

# UCLA

## UCLA Previously Published Works

### Title

How Qualified Immunity Fails

### Permalink

<https://escholarship.org/uc/item/2g39d61c>

### Author

Schwartz, Joanna C

### Publication Date

2017-01-10

Peer reviewed

---

---

# HOW QUALIFIED IMMUNITY FAILS

FORTHCOMING, 127 YALE L.J. \_\_\_\_ (2017)

*Joanna C. Schwartz\**

*This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong—protecting “all but the plainly incompetent or those who knowingly violate the law.” Legal scholars and commentators describe qualified immunity in equally stark terms, often criticizing qualified immunity for closing the courthouse doors for plaintiffs whose rights have been violated. And the Court has repeatedly explained that qualified immunity must be as powerful as it is to protect government officials from burdens associated with participating in discovery and trial. Yet the Supreme Court has relied on no empirical evidence to support its assertion that qualified immunity doctrine shields government officials from these assumed burdens.*

*This Article is the first to test this foundational assumption underlying the Supreme Court’s qualified immunity decisions. I reviewed the dockets of 1183 Section 1983 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period and measured the frequency with which qualified immunity motions were brought by defendants, granted by courts, and dispositive before discovery and trial. I found that qualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in my study, just thirty-six (3.7%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. And when one considers all the Section 1983 cases brought against law enforcement defendants—each of which could expose law enforcement officials to burdens associated with discovery and trial—just eight (.7%) of cases were dismissed at the motion to dismiss stage and twenty-eight (2.4%) were dismissed at summary judgment on qualified immunity grounds. My findings enrich descriptive accounts of qualified immunity’s role in constitutional litigation, undermine expectations about the policy interests served by qualified immunity, and militate in favor of adjustments to qualified immunity doctrine that would reflect its actual role in constitutional litigation.*

INTRODUCTION .....	2
I. QUALIFIED IMMUNITY’S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION.....	6
A. <i>The Court’s Concerns about the Burdens of Litigation</i> .....	6

---

\* Visiting Professor of Law, Harvard Law School; Professor of Law, UCLA School of Law. For helpful conversations and comments, thanks to Will Baude, Karen Blum, Alan Chen, Beth Colgan, Richard Fallon, William Hubbard, Aziz Huq, John Jeffries, Doug NeJaime, James Pfander, John Rappaport, Alexander Reinert, Louis Michael Seidman, Stephen Yeazell, and participants in workshops at The University of Chicago Law School, Duke University School of Law, Harvard Law School, and UCLA School of Law. Special thanks to Ben Nyblade, who calculated the statistical significance of my findings. Thanks also to Michelle Cuozzo, Rosemary McClure, David Schmutzer, and the expert research staff at UCLA’s Hugh & Hazel Darling Law Library for excellent research assistance.

B. Doctrinal Impact of the Court’s Desire to Protect Defendants from Discovery and Trial.....	8
C. Conclusion.....	12
II. STUDY METHODOLOGY.....	13
III. FINDINGS.....	17
A. Cases in Which Qualified Immunity Cannot Play a Role.....	18
B. Defendants’ Choices: The Frequency and Timing of Qualified Immunity Motions.....	19
C. District Courts’ Decisions: The Success Rate of Qualified Immunity Motions.....	23
D. Circuit Courts’ Decisions: The Frequency and Success of Qualified Immunity Appeals.....	25
E. The Impact of Qualified Immunity on Case Dispositions.....	26
IV. IMPLICATIONS.....	31
A. Descriptions of Qualified Immunity’s Role in Constitutional Litigation.....	31
B. Why Qualified Immunity Disposes of So Few Cases.....	33
C. Implications for the Balance Struck by Qualified Immunity.....	38
D. Moving Forward.....	46
CONCLUSION.....	50

## INTRODUCTION

The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal. The Supreme Court has long described qualified immunity doctrine as incredibly strong—protecting “all but the plainly incompetent or those who knowingly violate the law.”<sup>1</sup> Yet the Court’s most recent qualified immunity decisions have broadened the scope of qualified immunity doctrine even further.<sup>2</sup> The Court has also granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, and reversed every one.<sup>3</sup> In these decisions, the Supreme Court has scolded lower courts for applying qualified immunity doctrine in a manner that is too favorable to plaintiffs and thus ignores the “importance of qualified immunity ‘to society as a whole.’”<sup>4</sup> As Noah Feldman has observed, the Supreme Court’s recent qualified immunity decisions have sent a clear message to lower courts: “The Supreme Court wants fewer lawsuits against police to go forward.”<sup>5</sup> And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

Among legal scholars and commentators, there is a widespread belief that the Supreme Court is succeeding in its efforts. Scholars report that qualified immunity motions are raised frequently by defendants, granted frequently by courts, and often result in the dismissal of cases.<sup>6</sup> As Ninth Circuit Judge Stephen Reinhardt has written, the Supreme

<sup>1</sup> Malley v. Briggs, 475 U.S. 335, 341 (1986).

