester* described the operation of the functional approach this way:

judicial conduct. Indeed, that is how the circuits have applied judicial immunity. It is a rare case indeed where a judge loses absolute immunity for judicial conduct even remotely connected to a judicial proceeding because he acted in the clear absence of all jurisdiction or because the challenged conduct was not a judicial act.<sup>34</sup> Thus, under these circumstances, the injured party bears his own costs without ever getting a chance to tell a fact-finder his story about the judge's allegedly unconstitutional and thus blameworthy conduct.<sup>35</sup>

### B. Unpacking *Mireles v. Waco*

Just how broadly protective judicial immunity really is became especially clear in *Mireles v. Waco*,<sup>36</sup> a *per curiam* decision that is more problematic the more one thinks about it. In this case the Supreme Court applied the jurisdictional and judicial act criteria of *Stump* and held that a judge accused of ordering police officers to use excessive force to bring a public defender to him in his courtroom was protected by absolute judicial immunity.<sup>37</sup> The Court noted that the public defender was dealing with the judge in the latter's judicial capacity because he had been called into the courtroom in connection

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Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to liability would likely have on the appropriate exercise of those functions. Officials who seek exemption for personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified immunity" that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

*Id.* at 224. On the other hand, there are executive officials who, although ordinarily protected only by qualified immunity, are sometimes protected by judicial immunity for their judicial conduct, particularly in connection with administrative proceedings. Parole board officials are a good example. See NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8:99 (analyzing and collecting cases).

34. See cases collected in NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 7:16-7:23.

35. See Nahmod, *supra*, note 27 at 826-32, arguing that the Court's substantive and procedural changes in qualified immunity doctrine have given priority to the § 1983 defendant's narrative and marginalized that of the plaintiff. As pointed out later, however, where the allegedly unconstitutional judicial conduct takes place in a judicial proceeding that is reviewable, the injured party can tell his story to an appellate court. See discussion *infra* at 624-27.

36. 502 U.S. 9 (1991).

37. *Id.* at 10.

with a pending case.<sup>38</sup> While the judge's alleged direction to use excessive force was not a normal judicial function, this was to put the inquiry at too particular a level, according to the Court.<sup>39</sup> Under *Stump*, the inquiry was into the nature or function of the act, not the "act itself."<sup>40</sup> The Court explained: "In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court."<sup>41</sup> The Court also rejected the argument that the challenged conduct—issuing the order—was transformed into an executive act through its implementation by police officers.<sup>42</sup> Finally, the Court concluded that the judge did not act in the clear absence of all jurisdiction because his conduct, even if legally erroneous, was in aid of his jurisdiction.<sup>43</sup>

Justice Stevens dissented, arguing that the Court should have distinguished between the two orders of the judge: One, ordering the police to bring the plaintiff before him, was clearly judicial, while the other, ordering the police to commit a battery, was not.<sup>44</sup> He observed that this would have been clearer had an interval of several minutes separated the two orders.<sup>45</sup>

At first blush, the majority was correct in analyzing the challenged conduct at a relatively high level of generality and thus finding absolute immunity applicable. If all it took to avoid judicial immunity were the mere allegation that a judge knowingly issued an unconstitutional order of the *Mireles* kind, that would seriously undermine the protections of the doctrine, which include minimizing, if not altogether eliminating, the costs of defending against lawsuits. Indeed, the very purpose of judicial immunity in the § 1983 setting is to protect against lawsuits alleging that a judge acted with an unconstitutional motive.<sup>46</sup>

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38. *Id.*

39. *Id.*

40. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

41. *Mireles v. Waco*, 502 U.S. 9, 13 (1991).

42. *Id.* at 13.

43. *Id.*

44. *Id.* at 14. Justices Scalia and Kennedy also dissented, suggesting that in light of Justice Stevens' dissent, the Court should not have summarily reversed but ordered briefing and argument. *Id.* at 15.

45. *Id.*

46. The Court in *Mireles* may have believed that in excessive force cases, it would ordinarily be too easy for plaintiffs to include the judge as a defendant by simply alleging that the judge ordered that excessive force be used. The short answer, of course, is that

Still, there is something to Justice Stevens' dissent. What if, instead of the allegation of a judicial order to use excessive force, there had been an allegation that the judge ordered the police officers to shoot the lawyer in the arm or leg and bring him to his courtroom, and the police officers had done so? To paraphrase *Mireles*, this particular act—ordering the police officers to shoot the lawyer and bring him into the courtroom—is certainly related to the general function normally performed by a judge of directing police officers to bring counsel in a pending case to the court. In addition, this action appears to be taken “in the very aid of the judge’s jurisdiction over a matter before him” and thus not in the clear absence of all jurisdiction.<sup>47</sup> Under the reasoning in *Mireles*, then, judicial immunity could apply.

Nevertheless, *Mireles* can and should be distinguished on the ground that a judge’s order to police officers to bring a lawyer to his courtroom is a quintessential judicial act because implicit in such an order is the normal and expected use of some physical force. That excessive force was ordered by the judge does not change the nature of the force, only its amount. In contrast, if a judge orders police officers to shoot the lawyer, this changes not only the amount of force but its very nature, and this kind of force is not the sort normally ordered by a judge and expected by litigants and their lawyers.<sup>48</sup>

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this can be readily tested on summary judgment in a qualified immunity setting. Indeed, this can be tested much more readily than a claim that a judge acted unconstitutionally with an impermissible motive. Such a claim, based as it is on credibility, would probably result in the denial of a judge’s motion for summary judgment and thus more directly implicate the policies underlying judicial immunity.

As an example of an impermissible motive judicial immunity case, consider *Hawkins v. Comparet-Cassini*, 33 F. Supp. 2d 1244, 1249-51 (C.D. Cal. 1999), a case in which the plaintiff prisoner, who had a stun belt placed on him which was then activated for a sentencing proceeding, sued the judge who ordered the activation, alleging that she did so to silence him. Finding judicial immunity applicable, the court ruled that the judge’s order was a judicial act because it was for the purpose of controlling a party in the case before her. *Id.* In addition, the judge did not act in the complete absence of all jurisdiction because she was hearing a motion in a criminal matter and, under California law, she had the power to control individuals appearing before her. *Id.* Here, unlike *Mireles*, the issue was the judge’s intent and this was therefore an easy case for judicial immunity. To the extent that the court’s order itself, that is, the activation of the stun belt, was challenged, this could be appealed, even if damages could not be awarded. *Id.*

47. *Id.* at 13.

