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*By Madeleine Sharp**

Introduction

The United States justice system was designed to ensure that there is equal access under the law. Such a system is truly legitimate only if the government can be held accountable in court. In that vein, the *Bivens* cause of action was created to protect the people and to contain government overreach by allowing the public to sue under the Constitution.

The qualified immunity doctrine was designed as a counterweight to *Bivens*. It is a reasonable enough principle, created to prevent government officials from being incessantly sued over areas of law with which they might be unaware. However, recent developments with the qualified immunity doctrine have transformed the counterweight into a blockade. Qualified immunity since the 2011 *Ashcroft v. al-Kidd* decision essentially guarantees that no plaintiff will ever succeed in a suit against the government.

Part I of this Article reviews the origins of *Bivens* suits and the roots of qualified immunity in English common law. Additionally, Part I also discusses the Supreme Court's reasoning as to why qualified immunity is a necessary component of the American legal system. Part II outlines how qualified immunity was analyzed before *al-Kidd*. Part III surveys the various critiques of qualified immunity to illuminate the controversy that surrounds the doctrine. Part IV explores *al-Kidd* and highlights the changes it brought to the qualified immunity doctrine. Finally, Part V delves into three post-*al-Kidd* cases and argues how these decisions reflect the adverse changes in the application of qualified immunity. Ultimately, this Article contends that these changes degrade the reputation of the Supreme Court, rendering it particularly unable to satisfactorily rule on issues associated with the Black Lives Matter movement.

I. The Origins of *Bivens* and Qualified Immunity

The principle that individuals should be able to seek redress for violations of their constitutional rights is a thoroughly American one, appearing in one of the nation's earliest cases, *Marbury v. Madison*: "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[1]

This is the idea that inspired the creation of *Bivens* suits. *Bivens* suits emerged from the 1971 Supreme Court case, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. In that case, the Court held that the Fourth Amendment guarantees a remedy of money damages against federal government officials.[2] The Court emphasized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to

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[1] Marbury v. Madison, 5 U.S. 137, 147 (1803).

[2] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971).

adjust their remedies so as to grant the necessary relief."[3] Despite the fact that the Fourth Amendment did not explicitly provide for this remedy, the majority concluded that federal courts may use any available remedy to "make good the wrong done."[4] In Supreme Court cases since 1971, plaintiffs have been permitted to seek *Bivens* remedies under the Due Process Clause of the Fifth Amendment[5] as well as under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[6] In addition, the Court has previously assumed without deciding that *Bivens* extends to First Amendment violations.[7]

Qualified immunity has equally deep roots. A public official's immunity from suit first appeared as a principle in English common law. The King originally held absolute immunity because English society widely accepted that a citizen could not bring an action against the crown in a court licensed by the King.[8] Absolute immunity for English judges was similarly a feature of English common law.[9] Furthermore, the English Bill of Rights of 1689 granted members of Parliament absolute immunity from criminal or civil action related to their official duties.[10] These roots were to inspired America's Founding Fathers.

Absolute immunity has traditionally only been extended to select classes of government officials. Those given total immunity include judges acting in their judicial role.[11] The Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."[12] Prosecutors are also given absolute immunity for their prosecutorial tasks, as "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."[13]

Additionally, legislators are given the protection of absolute immunity for their legislative tasks. Legislators are immune from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."[14] Thus, immunity is considered necessary to protect legislators from the cost and inconvenience of a trial.[15] Lastly, absolute immunity is available to the President[16] as well as to law enforcement officers acting as witnesses in court.[17]

In essence, qualified immunity is given to all other government officials. This applies when a state or local official faces individual liability for a constitutional tort in a 42 U.S.C. § 1983

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[3] *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
[4] *Id.* at 396 (quoting Bell, 327 U.S., at 684).
[5] Davis v. Passman, 442 U.S. 228 (1979).
[6] Carlson v. Green, 446 U.S. 14 (1980).
[7] Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).
[8] Kelson Bohnet, *Incomplete Approach, Incorrect Outcome: Qualified Immunity, Viewpoint Discrimination, and the Troubling Implications of* Weise v. Casper, 88 DENV. U. L. REV. 401, 402 (2011).
[9] *Id.*
[10] *Id.*
[11] Stump v. Sparkman, 435 U.S. 349, 356–57, 360 (1978).
[12] Bradley v. Fisher, 80 U.S. 335, 347 (1871).
[13] Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976).
[14] Tenney v. Brandhove, 341 U.S. 367, 377 (1951).
[15] *Id.*
[16] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).
[17] Rehberg v. Paulk, 132 S. Ct. 1497, 1506 (2012).