<sup>2</sup> See Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. Headnotes 62 (2016). See also *infra* notes 43-**Error! Bookmark not defined.** and accompanying text.

<sup>3</sup> See Scott Michelman, Taylor v. Barks: *Summary Reversal is Part of a Qualified Immunity Trend*, SCOTUSblog (Jun. 2, 2015), <http://www.scotusblog.com/2015/06/taylor-v-barks-summary-reversal-is-part-of-a-qualified-immunity-trend/>. See also William Baude, *Is Qualified Immunity Unlawful?*, Appendix, available at ssrn: <https://ssrn.com/abstract=2896508>.

<sup>4</sup> City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015).

<sup>5</sup> Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG LAW (Jan. 9, 2017, 3:08 PM).

<sup>6</sup> See FEDERAL JUDICIAL CENTER, SECTION 1983 LITIGATION (3<sup>RD</sup> ED. 2014) (describing qualified immunity as “the most important defense” in § 1983 litigation, that “is frequently asserted as a

2017]

3

Court's recent qualified immunity decisions have "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."<sup>7</sup> Three of the foremost experts on Section 1983 litigation—Karen Blum, Erwin Chemerinsky, and Martin Schwartz—have concluded that recent developments in qualified immunity doctrine leave "not much *Hope* left for plaintiffs."<sup>8</sup>

Despite the widespread assumption that qualified immunity is an exceedingly strong protection for government officials, we know little about the role qualified immunity actually plays in the litigation of constitutional claims.<sup>9</sup> The scant evidence available on this topic points in opposite directions. Studies of qualified immunity decisions have found that qualified immunity motions are infrequently denied, suggesting that the doctrine plays a controlling role in the resolution of Section 1983 cases.<sup>10</sup> But when Alex Reinert studied the dockets in *Bivens* actions—constitutional cases brought against federal actors—he found that grants of qualified immunity led to just 2% of case dismissals over a three-year period.<sup>11</sup> If qualified immunity protects all but the incompetent and those who knowingly violate the law, and qualified immunity motions are infrequently denied, how can they lead to the dismissal of such a small percentage of cases?

More than descriptive accuracy is at stake in answering this question—it goes to a core justification for qualified immunity's existence. Although the concept of qualified

---

defense to § 1983 personal-capacity claims for damages. Furthermore, courts decide a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity.") See also Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from trial as well as from liability—has been largely successful.").

<sup>7</sup> Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015). See also Caryn J. Ackerman, *Fairness or Fiction: Striking a Balance Between the Goals of Section 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1028 (2006) (describing qualified immunity doctrine as "one of the most significant obstacles for § 1983 cases.").

<sup>8</sup> See generally Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013).

<sup>9</sup> See *infra* note 62 and accompanying text (describing the lack of empirical research concerning qualified immunity litigation practice and the justifications underlying the doctrine). For research regarding other aspects of qualified immunity doctrine, see *infra* notes 10, 55.

<sup>10</sup> See Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (finding qualified immunity was denied in twenty percent of federal cases over a two-year period); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 692 (2009) (finding that qualified immunity was denied in 14-32% percent of district court decisions); Greg Sobolski & Matt Steinberg, *Note, An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v. Callahan*, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in approximately 32% of appellate decisions).

<sup>11</sup> See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

immunity was drawn from a history of common law immunities, the Court has made clear that the contours of qualified immunity's protections are informed not by the common law but instead by the Court's views about how best to balance "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."<sup>12</sup> Since the doctrine's inception, the Court has repeatedly stated that financial liability is one of the burdens qualified immunity is intended to protect against.<sup>13</sup> Yet, as I showed in a prior study, law enforcement defendants are almost always indemnified and so rarely pay anything towards settlements and judgments entered against them.<sup>14</sup> Near certain and universal indemnification drastically reduces the value of qualified immunity as a protection against the burdens of financial liability.