48. For judicial immunity purposes, a judge’s order to police officers to shoot a lawyer and bring him to the courtroom is equivalent to what a justice of the peace did in *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), a much-cited 1974 case that is still good law in the Ninth Circuit. Here, after the plaintiff, a non-lawyer, had injected himself into a minor traffic violation case involving a third person, the justice of the peace asked or told the

Even if, as I have argued, the judge in the hypothetical should not be protected by absolute immunity, the Court has nevertheless considerably broadened judicial immunity and has protected judges at the expense of plaintiffs who have suffered constitutional harm at their hands. This has occurred despite the previously noted questionable basis for § 1983 judicial immunity in the first place. The result is that where a judge knowingly violates the Constitution and intentionally harms innocent citizens, she not only escapes damages liability for that harm but she is also personally free of the need to explain and defend. In this way, the community's interest in avoiding any chilling of independent judicial decision-making by judges trumps individual responsibility for normatively blameworthy, harm-causing, unconstitutional conduct and thus corrective justice.<sup>49</sup> And while this

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plaintiff to leave his courtroom. *Id.* The plaintiff then foolishly refused, daring the justice of the peace to throw him out, which the justice of the peace, even more foolishly, proceeded to do, allegedly with excessive force. *Id.* Rejecting the argument that the justice of the peace was exercising his inherent power to keep order in the courtroom and thus was protected by judicial immunity, the Ninth Circuit reasoned that "[t]he decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached." *Id.* at 64. The Ninth Circuit observed that the challenged conduct was not amenable to "appellate correction." *Id.* Also, independent judicial decision-making would not suffer "in the slightest" if physical assaults by judges in their courtrooms were not protected by judicial immunity. *Id.*

Similar reasoning should apply to a judge's order to police officers to shoot a lawyer and bring him to the courtroom. It is true that in *Gregory*, the judge physically evicted the plaintiff, while in the hypothetical, the challenged conduct is a court order. But even a court order is a physical act: the relevant questions are whether the court order is of the kind that judges normally (or even extraordinarily) issue and that litigants and lawyers expect, and whether the judge arguably has jurisdiction, that is, the power to issue such an order. And for this hypothetical, the answers should be no. *Cf. Archie v. Lanier*, 95 F.3d 438, 441 (6th Cir. 1996) (a § 1983 damages case where the Sixth Circuit declared:

We hold that stalking and sexually assaulting a person, no matter the circumstances, do not constitute 'judicial acts.' The fact that, regrettably, Lanier happened to be a judge when he committed these reprehensible acts is not relevant to the question of whether he is entitled to immunity. Clearly he is not.

*Id.* at 44). *See also* *United States v. Lanier*, 520 U.S. 259 (1997) (a criminal prosecution brought against the same judge under 18 U.S.C. § 242).

49. Although, strictly speaking, absolute immunity is inconsistent with corrective justice, I do not mean to suggest that judicial immunity (or legislative or prosecutorial immunity, for that matter) is never appropriate. Rather, (absolute) judicial immunity should be limited to core cases directly implicating the deliberative functions of judges and thus, the operation of the justice system itself. Analogously, Bernard Dauenhauer and Michael Wells have written:

It follows from our argument that absolute immunity from all relief... is inconsistent with the requirements of corrective justice. But of course there are good reasons for placing limits on the government's liability. Unrestricted official or governmental liability would surely impair government's ability to

result may be defensible for most, even if not for all, judicial conduct, the important questions are whether, and to what extent, the community's interest should similarly trump normative considerations: (1) where executive officers whose challenged conduct is *prescribed* by *presumptively valid* judicial orders; (2) where their challenged conduct is *not prescribed* by *presumptively valid* judicial orders; and (3) where their challenged conduct is *prescribed* by *presumptively invalid* judicial orders.

### III. Quasi-Judicial Immunity and Challenges to Conduct *Prescribed by Presumptively Valid Court Orders*<sup>50</sup>

Suppose a court clerk erroneously issues an arrest warrant at the direction of a judge.<sup>51</sup> Or a court clerk refuses, pursuant to judicial direction, to accept the civil filings of inmates.<sup>52</sup> Or a probate court administrator executes a juvenile division referee's court order of placement.<sup>53</sup> Or a sheriff, pursuant to court order, enters the plaintiff's home, seizes nonexempt personal property, and sells it at public auction.<sup>54</sup> Or, finally, law enforcement officers arrest and incarcerate the plaintiff pursuant to the order of a trial court which has found him in contempt.<sup>55</sup>

In all of these cases, the challenged conduct is the very conduct called for by a presumptively valid court order, and in all of these cases the circuits found that the defendants were protected by quasi-judicial immunity. The rationales for such decisions vary, however. Some circuits have broadly suggested that the acts of persons "in the performance of an integral part of the judicial process" are thereby protected by quasi-judicial immunity.<sup>56</sup> But this rationale was

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perform its necessary functions . . . . At bottom, the victim's basic interest, if he is rational, is to live in a well functioning society. . . . Compensation that would substantially hamper the government's work would run counter to the very point of corrective justice.

Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 924 (2001). However, absolute immunity in the guise of quasi-judicial immunity should not be expanded to protect allegedly unconstitutional executive conduct that is not prescribed by presumptively valid judicial orders.

50. The § 1983 liability of law enforcement officers who follow presumptively invalid court orders is addressed later. See discussion *infra* at 634-36.

51. *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988).

52. *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992).

53. *Bush v. Rauch*, 38 F.3d 842 (6th Cir. 1994).

54. *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986).

55. *Valdez v. City & County of Denver*, 878 F.2d 1285 (10th Cir. 1989).

56. *E.g.*, *Burks v. Callion*, 433 F.2d 318 (9th Cir. 1970).

effectively undermined by the Supreme Court's unanimous 1993 decision in *Antoine v. Byers & Anderson*,<sup>57</sup> which held that absolute judicial immunity did not protect a court reporter accused of failing to provide a criminal trial transcript in a timely manner to the plaintiff, thereby delaying his appeal for more than four years. The Court emphatically rejected the reasoning of the Ninth Circuit which had found absolute immunity applicable on the ground that preparing a trial transcript was part of the appellate judicial function which was "inextricably intertwined with the adjudication of claims."<sup>58</sup>

Another rationale for decisions applying quasi-judicial immunity to those whose challenged conduct is prescribed by a presumptively valid court order is that it is based on avoiding the unfairness of imposing liability on an official who acts pursuant to court order while conferring absolute immunity on the judge who issued that order.<sup>59</sup> However, the challenged conduct in such cases is clearly executive in nature because it is not the sort of conduct engaged in by judges but rather by law enforcement officers.<sup>60</sup> And it seems to be no less unfair to impose liability on law enforcement officers who arrest violators of unconstitutional ordinances and statutes while conferring absolute immunity on the legislators themselves, and yet we do it all the time. In addition, while this rationale emphasizes fairness to the law enforcement officer, it entirely ignores fairness to the injured plaintiff.<sup>61</sup>

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57. 508 U.S. 429, 433 (1993).

58. 950 F.2d 1471, 1476 (9th Cir. 1991), *rev'd*, 508 U.S. 429 (1993). In an opinion by Justice Stevens, the Supreme Court first noted that there was no history of common-law immunity for professional court reporters because they did not exist when the common-law doctrine of judicial immunity developed. It then rejected the court reporter's proposed analogy to common-law judges who made handwritten notes during trial. *Id.* Those notes were not verbatim reports of trials; and even if a judge were to make such verbatim notes, under the functional approach it was likely, said the Court, that this conduct would be characterized as administrative in nature and hence protected only by qualified immunity. *Id.* In short, court reporters did not perform quasi-judicial functions because they did not really exercise discretion. *Id.* Thus, after *Antoine* it does not suffice for quasi-judicial immunity that the challenged conduct is simply a part of the judicial process. *Id.*

59. See *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972); Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229, 1239 (1955).