action, or when a federal official faces individual liability for a constitutional tort through a *Bivens* action.[18]

In articulating the need for qualified immunity, the Supreme Court does not fully discuss the risks of having such a doctrine, such as the fear of a government that operates carte blanche, with officers recklessly infringing on the rights of citizens. Instead, the qualified immunity doctrine is described as necessary to protect those faced with important decisions. The Court has argued that it would be unjust to subject government officials to liability without evidence of bad faith, particularly since the officer "is required, by the legal obligations of his position, to exercise discretion."[19] The Court has also stated that it is unfair to expect too much of officials when it comes to keeping track of what is or is not legal: "[t]hese officials are subject to a plethora of rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.'"[20]

The Supreme Court also emphasizes the importance of preventing government officials from hesitating when exercising their discretion. Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."[21]

The Supreme Court even appears to find civil rights suits a threat to society. Such social costs include the fact that claims are frequently run against the innocent, the expenses of litigation, diversion and distraction from the government's important public duties, the risk of deterring people from serving public office, and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[22] Thus, qualified immunity was designed to make the courts efficient and protect officials, not to make suing the government more accessible to the people. In fact, the Supreme Court sees qualified immunity as a shield that actually protects the public.

II. Qualified Immunity Before *al-Kidd*

The qualified immunity doctrine pre-*al-Kidd* generally shielded government officials from liability for civil damages "insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[23] This test requires a close analysis of two questions: 1) whether there was a "constitutional violation"[24] and 2) whether the right at issue was "clearly established."[25]

A. Constitutional Violation Prong

Typically courts are discouraged from examining the first question as to constitutionality if there is no need to. This is partly because of the judicial policy of avoidance of constitutional

[18] Bohnet, *supra* note 8, at 403.
[19] Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).
[20] Davis v. Scherer, 468 U.S. 183, 196 (1984) (citations omitted).
[21] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).
[22] *Harlow,* 457 U.S. 800, 814.
[23] *Id.* at 818.
[24] *Id.* at 815.
[25] *Id.* at 818.

questions unless adjudication is considered absolutely necessary.[26] The first question is also not examined due to the courts' desire to conserve government resources on these types of cases: "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or …even the burdens of litigation."[27] The Supreme Court has also made clear that engaging in an analysis of the first question is "an essentially academic exercise" which can overwhelm courts with heavy caseloads and result "in substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[28] This disdain of discussing whether there was a constitutional violation has led to an overly close examination of the second question in the analysis.

B. Clearly Established Right Prong

The "clearly established right" prong was clarified in several decisions and has remained relatively unchanged since 1971.[29] In determining whether a right at issue was clearly established, the "contours" of the right must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[30] The exact action in question need not be unlawful, however, in "light of pre-existing law the unlawfulness must be apparent."[31]

Because of the subjective nature of the analysis, determining whether a right was "clearly established" is the subject of some confusion. For instance, some Supreme Court cases have found that a "clearly established right" existed despite the absence of cases explicitly stating so.[32] There are also cases in which the Court found that no "clearly established right" existed because there was no precedent directly on point as to that issue.[33]

Thus, the state of the doctrine before *al-Kidd* was to avoid constitutional issues and instead focus on the "clearly established" prong. While the "clearly established" prong could be interpreted favorably to the plaintiff by finding that the right violated was clearly established by law despite no precedent directly on point, it was more often found that the right violated was not clearly established by law because there was not enough supporting precedent.

III. Critiques of Qualified Immunity

Even prior to the recent trend that has made qualified immunity an insurmountable obstacle for plaintiffs, the doctrine had been subject to criticism.