In recent years, the Court has focused increasingly on a different justification for qualified immunity—the need to protect government officials from nonfinancial burdens associated with discovery and trial.<sup>15</sup> This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine.<sup>16</sup> Yet we do not know to what extent discovery and trial actually burden government officials, or the extent to which qualified immunity doctrine protects against those assumed burdens. Although both questions are critically important, this Article focuses on the latter. Assuming that discovery and trial do impose a substantial burden on government officials, and that shielding officials from discovery and trial is a legitimate aim of qualified immunity doctrine, to what extent does qualified immunity actually achieve its intended goal?

To answer these questions, I undertook the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. I reviewed the dockets of 1183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California.<sup>17</sup> I tracked several characteristics of these cases including the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, courts' assessments of defendants' qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases' dispositions.

I found that, contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end. Qualified immunity is raised infrequently before discovery begins: Across the districts in my study, defendants raised qualified immunity in motions to dismiss in 14.1% of the cases in which they could raise the defense. These motions were less frequently granted than one might expect: Courts granted motions to dismiss in whole or part on qualified immunity grounds 14.5% of the time. Qualified immunity was raised more often by defendants at summary judgment and was more often granted by courts at that stage. But even when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants did not always result in the dismissal of the cases—additional claims

---

<sup>12</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>13</sup> *See infra* notes 24-28 and accompanying text.

<sup>14</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

<sup>15</sup> *See infra* notes 29-33 and accompanying text.

<sup>16</sup> *See* Part I.B.

<sup>17</sup> *See* Part II for a description of my study design and methodology.

2017]

5

or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial. Across the five districts in my study, just 3.7% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. And when one considers all of the Section 1983 cases brought against law enforcement defendants—each of which could expose law enforcement officials to whatever burdens are associated with discovery and trial—just .7% of cases were dismissed at the motion to dismiss stage and 2.4% were dismissed at summary judgment on qualified immunity grounds.

Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways. The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial.<sup>18</sup> Qualified immunity motion practice and interlocutory appeals of qualified immunity denials may increase the costs and delays associated with Section 1983 litigation. The challenges of qualified immunity doctrine may cause plaintiffs' attorneys to include claims in their cases that cannot be dismissed on qualified immunity grounds—claims against municipalities, claims seeking injunctive relief, and state law claims. Qualified immunity is likely influencing the litigation of cases against law enforcement in each of these ways. But, as my study makes clear, qualified immunity does not impact constitutional litigation against law enforcement in the way the Court expects and intends.

One should not conclude based on my findings that the Supreme Court simply needs to make qualified immunity stronger. Instead, my data suggest that qualified immunity is often fundamentally ill-suited to dismiss filed cases.<sup>19</sup> Although district courts recognize that they should dispose of cases as early as possible on qualified immunity grounds, plaintiffs can often plausibly plead clearly established constitutional violations in their complaints, foreclosing motions to dismiss. Factual disputes often prevent dismissal at summary judgment. And even when courts grant qualified immunity motions, additional defendants or claims regularly remain that continue to expose government officials to additional litigation. My data also suggest that qualified immunity is less necessary than has been assumed to serve its intended protective function. The Supreme Court suggests in its opinions that qualified immunity is the only barrier standing between government officials and the burdens of discovery and trial. Instead, my study shows that litigants and courts have a wide range of tools at their disposal to resolve Section 1983 cases.

Qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.<sup>20</sup> Were qualified immunity doctrine regularly insulating government officials from burdens associated with litigation, one could argue that the doctrine's incoherency, illogic, and overprotection of government officials are unfortunate but necessary to further government interests. To the contrary, available evidence suggests that qualified immunity is unnecessary to shield government officials from financial liability, poorly designed to shield government officials from discovery and trial in filed cases, and may in fact increase the costs and delays associated with constitutional litigation. It may be that qualified immunity benefits government in other ways, and further research is necessary to explore

---

<sup>18</sup> For further discussion of these possibilities see *infra* notes 114-119 and accompanying text.

<sup>19</sup> See *infra* notes 125-130 and accompanying text.

<sup>20</sup> See generally *infra* Part I.B.

this possibility.<sup>21</sup> But the evidence that is now available greatly weakens the Court's current justifications for the doctrine's structure and highly restrictive standards. The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.<sup>22</sup> Given my findings, it is high time for the Supreme Court to reconsider the balance it has struck.