60. See *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), discussed *supra* note 48, which held that the conduct of a justice of the peace in physically evicting a person from his courtroom was not a judicial act.

61. Yet another possible rationale, albeit one not mentioned in the cases, is that quasi-judicial immunity is in reality a qualified immunity surrogate because officials who act pursuant to a presumptively valid court order will ordinarily be found to have acted in an objectively reasonable manner even if the court order itself is later determined to have

A third rationale for quasi-judicial immunity for allegedly unconstitutional conduct prescribed by a presumptively valid court order is perhaps the most persuasive: a § 1983 damages action challenging such conduct is in reality a challenge to the validity of the court order itself and thus may be thought to directly implicate the core policies underlying judicial immunity. Since one of the policy justifications for judicial immunity in general is that an allegedly erroneous judicial decision ordinarily can be appealed, it makes sense to suggest that, instead of a § 1983 damages action against the law enforcement officer, the proper remedy is an appeal of the court order.<sup>62</sup>

Consequently, even though the challenged conduct of law enforcement officials in following presumptively valid court orders is

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violated clearly settled law. Under the qualified immunity standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), an official who could reasonably have believed that his allegedly unconstitutional conduct was constitutional at the time it occurred under the circumstances and in light of then-existing law, is protected by qualified immunity. Except in those circumstances where an official has acted unconstitutionally in obtaining the very court order that the official thereafter follows, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986), it is likely that an official who follows a presumptively valid court order will be found to have acted in an objectively reasonable manner for qualified immunity purposes, even if it turns out there was a violation of clearly settled law, because the official could point to his reliance on the legal determination of the judge. This could even be an “extraordinary circumstance” within the meaning of *Harlow*. *Harlow*, 457 U.S. at 819. See, on the latter, NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8:16.

But the assumption that officials who act pursuant to a presumptively valid court order will ordinarily pass the qualified immunity test depends on the extent to which the court order violated clearly settled law: if the order was obviously unconstitutional in light of clearly settled law, then not only would the law enforcement officer not have acted pursuant to a presumptively valid court order so as to be entitled to assert quasi-judicial immunity, but, as discussed later, he would not be protected by qualified immunity either. However, if the empirical assumption is made that, in the overwhelming number of cases, court orders to law enforcement officers do not obviously violate clearly settled law, then this rationale makes some explanatory sense. Nevertheless, it is preferable to confront the qualified immunity issue head on, rather than disguise it as quasi-judicial immunity.

62. This rationale was applied in a Seventh Circuit case, *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986), where the plaintiffs sued law enforcement officers, including a sheriff, for damages under § 1983 for executing foreclosure judgments. Specifically, they alleged that the sheriff wrongfully entered their home, seized their non-exempt personal property and later sold that property at a public auction, all pursuant to a court order directing the sheriff to enforce a judgment by confession entered by the court on a promissory note. Ruling for the sheriff, the court reasoned that since the sheriff had acted pursuant to a presumptively valid court order, quasi-judicial immunity was appropriate because the court order could be appealed. “The proper procedure for a party who wishes to contest the legality of a court order enforcing a judgment is to appeal that order and the underlying judgment, not to sue the official responsible for its execution.” *Id.* at 1239.

better characterized as executive rather than judicial in nature, it has consistently been accorded quasi-judicial immunity in the circuits for defensible policy reasons.

#### **IV. Quasi-Judicial Immunity and Challenges to Conduct *Not Prescribed by a Presumptively Valid Court Order***

##### **A. The Eighth Circuit's *Hendren* Decision**

One of the hypotheticals set out at the beginning of this Article posited a case in which a judge holds a litigant in her courtroom in contempt, orders a police officer to handcuff the litigant and the police officer allegedly uses excessive force in doing so. This hypothetical is based on the Eighth Circuit case, *Martin v. Hendren*,<sup>63</sup> mentioned earlier, which is a prime example of instrumentalism (in the name of avoiding over-deterrence) run amok at the expense of corrective justice and the policies underlying § 1983. In *Hendren*, the plaintiff's son was appearing before a traffic court judge when the plaintiff approached the bench unasked and was twice requested by the judge to sit down.<sup>64</sup> She refused and the judge ordered a police officer to remove her.<sup>65</sup> She resisted, there was a bit of a scuffle, she was next held in contempt by the judge who ordered the officer to "put the cuffs on her," she was flipped face down on the floor, handcuffed, pulled up by the handcuffs and her hair, and she was then taken away.<sup>66</sup> The plaintiff, who required medical treatment for her shoulder, thereafter sued the police officer under § 1983 for violating her constitutional rights.<sup>67</sup>

The Eighth Circuit ruled that quasi-judicial immunity protected the police officer.<sup>68</sup> It initially observed that the police officer acted as a *de facto* bailiff who obeyed the judge's order to restore order in the courtroom, and that this order "unquestionably related to the judicial

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63. 127 F.3d 720 (8th Cir. 1997), *reh'g and suggestion for reh'g en banc denied* (1997). Chief Judge Richard Arnold, and Judges Theodore McMillian and Morris Arnold would have granted the suggestion. As noted earlier, the Seventh Circuit refused to follow *Hendren* and instead held in *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002), that quasi-judicial immunity did *not* apply to such conduct. Judge Bauer dissented. *Richman*, 270 F.3d at 443.

64. *Hendren*, 127 F.3d at 721.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

function.”<sup>69</sup> To the plaintiff’s argument that the officer did not act in a quasi-judicial capacity when he carried out the judge’s orders using excessive force, the Eighth Circuit responded by relying on *Mireles* which, as noted earlier, held that a judge’s order to use excessive force was a judicial act protected by judicial immunity.<sup>70</sup> Even though the Eighth Circuit acknowledged that, strictly speaking, *Mireles* did not deal with quasi-judicial immunity but rather with a judge’s order, it read *Mireles* broadly for the proposition that the officer’s conduct in “carrying out a judicial command in the judge’s courtroom and presence,”<sup>71</sup> even if that conduct was allegedly improper, was protected by absolute immunity.<sup>72</sup> Picking up on *Mireles*’ reasoning that it was the nature of the function performed, and not the particular act, that controlled the judicial immunity inquiry, the Eighth Circuit concluded: “[b]ecause judges frequently encounter disruptive individuals in their courtrooms, exposing bailiffs and other court security officers to potential liability for acting on a judge’s courtroom order could breed a dangerous, even fatal, hesitation.”<sup>73</sup>

#### **B. Criticism of *Hendren*: Misplaced Reliance on *Mireles***

Contrary to the Eighth Circuit’s determination, there can be little doubt that the challenged conduct in *Hendren* was not judicial in nature but rather executive. Restraining a citizen with force and arresting him or her are quintessentially executive functions for immunity purposes. The conduct in *Hendren* is, in this regard, like a warrantless arrest by law enforcement officers, an arrest pursuant to warrant by law enforcement officers and the use of excessive force in making an arrest.<sup>74</sup> In addition, what the police officer allegedly did

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69. *Hendren*, 127 F.3d at 721.

70. *Id.* at 721-22.

71. *Id.* at 722.