One of the most troubling aspects of qualified immunity is that it pits vital interests against each other—the desire to accommodate immediate yet important decisions government officials make, against the need to oversee those who have tremendous power over others. This often results in an unwieldy balancing act, as a hands-off approach to police oversight "creates unbridled discretion, increased arbitrariness of action, and no remedial aid for those injured by

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[26] Pearson v. Callahan, 555 U.S. 223, 241.
[27] Brosseau v. Haugen, 543 U.S. 194, 198 (2004).
[28] Pearson, 555 U.S. 236-237.
[29] See, e.g., Wood v. Moss, 134 S. Ct. 2056, 2067 (2014); Saucier v. Katz, 533 U.S. 194, 202 (2001); Anderson v. Creighton, 483 U.S. 635, 640 (1987);
[30] Anderson, 483 U.S. 640.
[31] *Id.*
[32] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002); United States v. Lanier, 520 U.S. 259, 271 (1997).
[33] *See*, Wilson v. Layne, 526 U.S. 603, 617-18 (1999).

inappropriate police work …. [y]et, too much regulation and scrutiny amount to fear of action, an unwillingness to serve, and undue exposure to personal liability."[34] Either way, law enforcement risks losing the trust and support of the public.

There was also concern about how qualified immunity being manipulated by the courts. The Supreme Court has emphasized the need to preserve judicial resources by allowing courts to use the order of qualified immunity analysis that most quickly resolves the matter.[35] Accordingly, courts are able to avoid the constitutional analysis entirely and instead focus on whether the legality of the action in question is "clearly established."[36] Thus, qualified immunity became "a policy-driven analysis which was largely uninfluenced by any controlling law," allowing for the resolution of civil rights actions to be "almost entirely in the unfettered control of the courts."[37]

Because qualified immunity is largely based on judicial discretion, the application of the doctrine varies wildly across the country. In fact, the instability of its application has been so persistent and so pronounced that one expert describes qualified immunity as existing "in a perpetual state of crisis."[38]

Other criticisms go so far as to blame qualified immunity for preventing the development of civil rights law: "[t]he civil rights remedial scheme organized around qualified immunity thus has an inherently self-preserving or stabilizing quality [as] it allows for tinkering at the margins, but fundamental recasting of the terms of the debate is unlikely."[39] Specifically, qualified immunity is criticized as preventing certain types of civil rights claims, such as an equal protection claim, from being properly heard. In other words, "[t]he fact that some types of claims are destined to fail because of the type of claim they are, [and] not because of the particularized behavior of the defendant, is hidden."[40] When civil rights claims were heard, qualified immunity analysis before *al-Kidd* was also criticized for focusing too much on the reasonableness of the government rather than on the constitutional rights implicated: "[q]ualified immunity makes the essential issue of a civil rights claim the question of whether it would be too much of an inhibitor of government action to require a particular defendant to pay damages to the plaintiff."[41]

Even more troubling is that a rare success prevents an accurate understanding of qualified immunity, as "[a] few large recoveries in cases that present particularly compelling facts obscure the reality of the fruitlessness of most claims."[42] *Hope v. Pelzer* is an example of such a success story, while the large number of cases that fail go unnoticed. In the *Hope* case a prisoner was tied to a hitching post for seven hours with his shirt off, exposing him to the sun.[43] While there, he was given one or two water breaks but no bathroom breaks, and a guard taunted him about his thirst.[44] The Court denied the prison officials qualified immunity after concluding that there was no way the officials could provide an adequate explanation for their behavior.[45] Because this case involved such a shocking abuse of power, it would have been difficult for the Court to

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[34] Jeffrey D. May, *Determining The Reach of Qualified Immunity in Excessive Force Litigation: When is the Law "Clearly Established?,"* 35 AM. J. TRIAL ADVOC. 585 (2012).
[35] Pearson v. Callahan, 555 U.S. 223, 236-237 (2009).
[36] May, *supra* note 34, at 595.
[37] Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 664 MO. L. REV. 123, 126 (1999).
[38] John C. Jeffries, Jr, *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).
[39] Hassel, *supra* note 37 at 153.
[40] *Id.* at 155.
[41] Hassel, *supra* note 37 at 156.
[42] *Id.*
[43] Hope, *supra* note 32 at 734-735.
[44] *Id.* at 734.
[45] *Id.* at 746.

decide any other way. Since then, no cases have involved such egregious facts, and *Hope* appears to be an anomaly in a long line of decisions granting qualified immunity to government officials. With the emphasis on the defendant, no attention is given to the more important discussions of which civil rights should be protected or how the law should be enforced.

IV. *Al-Kidd* and How it Changed Qualified Immunity

Aschcroft v. al-Kidd, decided in 2011, created an even more stringent standard for plaintiffs to meet. This new standard eventually came to prevail, appearing in the Supreme Court's qualified immunity decisions from that point forward.