The remainder of the Article proceeds as follows. Part I describes the Supreme Court's assumptions about the burdens of discovery and trial for government officials, and the ways in which these assumptions have shaped qualified immunity doctrine. In Part II, I describe the methodology of my study. In Part III, I describe my findings about the frequency with which law enforcement defendants raise qualified immunity, the frequency with which courts grant qualified immunity, the frequency and outcome of qualified immunity appeals, and the frequency with which qualified immunity disposes of plaintiffs' cases. In Part IV, I consider the implications of my findings for descriptive accounts of qualified immunity's role in constitutional litigation and expectations about the policy interests served by qualified immunity doctrine. I additionally suggest adjustments to qualified immunity doctrine that would reflect its actual role in constitutional litigation.

## I. QUALIFIED IMMUNITY'S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION

The Supreme Court has long viewed qualified immunity as a means of protecting government officials from burdens associated with participating in discovery and trial. Indeed, the Supreme Court has justified several major developments in qualified immunity doctrine over the past thirty-five years by an interest in protecting government officials from these assumed burdens. In this Part, I describe the Court's stated assumptions about the purposes served by qualified immunity, the ways in which those assumptions have shaped qualified immunity doctrine, and the Court's recent efforts to further strengthen qualified immunity's protections.

### A. *The Court's Concerns about the Burdens of Litigation*

The Supreme Court has made clear that its qualified immunity jurisprudence reflects the Court's view about how best to balance "the importance of a damages remedy to protect the right of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."<sup>23</sup> Yet the Court's descriptions of the ways in which qualified immunity protects government officials have shifted over time.

When the Supreme Court first announced that law enforcement officials were entitled to a qualified immunity from suits, qualified immunity was justified as a means of protecting government defendants from the financial burdens of liability when acting in good faith in legally murky areas.<sup>24</sup> Qualified immunity was necessary, according to the

---

<sup>21</sup> See *infra* notes 152-**Error! Bookmark not defined.** and accompanying text for a description of remaining questions about the way qualified immunity doctrine functions and the extent to which it achieves its intended goals.

<sup>22</sup> *Anderson v. Creighton*, 483 U.S. 635, 642 n.3 (1987).

<sup>23</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

<sup>24</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

2017]

7

Court, because “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does.”<sup>25</sup> The scope of qualified immunity defense is in many ways consistent with an interest in protecting government officials from financial liability. For example, qualified immunity does not attach in claims against municipalities, claims against some private actors, and claims for injunctive or declaratory relief.<sup>26</sup> Indeed, the Court has been clear that municipalities and private prison guards are not entitled to qualified immunity in part because neither type of defendant is threatened by personal financial liability.<sup>27</sup>

The Supreme Court’s decision in *Harlow v. Fitzgerald*, fifteen years after *Pierson*, expanded the policy goals animating qualified immunity. The Court explained in *Harlow* that qualified immunity was necessary not only to protect government officials from “being mulcted in damages,”<sup>28</sup> but also to protect against “the diversion of official energy from pressing public issues,” “the deterrence of able citizens from acceptance of 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.’”<sup>29</sup>

In subsequent cases, the Court has focused increasingly on the need to protect government officials from burdens associated with discovery and trial and the expectation that qualified immunity can protect government officials from those burdens. In *Mitchell v. Forsyth*, the Court reaffirmed the *Harlow* Court’s conclusion that qualified immunity was necessary to protect against the burdens associated with both trial and pretrial matters, like discovery, because “[i]nquiries of this kind can be peculiarly disruptive of effective government.”<sup>30</sup> In *Ashcroft v. Iqbal*, the Court again emphasized the value of qualified immunity in curtailing the time-intensive discovery process. As the Court explained:

The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.”

---

<sup>25</sup> *Id.* at 555. See also *Wood v. Strickland*, 420 U.S. 308 (1975) (“Liability for damages for every action which is found subsequently to have been violative of a student’s constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties”).

<sup>26</sup> See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in “criminal cases and §1983 cases against a municipality, as well as §1983 cases against individuals where injunctive relief is sought instead of or in addition to damages”); *Richardson v. McKnight*, 521 U.S. 339 (1997) (holding that private prison guards are not entitled to qualified immunity); *Wood v. Strickland*, 420 U.S. 308, 314-15 n.6 (1975) (“[I]mmunity from damages does not ordinarily bar equitable relief as well.”).