72. *Id.*

73. *Id.* at 722. Judge Lay dissented, arguing that the majority erroneously relied on *Mireles* because that case did not at all address quasi-judicial immunity, but rather the protection afforded “the first-tier, decision-making function of a judge.” *Id.* at 723. He also commented that the record did not indicate that the judge instructed the police officer to use excessive force. Judge Lay declared:

Under the majority’s reasoning, if a judge orders a bailiff to remove a litigant from the courtroom, and the bailiff decides that the most expeditious way to accomplish this order is to bash the litigant in the head with a baseball bat, the bailiff would enjoy absolute immunity. This is not the type of action the doctrine of absolute immunity is designed to protect.

*Hendren*, 127 F.3d at 723-724.

74. See *Pierson v. Ray*, 386 U.S. 547 (1967) (warrantless arrest by law enforcement

in *Hendren* was clearly not a judicial ruling<sup>75</sup> and it was neither an act normally performed by a judge nor an act consistent with the expectations of parties appearing before a judge. That the judge in *Hendren* may have requested that the police officer take and detain the plaintiff did not magically convert the officers' executive law enforcement conduct into judicial conduct protected by absolute quasi-judicial immunity any more than a police officer's enforcement of a statute or ordinance would convert that conduct into absolutely immune quasi-legislative conduct.

Recall that in *Mireles*, the Court held that the judge was protected by absolute immunity because his order that a lawyer be brought to him in connection with a pending case was a judicial act.<sup>76</sup> However, in relying on *Mireles* for the proposition that using excessive force in connection with judicial proceedings is judicial in nature, the Eighth Circuit minimized the all-important fact that the challenged conduct in *Mireles* was the judge's alleged order to the police officers to use excessive force to bring the lawyer before him, and *not* the use of excessive force by the police officers themselves. Only the former was held by the Supreme Court to be protected by absolute immunity. In marked contrast to the situation in *Mireles*, the plaintiff in *Hendren* did *not* sue the judge for requesting that she be restrained, but rather sued the police officer who allegedly restrained her with excessive force in violation of her constitutional rights.<sup>77</sup>

By relying on *Mireles*, then, the Eighth Circuit in effect maintained that because the judge, if sued, would be absolutely immune for ordering the police officer to restrain the plaintiff, the officer, too, should be absolutely immune. But this cannot be correct. The Supreme Court had previously rejected the concept of derivative immunity in the § 1983 setting when it held unanimously that a private defendant who conspires with an absolutely immune judge is not derivatively protected from § 1983 liability by the judge's immunity.<sup>78</sup> Moreover, if the judge in *Hendren* had personally

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officers); *Malley v. Briggs*, 475 U.S. 335 (1986) (arrest pursuant to warrant by law enforcement officers). See also *Graham v. Connor*, 490 U.S. 386 (1989) (excessive force in making an arrest).

75. See *Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986) (Judge Posner dissenting, arguing that there was nothing in Supreme Court case law or policy to warrant the expansion of judicial immunity beyond judicial rulings), *rev'd*, 484 U.S. 219 (1988).

76. *Mireles v. Waco*, 502 U.S. 9 (1991).

77. *Hendren*, 127 F.3d at 121.

78. See *Dennis v. Sparks*, 449 U.S. 24 (1980). In a parallel fashion, the Supreme Court has rejected *respondeat superior* liability under § 1983. *Monell v. Dep't of Soc. Servs.*, 436

stepped down from the bench and physically restrained the plaintiff, then this conduct would not be judicial in nature because it is unrelated to the functions usually performed by judges and is contrary to the expectations of litigants.<sup>79</sup>

Furthermore, the Eighth Circuit overstated the concern with avoiding police officer hesitation in complying with a judge's presumptively valid orders in the courtroom.<sup>80</sup> To the contrary: we want the police officer to hesitate, if only for a moment, to be sure that the judge's order is carried out in a constitutional manner. The availability of qualified immunity in Fourth Amendment excessive force cases provides the appropriate margin for error for police officers and properly balances the plaintiff's interest in compensation for harm caused, the community's interest in ensuring that official conduct complies with constitutional norms, the defendant's interest in avoiding liability, and the community's interest in minimizing the chilling effect on independent decision-making.<sup>81</sup>

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U.S. 658 (1978). For individuals, then, personal responsibility is the norm.

79. See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("[T]he facts determining whether an act by a judge is a 'judicial one' relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity."); *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974) ("The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached."); see discussion *supra* note 48.

80. *Hendren*, 127 F.3d at 722.

81. *Saucier v. Katz*, 533 U.S. 194 (2001) (holding that the objective reasonableness inquiry for qualified immunity purposes provides an additional layer of protection beyond the objective reasonableness inquiry for Fourth Amendment excessive force purposes).

Compare *Hendren* to an earlier Tenth Circuit case that involved a § 1983 damages action against deputy sheriffs alleging that they used excessive force in executing a search warrant. *Martin v. Bd. of County Comm'rs*, 909 F.2d 402 (10th Cir. 1990). The Tenth Circuit emphasized that while absolute quasi-judicial immunity might protect the deputy sheriffs "from liability for the actual arrest, it does not empower them to execute the arrest with excessive force." *Id.* at 404. It reasoned that "a judicial warrant contains an implicit directive that the arrest and subsequent detention be carried out in a lawful manner." *Id.* at 405. But to the extent that the defendants "exceeded legal bounds in executing the warrant for arrest, defendants have *a fortiori* violated the very judicial order under which they seek the shelter of absolute immunity." *Id.* Thus, according to the Tenth Circuit, quasi-judicial immunity did not extend to the *manner* of the execution of a court order. Moreover, the Tenth Circuit distinguished its earlier decision in *Valdez v. City & County of Denver*, 878 F.2d 1285 (10th Cir. 1989), where the officers were sued for their compliance with a facially valid court order of contempt, and not for the manner in which they complied. In *Valdez*, the defendants had been held to be protected by quasi-judicial immunity.

Even more on point, the Seventh Circuit, in a post-*Hendren* decision, dealt with a claim that police officers used excessive force *in a courtroom* against the plaintiff's decedent who

### C. Criticism of *Hendren*: Inconsistency with the Common Law Immunity Background of § 1983

*Hendren's* holding that the police officer who allegedly used excessive force against the plaintiff was protected by quasi-judicial immunity is inconsistent with the common law immunity background of § 1983. Although the Supreme Court's reliance on the common law immunity background in 1871, when § 1983 was enacted, has been severely (and often persuasively) criticized as manipulative, erroneous or beside the point,<sup>82</sup> it may still be appropriate to pay some attention to that background given its purported importance in the Court's approach to immunities.

This role was articulated in the Court's first prosecutorial immunity decision, *Imbler v. Pachtman*.<sup>83</sup> The Court canvassed its earlier decisions on immunities under § 1983, stating that *Tenney* "established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation

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had been held in contempt. *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). The court agreed with the distinction between law enforcement conduct specifically ordered by a judge and "the separate question of whether the conduct was lawful or exceeded the actor's authority." *Id.* at 436. It observed that, for this reason, *Hendren* "stretched" the reasoning of *Mireles* too far, specifically noting that in *Mireles* the plaintiff had challenged the judge's order directly. *Id.* The Seventh Circuit then went on to consider the policies set out in its quasi-judicial immunity cases. It first pointed out that the interest in protecting the judicial decision-making function was not directly implicated where law enforcement officers were accused of their own wrongdoing. *Id.* at 438. Next, it observed that the need of law enforcement officers to act in a split-second manner in dangerous circumstances was not limited to courtrooms. *Id.* Finally, it commented that qualified immunity provided adequate protection for law enforcement officers in this kind of situation so long as their acts were not knowingly unlawful or plainly incompetent. *Id.* Thus, the Seventh Circuit rejected the reasoning in *Hendren*.