Abdullah al-Kidd was a United States citizen who was detained in March 2003 as he checked in for a flight to Saudi Arabia.[46] His detainment was one of many that occurred in the aftermath of the September 11, 2001 terrorist attacks.[47]

Then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material witness statute[48] to detain individuals with suspected ties to terrorist organizations,[49] despite the fact that federal officials had no intention of calling most of these individuals as witnesses. Essentially, these individuals were detained because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.[50]

Al-Kidd remained in federal custody for 16 days.[51] Over those 16 days, he was confined in a high-security cell that was lit for 24 hours a day in Virginia, Oklahoma, and then Idaho, during which he was strip-searched on multiple occasions.[52] Additionally, each time al-Kidd was transferred to a different facility, he was handcuffed and shackled about his wrists, legs, and waist.[53] He was finally released on "house arrest" although his freedom was subject to numerous restrictions.[54] By the time al-Kidd's confinement and supervision ended 15 months after his arrest, al-Kidd had been fired from his job as an employee of a government contractor and had separated from his wife.[55]

Al-Kidd was never charged with any crime, nor was he ever used as a material witness. He sued Ashcroft, who contended that he was protected by qualified immunity and moved to dismiss the lawsuit.[56] Rejecting Ashcroft's argument, the federal court of appeals found it clearly established law that, to arrest and detain a person as a material witness, without a desire to then use the person as a witness, and without probable cause of a crime, violates the Fourth

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[46] Ashcroft v. al-Kidd, 563 U.S. 731, 734 (2011).
[47] *Id.*
[48] The statute authorizes judges to "order the arrest of [a] person" whose testimony "is material in a criminal proceeding . . . if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U. S. C. §3144.
[49] *Id.*
[50] *Id.*
[51] Al-Kidd v. Ashcroft, 598 F.3d 1129, 1132 (9th Cir. 2010).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Ashcroft v. al-Kidd, 563 U.S. 731.

Amendment.[57] The Supreme Court, however, reversed, holding that al-Kidd had no claim upon which he could recover.[58]

The Court defined "clearly established law" in a novel way. The Court held that "a Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[59] The Court further reasoned that while a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate."[60]

Defining the right at issue very narrowly, the Court then applied a new test that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional.[61] Unsurprisingly, existing precedent did not place this extremely specific issue beyond debate. The opinion went on to state that "qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[62] According to the Court, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[63] The Court concluded that Ashcroft deserved neither label and was therefore entitled to qualified immunity.[64]

This opinion gave the government more protection under qualified immunity than had ever been articulated before. Now, "every reasonable official" needed to be in agreement that the conduct at issue was impermissible, existing law had to make the question of whether a constitutional violation occurred "beyond debate,"[65] and the government was allowed to violate the law if the decision was deemed reasonable but mistaken. However, none of the judges acknowledged these new additions in the opinion or those thereafter. This new formulation would prove to be quite an obstacle for plaintiffs in cases following *al-Kidd*.

V. *Al-Kidd* and its Impact on Subsequent Qualified Immunity Opinions

Qualified immunity opinions issued by the Supreme Court since *al-Kidd* have included these changes to the doctrine.[66] None of these cases mention the fact that the new language seemingly came out of nowhere. Without explanation, the stringent demands of *al-Kidd* have become law, allowing an array of constitutional violations to go unremedied.

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[57] Al-Kidd v. Ashcroft, 598 F.3d at 1135.
[58] Ashcroft v. al-Kidd, 563 U.S. at 744.
[59] *Id.* at 741.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 743.
[63] *Id.*
[64] *Id.*
[65] Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 JUL HUM. RTS. 5, 6 (2015).
[66] *See, e.g.*, Reichle v. Howards, 132 S.Ct. 2088 (2012); Stanton v. Sims, 134 S.Ct. 3 (2013); Carroll v. Carman, 135 S.Ct. 348 (2014); City and County of San Francisco, Calif. v. Sheehan, 135 S.Ct. 1765 (2015); Lane v. Franks, 134 S.Ct. 2369 (2014); Plumhoff v. Rickard, 134 S.Ct. 2012 (2014); Taylor v. Barkes, 135 S.Ct. 2042 (2015).