<sup>27</sup> See *Owen v. City of Independence*, 445 U.S. 622, 653 (1980) (concluding that municipalities should not be protected by qualified immunity in part because concerns about overdeterrence are “less compelling, if not wholly inapplicable when the liability of the municipal entity is at stake”); *Richardson*, 521 U.S. at 411 (finding that private actors’ insurance “increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face.”). The Court has offered little explanation why the qualified immunity defense is not available in claims for non-monetary relief.

<sup>28</sup> *Pierson*, 386 U.S. at 555.

<sup>29</sup> *Id.*

<sup>29</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted).

<sup>30</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817).



There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.<sup>31</sup>

In recent years, the interest in shielding government officials from burdens of discovery and trial has taken center stage in the Court's qualified immunity calculations. In 1997, the Supreme Court made clear that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity."<sup>32</sup> Twelve years later, in 2009, the Court described protecting government officials from burdens associated from discovery and trial as the "'driving force' behind creation of the qualified immunity doctrine."<sup>33</sup> Indeed, the Court has recently suggested that it intends qualified immunity not only to protect government defendants from burdens associated with discovery and trial but also to protect government officials not named as defendants who may be required to testify, respond to discovery, or otherwise participate in litigation.<sup>34</sup>

### *B. Doctrinal Impact of the Court's Desire to Protect Defendants from Discovery and Trial*

Some aspects of qualified immunity doctrine are inconsistent with the Court's interest in protecting government officials from discovery and trial. After all, government officials must participate in discovery and trial in claims against municipalities—as witnesses, if not as defendants. In addition, government officials must participate in discovery and trial in claims for declaratory and injunctive relief. Yet, over the past thirty-five years, the Court's interest in protecting government officials from discovery and trial has shaped qualified immunity in several important ways. These adjustments have also inspired some of the most powerful critiques of the doctrine.

#### *1. Defendants' State of Mind*

The Court's interest in shielding government defendants from discovery and trial underlay its decision to eliminate the subjective prong of the qualified immunity defense. From 1967, when qualified immunity was first announced by the Supreme Court, until 1982, when *Harlow* was decided, a defendant seeking qualified immunity had to show both

---

<sup>31</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009).

<sup>32</sup> *Richardson*, 521 U.S. at 411.

<sup>33</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

<sup>34</sup> *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012) (holding that a private actor retained by the government to carry out its work is entitled to qualified immunity in part because the "distraction of lawsuits... will also often affect any public employees with whom they work by embroiling those employees in litigation.")

2017]

9

that his conduct was objectively reasonable and that he had a “good-faith” belief that his conduct was proper.<sup>35</sup> In *Harlow*, the Supreme Court concluded that the subjective prong of the defense was “incompatible” with the goals of qualified immunity because an official’s subjective intent often could not be resolved before trial.<sup>36</sup> Moreover, during discovery, gathering evidence of an official’s subjective motivation “may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues.”<sup>37</sup> By eliminating the subjective prong of the qualified immunity analysis, the Court believed it could “avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.”<sup>38</sup>

Many have criticized the Court’s decision in *Harlow* to disregard a government official’s subjective intent and focus instead on whether the law is clearly established as an objective matter. Although the Court intended with *Harlow* to streamline the qualified immunity analysis, its focus on “clearly established law” created its own complexities. Scholars have argued that the Supreme Court has not explained what sources of law can clearly establish a constitutional right or how factually similar prior cases must be to clearly establish the law, leading to significant confusion among courts.<sup>39</sup> One circuit court reported that “[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.”<sup>40</sup>

Moreover, when the Court has offered hints about what constitutes clearly established law, it has suggested an increasingly restrictive understanding of the phrase. Although the Court has sometimes looked to nonjudicial sources when determining whether the law was clearly established, its primary focus has been on prior court decisions; whether a prior court has held the right to be clearly established.<sup>41</sup> In 1999, the Court explained that a plaintiff could show the law was clearly established by pointing to “controlling authority in their jurisdiction” or a “consensus of cases of persuasive authority.”<sup>42</sup> Yet in more recent decisions, the Court has backed away from this position: it now only assumes *for the sake of argument* that controlling circuit authority or a consensus of cases of persuasive authority can clearly establish the law.<sup>43</sup>

---

<sup>35</sup> *Harlow*, 457 U.S. at 816.

<sup>36</sup> *Id.* at 817.

<sup>37</sup> *Id.*

<sup>38</sup> *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817-18).

<sup>39</sup> See, e.g., Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (“One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.”); Jeffries, *supra* note 6, at 852 (2010) (describing qualified immunity as “a mare’s nest of complexity and confusion”).