Judge Bauer dissented, arguing that *Hendren* was correct and should be followed by the Seventh Circuit. *Id.* at 443. He was most concerned about the courtroom setting and the need for police officers under the direct supervision of a judge "to maintain order in the court instantane." In his view, quasi-judicial immunity should protect law enforcement officers "when carrying out the orders of the court relating to the conduct of court proceedings themselves." *Id.* at 444.

Because both *Hendren* and *Richman* reached opposite conclusions, there is, as of this writing, a split in the circuits on the applicability of quasi-judicial immunity to law enforcement conduct in the courtroom, at least when officers are directed to seize a person held in contempt.

82. See Jack M. Beerman, *A Critical Approach to § 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989); Richard Matasar, *Personal Immunities Under § 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

83. 424 U.S. 409 (1976).

of them.”<sup>84</sup> It then generalized that “each [earlier decision on § 1983 immunities] was predicated upon a considered inquiry into the immunity historically accorded to relevant official at common law and the interests behind it.”<sup>85</sup> The Court ultimately determined that, in light of their immunity at common law for their decisions to initiate and conduct prosecutions, prosecutors were similarly absolutely immune from § 1983 damages liability for such conduct.<sup>86</sup>

For present purposes, the relevant common law immunity background indicates that, in 1871, law enforcement officers whose illegal conduct was not prescribed by a presumptively valid court order were not protected by absolute immunity, quasi-judicial or otherwise. Specifically, an inquiry into that background as set out in treatises by Cooley and Mechem<sup>87</sup> demonstrates that sheriffs and deputy sheriffs who used excessive force in making an arrest or otherwise restraining citizens<sup>88</sup> were not protected from tort liability, even where pursuant to court order. These treatises also make clear that arresting or restraining someone was not considered a judicial act under the then-extant common law, even though doing so involved the exercise of judgment.

Cooley states that a defendant under arrest is entitled to be treated with ordinary humanity by a sheriff, and, for purposes of tort liability, any unnecessary severity cannot be justified by the arrest writ.<sup>89</sup> He also declares that a sheriff must not make any mistakes in connection with the execution of a writ. Cooley expressly rejects the argument that a ministerial mistake by a sheriff is a judicial act just because the sheriff must exercise judgment. In his view of the relevant tort law, the mere exercise of judgment cannot be the test between a judicial act and a ministerial act of the sort engaged in by sheriffs regarding executions of writs because the underlying factual

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84. *Id.* at 418.

85. *Id.* at 421.

86. *Id.* at 427.

87. See THOMAS M. COOLEY, LAW OF TORTS (Callaghan 1880) and FLOYD R. MECHEM, THE LAW OF PUBLIC OFFICES AND OFFICERS (Callaghan 1890) [hereinafter “COOLEY” and “MECHEM”]. Both of these treatises are regularly relied on by the Supreme Court to determine the relevant common law immunity background in the fourth quarter of the 19th century.

88. Restraining a citizen pursuant to judicial order, even where it takes place in a courtroom, is akin to an arrest, if not identical to it. For this reason, the descriptions by COOLEY and MECHEM of arrest law are relevant.

89. COOLEY, *supra* note 87, at 395.

question is referred by the law to the sheriff himself.<sup>90</sup> Cooley explains:

It is difficult to name any subject in respect to which questions may not be raised; and if the existence of a question could be the test between [protected] judicial and [unprotected] ministerial action, there would be very little that would be classed as ministerial. Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself.<sup>91</sup>

In *Hendren*, and like cases, it is clearly the law enforcement officers who decide how to restrain others, not the judge.

Mechem is equally supportive of this view of the common law immunity background. Thus, his list of quasi-judicial officers and functions does not include anything resembling the making of an arrest, even pursuant to court order.<sup>92</sup> Also, in the course of characterizing service of process by sheriffs, marshals, coroners and constables as ministerial,<sup>93</sup> Mechem points out, as Cooley does, that a quasi-judicial official who acts ministerially can be liable in tort because an act can be ministerial even if it involves skill, judgment and discretion.<sup>94</sup> He further declares that a sheriff can be liable for abuse of process in making an arrest,<sup>95</sup> and for the arrest of the wrong person, even though the sheriff's mistake was reasonable.<sup>96</sup> Consequently, the relevant common law immunity background for law enforcement officers and the common law's characterization of their liability for abuse of process in making an arrest do not support the grant of quasi-judicial immunity to law enforcement officers whose challenged conduct is not that prescribed by court order.<sup>97</sup>

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90. *Id.* at 396.

91. *Id.*

92. MECHEM, *supra* note 87, at 421-24.

93. *Id.* at 485.

94. *Id.* at 429.

95. *Id.* at 514.

96. *Id.* at 518.

97. The Court has declared that where the common law in 1871 would not confer absolute immunity, "[t]he presumption is that qualified immunity is sufficient to protect government officials in the exercise of their duties, [and] we have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n.4 (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)). Significantly, the Supreme Court has never held in a §1983 case that absolute immunity is applicable where the 1871 common law would find it inapplicable.

It is worth noting that in *Richman*, the Seventh Circuit observed that classically ministerial conduct of law enforcement officers was not entitled to absolute immunity at common law.

The foregoing discussion, extensively criticizing the Eighth Circuit's *Hendren* decision on various grounds, focused primarily on the doctrinal aspects of quasi-judicial immunity in the context of judicial immunity. In arguing that quasi-judicial immunity should not protect law enforcement officers who violate constitutional rights in the course of enforcing a presumptively valid court order, even in the courtroom, I concluded that *Hendren* is seriously flawed. Part VI of this Article deals with theoretical implications of this critique. But before considering those implications, it is appropriate to address § 1983 liability for law enforcement conduct that is prescribed by *presumptively invalid* court orders.

## V. Challenges to Conduct *Prescribed by Presumptively Invalid Court Orders*

Section 1983 liability for following *presumptively invalid* court orders is a subject analogous to the unsuccessful "following orders" defense to war crimes at Nuremberg.<sup>98</sup> Although it has seldom arisen in § 1983 case law, the subject should still be addressed in order to complete the § 1983 picture. Simply put, neither absolute nor qualified immunity should protect a police officer where, for example, a judge orders that police officer to shoot a lawyer in order to bring the lawyer to her courtroom and the police officer complies.

### A. Absolute Immunity

That the police officer should be unprotected by *absolute* immunity is supported by several considerations. First, as argued previously,<sup>99</sup> the judge's order to shoot is not a judicial act protected

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*Richman v. Sheahan*, 270 F.3d 430, 435 n.3. It cited the treatises of Cooley and Mechem for this proposition. *Id.*

98. Article 8 of the Nuremberg International Military Tribunal's (IMT) Charter provided that "[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment." Trial of the Major War Criminals Before the IMT, Vol. I, 10, 12 (1947) (official text of the IMT in English). However, the defense will be successful where the order followed was *not obviously unlawful*. HILLAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 221 (1990). For a recent and useful discussion, see Gary Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481 (1999). Note that this rule is consistent with the position I take for § 1983 liability where the challenged conduct is prescribed by a presumptively valid court order. Compare Model Penal Code § 2.10 (emphasis added), which reads as follows: "It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed forces that *he does not know to be unlawful*."