A. Police Shootings

Plumhoff v. Rickard involved a suspect's death during a high-speed chase.[67] Initially, police officers pulled over a vehicle for a broken headlight.[68] Because the driver appeared nervous and did not produce his driver's license, an officer asked the driver to step out of the car.[69] Instead, the driver sped away. The officers gave chase, reaching speeds of over 100 miles per hour.[70] The chase ended with the car pinned between two police cruisers. The driver attempted to free his car from this position, which prompted one officer to fire three shots into the car.[71] As the driver tried to speed away, two more officers fired another twelve shots.[72] Both the driver and his passenger were killed.[73] The Supreme Court unanimously decided in favor of the police.

The Court held that there was no Fourth Amendment violation.[74] The Court reasoned that it was beyond "serious dispute" that the driver's conduct posed a "grave public safety risk," and the police were justified in shooting at the car to stop it.[75] The Court further stated that the number of shots fired into the car were not excessive, and that "the officers need not stop shooting until [a] threat has ended."[76]

Yet in its reasoning, the Court cited only one other case to support its contention that the officers were entitled to use deadly force. In that case, *Scott v. Harris*, the Supreme Court supported a police decision to employ a "Precision Intervention Technique" maneuver to stop a high-speed car chase, which carried a serious risk of injury or death for the driver and his passengers.[77]

However, this one case does not exactly support the Court's argument that the force the officers used in *Plumhoff* was "reasonable" as required to refute excessive force claims.[78] *Scott* involved a police car essentially bumping into the suspect's car to stop it. The *Scott* Court supported the actions of the police even though their actions "posed a high likelihood of serious injury or death to [the] respondent—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head."[79] In *Plumhoff*, the police fired multiple direct shots at a fleeing driver, which is quite a leap from employing a strategic maneuver that can be used to stop a car chase.

The *Plumhoff* Court went on to say that even if there were a Fourth Amendment violation, the officers were protected by qualified immunity because the law did not clearly establish that the conduct violated the Fourth Amendment.[80] To support this, the Court relied solely on *Brosseau v. Haugen*, which held that it was "not clearly established" that police who

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[67] Plumhoff, 134 S.Ct. at 2017.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 2018.
[74] *Id.* at 2021-2022.
[75] *Id.* at 2022.
[76] *Id.*
[77] *Id.* at 2021.
[78] *Id.* at 2020.
[79] Scott v. Harris, 550 U.S. 372, 386 (2007).
[80] Plumhoff, 134 S.Ct. at 2024.

shot a fleeing vehicle had violated the Fourth Amendment.[81] However, the *Brosseau* case is not quite guiding precedent.

Brosseau is distinguishable because it involved a situation with more obvious danger. Specifically, a felony no-bail warrant had been issued for the suspect's arrest on drug and other offenses.[82] The lone police officer attempting to prevent the suspect from fleeing believed the suspect was reaching for a weapon.[83] Additionally, the suspect was also in the middle of a fight at the time he was approached by police.[84] Therefore, there was more of a provocation to act in this case than in *Plumhoff*. A potentially armed felon fighting in public does not prevent the same provocation as someone whose only offense was driving with a headlight out. Further, in *Brosseau* an end to the chase was imperative for public safety, while in *Plumhoff* the risk to public safety was not as great. These important factual differences can mean the difference between constitutionally permissible government action and impermissible excessive force.

Despite the lack of clear support for the assertions of law concerning the Fourth Amendment, the Court protected the police in *Plumhoff*. In doing so, the Court has established that "whenever there is a high-speed chase that officers perceive could injure others – and that would seem to be true of virtually all high-speed chases – the police can shoot at the vehicle and keep shooting until it stops."[85] The practical result of *Plumhoff* is a dangerously permissive environment where the police have carte blanche to shoot as many times as they wish at fleeing suspects.