<sup>40</sup> Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). See also Blum, *supra* note **Error! Bookmark not defined.**, at 945-46 (quoting two judges’ descriptions of the complexities of determining whether a law is clearly established).

<sup>41</sup> See Blum, Chemerinsky & Schwartz, *supra* note 8, at 652-53. See also Ryan E. Meltzer, *Qualified Immunity and Constitutional-Norm Generation in the Post-Saucier Era: “Clearly Establishing” the Law through Civilian Oversight of Police*, 92 TEX. L. REV. 1277, 1295-99 (2014) (describing Supreme Court and circuit court decisions relying on nonjudicial sources to determine whether law was clearly established).

<sup>42</sup> *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

<sup>43</sup> See Kinports, *supra* note 2, at 70-71 (describing this shift in the law).

The Court's most recent decisions also suggest there must be an extremely close factual link between the prior decision and the instant case. The Court has repeatedly assured plaintiffs that it "do[es] not require a case directly on point," but requires that "existing precedent must have placed the statutory or constitutional question beyond debate."<sup>44</sup> In recent years, the Court has reversed several lower court decisions for relying on prior precedent that established constitutional principles at too general a level.<sup>45</sup>

Critics have argued not only that the Court's qualified immunity doctrine is confusing and difficult to apply, but also that it protects bad actors. The Court's disregard of subjective intent protects officers who act in bad faith.<sup>46</sup> In addition, government officials who have acted unconstitutionally can be shielded from liability simply because no prior case has held that conduct to be unconstitutional. It is, as Professor John Jeffries has written, "as if the one-bite rule for bad dogs started over with every change in weather conditions."<sup>47</sup> Even those who contend that qualified immunity doctrine serves a valuable role in the development and enforcement of constitutional rights believe that the doctrine is currently too deferential to government interests.<sup>48</sup>

## 2. *The Order of Battle*

The Court's decision to eliminate the subjective prong of qualified immunity—prompted by concerns about the burdens of discovery and trial—and to focus, instead, on whether the law has been clearly established, is related to another controversial aspect of qualified immunity doctrine often referred to as the "order of battle."<sup>49</sup> The "order of battle" concerns whether a court can grant qualified immunity on the ground that a constitutional right is not clearly established without first answering whether the defendant violated the constitutional right. In 2001, the Supreme Court held in *Saucier v. Katz* that the answer to this question was no—a court engaging in a qualified immunity analysis must first decide whether the defendant violated the plaintiff's constitutional rights and then decide whether the constitutional right was clearly established.<sup>50</sup> The Court insisted on this sequence because it would allow "the law's elaboration from case to case....The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."<sup>51</sup>

Eight years later, in *Pearson v. Callahan*, the Court reversed itself and concluded that *Saucier*'s two-step process was not mandatory.<sup>52</sup> In reaching this conclusion, the Court

---

<sup>44</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

<sup>45</sup> *See, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *White v. Pauly*, 137 S. Ct. 548 (2017).

<sup>46</sup> For example, in *Ashcroft v. Al-Kidd*, the Supreme Court held that then-Attorney General John Ashcroft was entitled to qualified immunity, even though he authorized federal prosecutors to use the material-witness statute pretextually, because qualified immunity doctrine "demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 734 (2011).

<sup>47</sup> John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013).

<sup>48</sup> *See, e.g., id.*

<sup>49</sup> *Pearson v. Callahan*, 555 U.S. 223, 234 (2009).

<sup>50</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>51</sup> *Id.*

<sup>52</sup> 555 U.S. 223 (2009).

2017]

11

explained that requiring courts to decide whether a plaintiff's constitutional rights were violated before deciding whether the law was clearly established had been harshly criticized by judges as burdensome for both courts and litigants.<sup>53</sup> Yet, after *Pearson*, commentators fear that if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established—leading to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims, and offering little guidance to government officials about the scope of constitutional rights.<sup>54</sup> Scholars who have studied the impact of *Pearson* have found some evidence to support these concerns.<sup>55</sup>