99. See discussion *supra* note 48.

by judicial immunity. It would be anomalous to allow a police officer who complied with an obviously unconstitutional judicial order to be protected by absolute immunity when the judge who issued the order was not. Second, a rule that disallows absolute immunity to the police officer in this situation is analogous to the rule that creates an exception to the collateral bar rule. Under the collateral bar rule, an injunction “must be obeyed until it is set aside, and . . . persons subject to the [injunction] who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.”<sup>100</sup> However, where an injunction is “transparently invalid or has only a frivolous pretense to validity,” then it may be disobeyed and challenged as unconstitutional without fear of criminal contempt for its violation.<sup>101</sup> Just as a citizen has no obligation to obey an obviously unconstitutional injunction, a police officer is not required to obey an obviously unconstitutional judicial order. Indeed, his or her constitutional obligation is disobedience, particularly where compliance will injure an innocent third party.<sup>102</sup>

### B. Qualified Immunity

That *qualified* immunity should be similarly inapplicable, a somewhat harder issue, can be inferred from *Malley v. Briggs*.<sup>103</sup> The Supreme Court declared in *Malley* that where a police officer acts on the basis of a warrant mistakenly issued by a judge, even where the warrant was requested by the police officer, the officer is protected by qualified immunity *so long as the officer acted within the range of professional competence*.<sup>104</sup> But if no officer of reasonable competence would have requested the warrant in the first place—as in *Malley* itself—then the officer cannot escape liability just because it turns out that the judge acted unconstitutionally. This suggests that

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100. Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551-52 (1977).

101. *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967). To put this point in a different way: even though the § 1983 challenge to the police officer's act is effectively a challenge to the judge's presumptively invalid order, appellate review is unnecessary because that order is obviously unlawful. Thus, the rationale for conferring quasi-judicial immunity on police officers whose conduct is prescribed by presumptively valid court orders is inapplicable where court orders are presumptively invalid.

102. *Cf. Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972) (police officers have an affirmative constitutional duty to protect citizens against the use of excessive force by fellow officers when the unconstitutional conduct takes place in their presence and they are able to prevent it).

103. 475 U.S. 335, 345 n.9 (1986).

104. *Id.* at 349.

reliance by a police officer on a judicial determination is not protected by qualified immunity where the officer knows of the judge's gross incompetence or neglect of duty. Hence, in the hypothetical, the judge's blatantly unconstitutional order to shoot the lawyer demonstrates both the judge's gross incompetence and neglect of duty and should not be followed by the police. To the extent that a police officer did in fact follow the order, he or she would therefore violate clearly (and obviously) settled law and would not be insulated by the judge's decision.<sup>105</sup>

The above positions are consistent with an emphasis on corrective justice and individual responsibility not only in § 1983 jurisprudence but in tort law and (for individual responsibility) criminal law as well.<sup>106</sup> They are also consistent with those cases indicating that police officers who rely on orders of their superiors are protected by qualified immunity so long as those orders are not facially outrageous and/or the police officers are relatively new or inexperienced in the matter.<sup>107</sup>

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105. See also *Wollin v. Gondert*, 192 F.3d 616, 624 (7th Cir. 1999) (interpreting *Malley*'s footnote to mean that police officers should not be required to second-guess a judge's order unless they know the order is obviously outside the range of the judge's professional competence).

106. When the "following orders" defense is raised in connection with tort liability, the rule is that "[o]ne whose conduct is otherwise tortious is not relieved from liability merely by the fact that his conduct is pursuant to the command of or is on account of another." RESTATEMENT (SECOND) OF TORTS: EFFECT OF ACTING AT COMMAND OF OR ON ACCOUNT OF ANOTHER § 888 (1979). Comment (a) explains that the underlying principle of § 888 is the "common law conception that each person is a free individual having equality with all others, with respect both to duties and to liabilities."

The "following orders" defense also arises in connection with criminal responsibility. Section 2.09 of the Model Penal Code provides that the only kind of duress that may constitute an affirmative defense is coercion by the use or threat of unlawful force against the actor or another, where a person of "reasonable firmness in his situation would have been unable to resist." In addition, § 2.04 provides that a belief that conduct does not legally constitute a criminal offense can be a defense where the actor acts in "reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . (ii) a judicial decision, opinion or judgment . . ." (emphasis added). See also note 98, *supra*, on the Nuremberg defense.

107. See, e.g., *Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388 (5th Cir. 2000) (prison suicide case in which deputy sheriff, who followed superiors' orders that were not facially outrageous, and who was relatively new, was protected by qualified immunity because he acted reasonably); *Balida v. McCloud*, 211 F.3d 166, 175 (1st Cir. 2002) (in Fourth Amendment destruction of property case, police officers were protected by qualified immunity because they reasonably relied on plausible instructions from a superior officer: "there were no warning signs or bases for suspicion about the lawfulness of the order"); *Varrone v. Bilotti*, 123 F.3d 75 (2d Cir. 1997) (qualified immunity applicable where there was reliance on superior's plausibly legal instructions); and *Diamondstone v. Macaluso*, 148 F.3d 113 (2d Cir. 1998) (reliance unreasonable where

## VI. Corrective Justice, Individual Responsibility, the Growth of Constitutional Law and the Educational Functions of § 1983 Liability

Section 1983 has been, and to a considerable extent still remains, a remarkable federal statute. Expressly intended by Congress to enforce the Fourteenth Amendment, it makes state and local government officials and employees, and local governments themselves, potentially liable in damages for harm caused by their unconstitutional conduct. The damages remedy functions not only to deter unconstitutional conduct but also to compensate innocent people as a matter of corrective justice.<sup>108</sup> Regrettably, however, the Supreme Court has all too often emphasized the possible over-deterrence of government officials and employees at the expense of providing corrective justice to those harmed by unconstitutional conduct. It is fair to say that this move has been based on the Court's intuition about the non-meritorious nature of many § 1983 claims,<sup>109</sup> to say nothing of its concern for federalism,<sup>110</sup> and its apparent distaste for many § 1983 plaintiffs, especially prisoners.<sup>111</sup> It was on such grounds, for example, that the Court transformed qualified immunity, originally a defense to liability,<sup>112</sup> into an immunity from suit, effectively converting it, primarily for instrumental reasons, into a

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superior's advice was clearly contrary to law).

108. Although I emphasize corrective justice throughout this Article, Congress clearly intended § 1983 to deter constitutional violations as well as compensate for harm caused. In the tort context, it has been argued that there is no necessary inconsistency between a deterrence rationale and a corrective justice rationale. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (arguing that deterrence furthers corrective justice goals).

109. Concern for non-meritorious claims was an explicit consideration in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), where the Court eliminated the subjective part of the qualified immunity test and made the test one of objective reasonableness in light of pre-existing law. *Id.* at 818.