B. Police Invasions of Privacy

Messerschmidt v. Millender involved a complaint against the police for violating the Fourth Amendment rights of a suspect with an overbroad search warrant.[86] The suspect had been involved in several instances of domestic violence against his girlfriend.[87] The victim told police that her boyfriend fired at her with a sawed-off shotgun and told her that he would kill her if she tried to leave.[88] She also told police that he was affiliated with a local street gang.[89]

The police obtained a warrant to search the suspect's home. The search warrant authorized two broad searches, one for "[a]ll handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition," and the other for "[a]rticles of evidence showing street gang membership" despite the fact only one particular gun was used in the domestic dispute.[90]

The Supreme Court focused on the second prong of the test for qualified immunity (no clearly established right), while skipping the first prong entirely (no right violated). The Court determined that the warrant in question was not plainly defective and the officers' belief in its

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[81] Brosseau v. Haugen, 543 U.S. 194, 201 (2004).
[82] *Id.* at 195.
[83] *Id.* at 196.
[84] *Id.*
[85] Chemerinsky, *supra* note 50 at 7.
[86] Messerschmidt v. Millender, 132 S. Ct. 1235, 1243 (2012).
[87] *Id.* at 1241.
[88] *Id.*
[89] *Id.*
[90] *Id.*.

validity was reasonable.[91] The Court came up with some odd explanations to justify the broad search.

One of the more troubling characterizations was made during the analysis of the search for gang-related evidence. Despite the fact that the affidavit described the crime as "spousal assault and an assault with a deadly weapon," the majority concluded that a reasonable officer could have viewed the suspect's attack on his girlfriend as motivated not by the souring of his romantic relationship but by a desire to prevent her from disclosing details of his gang activity to the police.[92] The Court further reasoned that "[s]he was, after all, no longer linked with him as a girlfriend; he had assaulted her in the past; and she had indeed called the cops on him."[93] Yet, no evidence supported this argument except for the fact that the suspect became angry after the victim called the police, which likely indicates that the suspect was upset his girlfriend reported his violence against her and that she slipped from his control, rather than that he feared exposure of his gang membership. The fact that the relationship ended should have been used to further the suit, as it "is likely that strong emotions still exist which can affect behavior, and in some cases resulting in a physical attack on that person."[94] The Court thus ignored the most obvious understanding of the suspect's behavior in order to accept the government's explanation.

The Court's reasoning suggests that the connection between the evidence and the crime can be speculative, entitling the police to search for anything that could potentially be related to a crime or could prove that some type of crime occurred. The warrant for gang-related evidence had no explanation of how gang-related items would provide evidence of the domestic assault the police were investigating. Probable cause requires more, but the focus of the Court was not on what the police did wrong. The Supreme Court instead echoed *al-Kidd*'s reasoning that officers are allowed to make "reasonable but mistaken judgments," and concluded that "[t]he officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.'"[95]

The *Messerschmidt* decision demonstrated that the Court will allow "reasonable" conduct by the police to be considered in qualified immunity cases rather than holding officers to the requirements of the Fourth Amendment. In her dissent, Justice Sotomayor argued that the search conducted in the case was the "kind of fishing expedition for evidence of unidentified criminal activity committed by unspecified persons [that] was the very evil the Fourth Amendment was intended to prevent."[96] She was concerned that the majority's holding would encourage "sloppy police work" and "exacerbate the risk" of Fourth Amendment violations.[97] Her concerns do not mention how the qualified immunity test was articulated in the opinion. Such a deferential view of what qualifies as reasonable conduct is not a part of the traditional qualified immunity analysis, but is obviously to be expected with *al-Kidd* as controlling precedent.

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[91] *Id.* at 1246.
[92] *Id.* at 1247.
[93] *Id.*
[94] Kali Morris, Messerschmidt v. Millender*: A Probable Cause Free-For-All*, 48 GONZ. L. REV. 431, 446 (2012).
[95] Messerschmidt, 132 S. Ct. at 1249.
[96] *Id.* at 1256.
[97] *Id.* at 1260.

C. The Silencing of Protesters

In *Wood v. Moss*, a group of protesters sued the Secret Service asserting that their First Amendment rights had been violated. In 2004, President George W. Bush was making a campaign appearance in Oregon when he made an unscheduled stop for dinner.[98] His supporters were permitted to demonstrate within the President's sight and hearing near the restaurant, but those who were protesting against him were moved two blocks away, far out of the President's sight and hearing.[99] The Secret Service said that relocating the protesters was a necessary measure to ensure that no demonstrator would be "within handgun or explosive range of the President."[100] The agents' concern, however, did not extend to the guests already inside the restaurant where the President was dining, who were not required to leave, to stay clear of the patio, or to go through any security screening.[101] As a result, the protesters alleged that the agents engaged in viewpoint discrimination when they moved the protesters away from the restaurant, while allowing only supporters to remain in their original location.[102]