The dueling interests described in *Saucier* and *Pearson* have been described as a “dilemma” and a “conundrum.”<sup>56</sup> It is crucial to remember, however, that this dilemma is a product of the Court's own decisions. The Supreme Court has made clear that qualified immunity motions can only be denied if defendants have violated clearly established law, and that the law can only be clearly established if prior decisions have held similar conduct unconstitutional. As courts accept *Pearson*'s invitation not to answer qualified immunity's first step—whether a constitutional right was violated—it becomes increasingly difficult for plaintiffs to defeat qualified immunity because they cannot point to prior decisions holding similar conduct unconstitutional. Were courts permitted to deny qualified immunity to officers acting in bad faith, or to officers acting in a “clearly unconstitutional” manner (even if there was not a prior case on point),<sup>57</sup> less would turn on whether courts answered qualified immunity's first step. Because *Harlow* eliminated the subjective element of qualified immunity and focused on clearly established law in an effort to protect government officials from discovery and trial, the dilemma associated with the order of battle is at least partially attributable to the Court's assumptions about the burdens of discovery and trial and the ability of qualified immunity to protect government officials from bearing those burdens.

---

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark*, 7 OHIO ST. J. CRIM. L. 463, 502-06 (2009); Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

<sup>55</sup> See Aaron Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015). See also Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights* 80 U. COLO. L. REV. 401 (2009) (predicting that *Pearson* will lead to constitutional stagnation); Colin Rolfs, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468 (2011) (finding that, after *Pearson*, district courts often answered both steps of the qualified immunity analysis, but circuit courts more often decided qualified immunity motions without ruling on the underlying constitutional right). *Cf.* Ted Sampsell-Jones & Jenna Yauch, Note, *Measuring Pearson in the Circuits*, 80 FORDHAM L. REV. 623, 625 (2011) (finding that circuit courts followed the *Saucier* two-step process “most of the time”).

<sup>56</sup> Pfander, *supra* note 54; Nielson & Walker, *supra* note 55.

<sup>57</sup> See Jeffries, *supra* note 6 (suggesting that qualified immunity should turn on whether defendants' conduct was “clearly unconstitutional,” not on whether the law was “clearly established”).

### 3. Interlocutory Appeals

The Court's interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials.<sup>58</sup> Generally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right "cannot be effectively vindicated after the trial has occurred."<sup>59</sup> The question, then, decided by the Court in *Mitchell v. Forsyth*, was whether qualified immunity should be understood as an entitlement not to stand trial that cannot be remedied by an appeal at the end of the case. In concluding that a denial of qualified immunity could be appealed immediately, the Court relied on its assertion in *Harlow* that qualified immunity was "an entitlement not to stand trial or face the other burdens of litigation."<sup>60</sup> If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants who lose on qualified immunity grounds could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and...it is effectively lost if a case is erroneously permitted to go to trial."<sup>61</sup>

### C. Conclusion

The Supreme Court's qualified immunity decisions over the past thirty-five years have relied heavily on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity shields government officials from these burdens. Yet the Court has relied on no empirical evidence to support these assumptions. Scholars have decried the lack of empirical evidence about the realities of civil rights litigation practice relevant to questions about the proper scope of qualified immunity doctrine and the extent to which the doctrine achieves its intended purposes.<sup>62</sup> This Article, and my research more generally, aims to fill that gap.

---

<sup>58</sup> *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Note that a defendant can immediately appeal a decision that the law was clearly established, but cannot immediately appeal a denial of qualified immunity made on grounds that there exists a genuine issue of fact for trial. See *Johnson v. Jones*, 515 U.S. 304 (1995).

<sup>59</sup> *Mitchell*, 472 U.S. at 525.

<sup>60</sup> *Id.* at 527.

<sup>61</sup> *Id.*

<sup>62</sup> Twenty years ago, Alan Chen complained that the Court and its critics make assertions about the role of qualified immunity in constitutional litigation without evidence to support their claims. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 101 (1997) ("Presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics. While the Court has consistently hypothesized that significant social costs are engendered by §1983 and Bivens litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials' actual behavior. Similarly, while other commentators also have observed that qualified immunity litigation may generate substantial social costs, they have offered no supporting empirical data either.") The same is largely true today. See also Richard H. Fallon, Jr., *Asking the Right Questions about Officer Immunity*, 80 FORDHAM L. REV. 479, 500 (2011) (writing that "we could make far better judgments of how well qualified immunity serves the function of getting the right balance between deterrence of constitutional violations and chill of conscientious official action if we had better empirical information.").

## II. STUDY METHODOLOGY

To explore the role that qualified immunity plays in the litigation of Section 1983 suits, I reviewed the dockets of cases filed from January 1, 2011-December 31, 2012 in five districts: the Southern District of Texas; Middle District of Florida; Northern District of Ohio; Eastern District of Pennsylvania; and Northern District of California. There were several considerations that led me to study these five districts.