110. Section 1983 raises several obvious federalism issues. For one thing, it is state and local government employees and local governments who are sued under federal law. For another, since most § 1983 claims are brought in federal court, it is the federal judiciary that ends up supervising state and local government affairs. I have suggested elsewhere that "many of the Court's decisions appear to treat § 1983 as a symbol of anti-federalism." See Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L. J. 1719, 1746 (1989).

111. I have maintained elsewhere that "[t]o signal its view that many § 1983 suits waste time and resources, the Court has chosen to review § 1983 cases brought by prisoners 'in particular, ostensibly trivial cases involving lost hobby-kit materials and injuries resulting from pillows left on prison stairs.'" See *id.* at 1744.

112. See, e.g., *Pierson v. Ray*, 386 U.S. 547 (1967) (establishing two-part, subjective and objective test for qualified immunity for law enforcement officers).

kind of absolute immunity.<sup>113</sup>

Still, as potent as qualified immunity often is, it does not invariably defeat every § 1983 plaintiff's claim. There are always egregious cases in which a defendant has acted in an objectively unreasonable manner in light of pre-existing law and thereby loses qualified immunity. In marked contrast, absolute immunity, whether judicial or quasi-judicial, does not even inquire into whether the challenged conduct violated clearly settled constitutional law at the time it occurred. Instead, it applies broadly to protect the defendant regardless of the nature and scope of the constitutional violation alleged. When misapplied, absolute immunity has serious repercussions for corrective justice, individual responsibility, the growth of constitutional law and the educational functions of § 1983 liability.

#### A. Corrective Justice and Individual Responsibility

Although it was only in 1978, in the now-famous *Monell* case,<sup>114</sup> that the Court interpreted § 1983 to include local governments, there has never been any doubt that natural persons are covered by the word 'person' in the statute. By its very terms, then, § 1983 makes individuals responsible for the constitutional harm they cause others. From a classical liberal perspective, such individual responsibility, similar to that reflected in the common law of torts,<sup>115</sup> has several components. One is the concept of personal autonomy: as a means of promoting their own growth and development, individuals must have a wide range of choices in a liberal society. At the same time, this liberty of choice is limited by the principle that individuals may not engage in wrongful conduct that causes harm to others, which is related to a second component: the normative obligation to pay for the harm thereby caused, as required by corrective justice.<sup>116</sup>

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113. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* is criticized for understating the costs to § 1983 victims and for overstating the costs to § 1983 individual defendants, NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8:5.

114. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), discussed at great length in NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION ch. 6.

115. See the Restatement (Second) of Torts, which provides as follows for private parties:

§ 888 Effect of Acting at Command of or on Account of Another.

One whose conduct is otherwise tortious is not relieved from liability merely by the fact that his conduct is pursuant to the command of or is on account of another.

116. See note 11, *supra*, on corrective justice.

These components of individual responsibility under § 1983 clearly have a great deal in common with tort liability in general, but they differ because of their application in the § 1983 setting to state and local government officials and employees. It is not just the interests of the individual plaintiff and the individual defendant which are directly implicated by § 1983 liability (as is, in contrast, typically the case in bi-polar tort litigation involving private parties) but also the community's interest in the effective functioning of government and, more specifically, in minimizing the chilling effects on independent decision-making of both defending against suit and potential liability. The importance of this public interest, often described as avoiding over-deterrence, has been endlessly asserted by the Supreme Court in its absolute and qualified immunity cases and, not surprisingly, has been extensively commented on in the literature.<sup>117</sup>

However, in light of the severe consequences of absolute immunity, this interest must not be over-weighted. The application of absolute immunity means that the § 1983 plaintiff is not compensated for constitutional harm caused by the defendant, even though it may be undisputed in the particular case that the defendant in fact violated the plaintiff's constitutional rights and was thus at fault. This result, sound as it may be in connection with core judicial decision-making,<sup>118</sup> comes at the expense of corrective justice and individual responsibility.

Seen from this perspective, *Hendren's* approach to quasi-judicial immunity was fundamentally misguided when it expanded the defense of following judicial orders.<sup>119</sup> *Hendren* overstated the costs, and understated the benefits, of constitutional compliance. It

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117. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983); Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

118. As maintained earlier, see *supra* note 49, absolute immunity may be justified, despite its adverse impact on corrective justice, only when it promotes the efficient operation of the justice system itself. Even in such cases, it might be suggested that the governmental employer of the absolutely immune defendant ought to be liable for damages under a *respondeat superior* theory inasmuch as the plaintiff's individual interest has been taken by the community. Compare the public necessity cases in tort law where a government official who unreasonably destroys the plaintiff's property because of a threat to the community is absolutely immune from tort liability, even though corrective justice requires compensation to the plaintiff. However, there is currently no *respondeat superior* liability under § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Moreover, states are not suable persons under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).

119. *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997).

demonstrated both a remarkable insensitivity to the harm caused by the allegedly unconstitutional conduct of the police officer and a willingness to allow the plaintiff's interest to be sacrificed for the community. This sacrifice for the community is incompatible with the Kantian principle that a person is to be valued and treated as "an end in himself" and *not* as "a means to the ends of others."<sup>120</sup> It calls for a heavy burden of justification, one that, I have argued, is not carried when, as in *Hendren*, the normatively blameful unconstitutional conduct of law enforcement officers is not prescribed by a presumptively valid court order. In *Hendren*, the plaintiff had no meaningful opportunity to secure corrective justice and the defendant (so far as we know) avoided responsibility for his allegedly unconstitutional conduct.<sup>121</sup>

## B. The Growth of Constitutional Law

A fair amount has been written recently about the relationship between § 1983 damages liability and the growth of constitutional law.<sup>122</sup> It has been argued, primarily by John Jeffries, that since a judge hearing § 1983 damages liability cases knows that a new constitutional decision will not come at the financial expense of the *current* § 1983 defendant because of qualified immunity, limiting § 1983 damages remedies for constitutional violations in this manner promotes the growth of substantive constitutional law. At the same time, *future* § 1983 plaintiffs will be entitled to relief because the earlier case (in which the new rule was set out when qualified immunity protection was accorded the defendant) provided notice to all potential defendants. This separation of rights from remedies, according to Jeffries, appropriately shifts wealth to younger generations.<sup>123</sup>

Given recent qualified immunity decisions in which the Supreme Court has repeatedly insisted that trial courts first determine whether there was an initial constitutional violation,<sup>124</sup> Jeffries is correct that

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120. KANT, *supra* note 11.

121. *Id.*

122. See, e.g., John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L. J. 87 (1999); John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L. J. 259 (2000); Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091 (criticizing Jeffries); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 U. VA. L. REV. 1 (2002) (applying analysis to harmless error).

123. Jeffries, *supra* note 100, at 105.

124. E.g., *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (substantive due process); *Wilson v. Layne*, 526 U.S. 603 (1999) (Fourth Amendment); *Saucier v. Katz*, 533

qualified immunity does not slow the growth of constitutional law, and is perhaps correct that qualified immunity may even promote it.<sup>125</sup> If so, according only qualified immunity protection to law enforcement officers who act in a manner not prescribed by a presumptively valid court order could promote the growth of constitutional law. In contrast, according quasi-judicial immunity to those law enforcement officers would likely have some negative impact on the growth of constitutional law.