Unsurprisingly, the Supreme Court unanimously decided in favor of the Secret Service. Although the Court stated that the Secret Service agents were entitled to qualified immunity, the language it used to reach that conclusion was unorthodox. Strangely, before even engaging in the analysis, the opinion emphasized the enormous respect owed to the Secret Service due to the importance of its work: "[i]n other contexts, we have similarly recognized the Nation's 'valid, even ... overwhelming, interest in protecting the safety of its Chief Executive.'"[103] The Court then went on to say that they were mindful that "'[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy.'"[104]

The Court then proceeded to discuss qualified immunity. While the Court purported to resolve the case on the second prong of the qualified immunity analysis (no clearly established right) rather than the first (no right violated), the analysis conflated the two prongs. Thus, most of the analysis asserted that there was no violation because the agents were motivated not by viewpoint discrimination, but by security concerns. A very limited discussion of case law ensued: "[n]o decision of which we are aware, however, would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation to ensure that groups with different viewpoints are at comparable locations at all times."[105] The rest of the opinion is spent not discussing precedent, but arguing that the agents were justified in moving the protesters based on the facts alleged by the Secret Service. The Court detailed the security risks that were purportedly present at the scene and concluded that the protesters could not "plausibly urge that the agents had no valid security reason to request or order the[ir] eviction."[106] Therefore, rather than analyzing whether the Secret Service agents should have known that their actions violated a

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[98] Wood v. Moss, 134 S.Ct. 2056, 2061 (2014).
[99] *Id.* at 2064.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 2065.
[103] *Id.* at 2067.
[104] *Id.* (internal citations omitted).
[105] *Id.* at 2068.
[106] *Id.* at 2069-70.

"clearly established right," the Court appears to be saying that the plaintiffs did not sufficiently plead a violation of the Constitution.

Contrary to the Court's finding, the First Amendment was certainly violated here: "[t]he law under the First Amendment is clear that the government cannot discriminate among speakers based on their views unless strict scrutiny is met."[107] Yet *Wood* permits government officials to engage in viewpoint discrimination. As illustrated, protesters exercising their right to free speech can be shunted aside if there is even a whiff of "national security" interests implicated.

Conclusion

Qualified immunity was not designed to be of great assistance to plaintiffs suing the government. Accordingly, it is no surprise that the doctrine has blocked some civil rights cases from being fully heard. What is surprising is that in recent years the doctrine has blocked all *Bivens* suits.

This evolution is not a product of the conservative majority of the Supreme Court. Important qualified immunity decisions post *al-Kidd* have been unanimous, showing that this is beyond partisan debate. Because of the Court's new interpretation of qualified immunity, the government is now able to shoot with impunity while chasing a suspect, enter homes uninvited, and smother the voices of protesters. The Supreme Court has essentially turned its back on plaintiffs suing the government.

The *al-Kidd* decision has meant that plaintiffs who would formerly file suit to find relief and justice now have to take their cases to the press and the public, as the Black Lives Matter movement has done. Bypassing attempts for legal redress, the Black Lives Matter movement uses the media to highlight systematic injustices inflicted by the police upon the African-American community. The media now frequently calls attention to police shootings of African-Americans and the lack of court response to these shootings. Public frustration with law enforcement and with the court has given rise to country-wide protests of the courts' response, or lack thereof, evidencing the extent of the courts' failure to provide a remedy.

The Supreme Court confronts the most pressing issues in the country decisions should accurately and fairly decide the law while reflecting the values of the United States. Yet the Supreme Court continuously protects the government to the detriment of victims of its overreach. The Court must recognize that their qualified immunity analysis is both deeply flawed and unjust and that the actions of the government must be subject to more demanding scrutiny.

The *al-Kidd* language cannot be undone, but the application of the new formulation of qualified immunity can change. The Court cannot continue to define the rights at issue so narrowly that no precedent can be examined nor can the Court refuse to acknowledge how their decisions lessen constitutional protections. Without a change, not only will the reputation of the judiciary continue to suffer, but civil rights law will remain stagnant. And most disturbing of all, the public will be denied access to justice.

[107] Chemerinsky, *supra* note 50 at 7. Strict scrutiny requires that a government action be narrowly tailored to serve a compelling state interest. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 655 (1990).