This can be seen from a comparison of judicial immunity and quasi-judicial immunity. First, consider judicial immunity itself. Judges do not ordinarily address the merits of the plaintiff's § 1983 claim when dismissing on absolute immunity grounds. In addition, the 1996 Federal Courts Improvement Act bars injunctive relief actions against judges in most situations.<sup>126</sup> One might think, then, that these factors demonstrate that absolute judicial immunity provides minimal opportunities for constitutional growth because rights are permanently severed from remedies. However, this is not the case. One of the core policy justifications for judicial immunity is the availability of appellate review of a judge's allegedly unconstitutional conduct. Many § 1983 cases involve constitutional challenges to judicial conduct arising out of trial or pretrial civil and (especially) criminal proceedings, and such challenges can ordinarily be litigated in appellate courts, where new constitutional law can be made without concern for the trial judge's personal liability.

For the most part, then, judicial immunity does not retard the growth of constitutional law. But while that may be true for judicial immunity, it does not help make the case that quasi-judicial immunity should protect *law enforcement officers* whose challenged conduct does not comply with a presumptively valid court order, as in *Hendren* and *Richman*. To the contrary: because in such cases

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U.S. 194 (2001) (Fourth Amendment).

125. Whether Jeffries is correct that for this and related reasons, qualified immunity is overall a good thing, is seriously questionable in light of the adverse effect on the ability of § 1983 plaintiffs to recover for harm caused them. Although his position is considerably more nuanced than what is set out here—essentially he is attempting to demonstrate that there are constitutional advantages to qualified immunity (which separates rights from remedies) as well as disadvantages—the consequence of his position is that much harm caused by wrongful unconstitutional conduct remains unredressed. However, further discussion of Jeffries' position is beyond the scope of this Article. For present purposes, I use his position to support my own view that only qualified immunity should protect law enforcement officers whose conduct is not prescribed by presumptively valid judicial orders.

126. Pub. L. No. 104-317, 110 Stat. 3847 (1996).

appellate review is typically not available, growth-of-law considerations suggest that law enforcement officers whose conduct is not prescribed by a presumptively valid court order should be protected only by qualified immunity.<sup>127</sup>

### C. The Educational Functions of § 1983 Liability

In addition to providing for corrective justice, § 1983 liability serves important educational functions for the parties and for those similarly situated. It provides a meaningful opportunity to characterize a defendant's conduct as blameworthy,<sup>128</sup> thereby emphasizing the importance of corrective justice and individual responsibility. In contrast to situations in which only qualified immunity applies,<sup>129</sup> the opportunity for declaring conduct blameworthy is lost where quasi-judicial immunity is applied. Moreover, § 1983 liability educates the governmental institutions involved. In cases involving alleged misconduct by state judges, for example, the state judiciary has an important interest in knowing what its judges are doing. Similarly, in cases involving law enforcement officers enforcing court orders, the state judiciary and institutions of law enforcement should know how competent those officers are. Finally, the community has a vital First Amendment interest in knowing of alleged irregularities in the conduct of judges and law enforcement officers so that it can engage in intelligent democratic decision-making.<sup>130</sup>

Even more broadly, § 1983 liability educates the community about the social contract that underlies democratic institutions and rule of law values. Section 1983 is covenantal in nature: by enacting §1983, Congress declared that there is a special<sup>131</sup> reciprocal relationship between the states (including local governments) and their citizens. Just as citizens must obey the law and bear the

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127. In contrast, growth-of-law considerations *do* support the position that law enforcement officers whose challenged conduct is prescribed by a presumptively valid court order should be entitled to quasi-judicial immunity, which is what the circuits have concluded. See discussion *supra* at 624.

128. See Barbara Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998) (arguing that § 1983 damages liability has a "moral blaming function" analogous to criminal prosecution). *Id.* at 591.

129. The Court has insisted recently that, as part of the qualified immunity inquiry, a court should first decide whether the plaintiff has stated a cause of action before it gets to the objective reasonableness question. See, e.g., *Saucier v. Katz*, 533 U.S. 194 (2001); *Wilson v. Layne*, 526 U.S. 603 (1999).

130. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

131. In the sense that it goes beyond the Fourteenth Amendment standing alone.

financial and other consequences when they do not, states, too, must obey not only their own laws but the Fourteenth Amendment (the supreme law of the land) and bear the financial and other consequences when they do not. In a very real sense, § 1983 liability educates state and local governments and their officials and employees in virtuous behavior.<sup>132</sup> We want government officials and employees to know what justice requires.<sup>133</sup> And to the extent that, as *Hendren* would have it, quasi-judicial immunity applies to the conduct of law enforcement officers not prescribed by a presumptively valid court order, this important educational function has been undermined.

## VII. Conclusion

With the foregoing discussion of corrective justice, individual responsibility, the growth of constitutional law and the educational functions of § 1983 liability, we appear to have come a long way from the seemingly narrow topic of judicial orders and § 1983 quasi-judicial immunity. But in reality we have not. These kinds of issues can arise at whatever stage § 1983 is analyzed, whether it be the elements of the *prima facie* case, local government liability, or any of the immunities. I have chosen to address these issues in the context of quasi-judicial immunity, specifically by analyzing the Eighth Circuit's *Hendren* decision critically and using it as a foil.

Although absolute immunity, including judicial immunity, is inconsistent with corrective justice, there is no gainsaying the crucial policy consideration that supports judicial immunity in cases involving core deliberative judicial decision-making conduct, namely, the effective operation of the justice system itself. However, there is no comparable support in doctrine or in theory for the broad application of quasi-judicial immunity to law enforcement officers who defend on the ground that they were following judicial orders. Quasi-judicial immunity should only apply to law enforcement officers and others

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132. This is the flip side of classical republicanism's position that government should educate its citizens in order to promote civic virtue among them. See Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 36 (1985) ("Adhering to the traditional republican view, the antifederalists argued that civil society should operate as an educator, and not merely as a regulator of private conduct.")

133. Tony Honore has written that one of the functions of tort law is to announce that there are some actions that should not be done. Tony Honore, *The Morality of Tort Law: Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 75 (David Owen, ed. 1995). He also observes that to comply with the rule of law, government must "set out and enforce certain rights of the citizen, even against itself." *Id.* at 77 n.8.

whose challenged conduct is prescribed by presumptively valid court orders. In such cases, a § 1983 damages action is in effect a challenge to the validity of the underlying court order itself. In contrast, neither absolute nor qualified immunity should protect law enforcement officers and others who follow *presumptively invalid* judicial orders. A 'following orders' defense has no place in these types of § 1983 cases.

Finally, quasi-judicial immunity should not apply to law enforcement officers and others whose allegedly unconstitutional conduct is not prescribed by presumptively valid court orders. Qualified immunity is more than adequate to protect society's interest in avoiding over-deterrence of government officials. To apply quasi-judicial immunity in such cases would be to overdo over-deterrence at the cost of important individual and societal values. Quasi-judicial immunity of the kind preached by *Hendren* must be firmly rejected because it is inconsistent with growth-of-law considerations and the educational functions of § 1983 liability. It is also fundamentally unjust.