I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh circuits because I expected judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal.<sup>63</sup> Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh circuit so hostile to Section 1983 cases that they are described as applying “unqualified immunity.”<sup>64</sup>

I chose these five districts within these five circuits for two reasons. First, I expected that these five districts would have a large number of cases to review: In 2011-12, these districts were among the busiest in the country, measured by case filings.<sup>65</sup> Second, these five districts have a range of small, medium, and larger law enforcement agencies and agencies of comparable sizes.<sup>66</sup>

I chose to review dockets instead of relying on the most obvious alternative—decisions available on Westlaw.<sup>67</sup> Although Westlaw can quickly sort out decisions in which qualified immunity is addressed by district courts, Westlaw could not capture information essential to my analysis about the frequency with which qualified immunity protects government officials from discovery and trial. First, of course, a Westlaw search could capture no information about the number of cases in which qualified immunity was never raised. In addition, a Westlaw search could not capture information about the number of cases in which qualified immunity was raised by the defendant in his motion but was not

---

<sup>63</sup> See, e.g., Reinert, *supra* note 11, at 832 n.126 (citing Lee Epstein, et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 312 fig. 4 (2007)).

<sup>64</sup> See Jeffries, *supra* note 47, at 250 n.151; Wilson, *supra* note 40 (describing the Eleventh Circuit as having a very restrictive view and the Third Circuit as having a broader view of what constitutes “clearly established law”). See also *Ashcroft v. Al-Kidd*, 131 S.Ct. 2074, 2084 (2011) (“We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”) (citation omitted).

<sup>65</sup> See ADMINISTRATIVE OFFICE OF U.S. COURTS, U.S. DISTRICT COURTS, FACTS AND FIGURES (Sept. 30, 2012), <http://www.uscourts.gov/statistics/table/42/judicial-facts-and-figures/2012/09/30>.

<sup>66</sup> For example, the Philadelphia and Houston Police Departments are both large, with between 5000-7000 officers; the Cleveland Police Department, San Francisco Police Department, and Jacksonville Sheriff’s Office, are midsized, with between 1600-2000 officers; and all five districts have smaller agencies. See Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT’L ARCHIVE CRIMINAL JUSTICE DATA (2008), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681>.

<sup>67</sup> Most empirical studies examining qualified immunity have relied on decisions available on Westlaw. See studies referenced *infra* note 62. One notable exception is Professor Reinert’s study of *Bivens* dockets. See *supra* note 11.

addressed by the court in its decision. Even when a defendant raises qualified immunity and the district court addresses qualified immunity in its decision, the decision may not appear on Westlaw—Westlaw does not capture motions resolved without a written opinion, and includes only those decisions that are selected to appear on the service.<sup>68</sup> In other words, opinions on Westlaw can offer insights about the ways in which district courts assess qualified immunity when they choose to address the issue in a written opinion and the opinion is accessible on Westlaw, but can say little about the frequency with which qualified immunity is raised, the manner in which all motions raising qualified immunity are decided, and case dispositions.

I reviewed the dockets of cases filed in 2011 and 2012 in the five districts in my study.<sup>69</sup> I searched case filings in the five districts in my study through BloombergLaw, a website that has dockets otherwise available through PACER and additionally provides access to documents submitted to the court—complaints, motions, orders, and other papers.<sup>70</sup> Within BloombergLaw, I limited my search to those cases that had been designated under the broad term “civil rights,” code 440.<sup>71</sup> This search generated 462 dockets in the Southern District of Texas, 465 dockets in the Northern District of Ohio, 674 dockets in the Middle District of Florida, 712 dockets in the Northern District of California, and 1435 cases in the Eastern District of Pennsylvania. I reviewed the complaints associated with these 3748 dockets and included in my dataset those cases, brought by civilians, alleging constitutional violations by state and local law enforcement agencies and their employees.<sup>72</sup>

I limited my study to cases brought by civilians against law enforcement defendants for several reasons. First, many of the Supreme Court’s qualified immunity decisions have involved cases brought against law enforcement. Of the twenty-eight qualified immunity

---

<sup>68</sup> Relying on Westlaw would have significantly reduced the number of qualified immunity opinions in my dataset. I searched on Westlaw for the qualified immunity opinions I found on BloombergLaw, and 64% of those decisions were available on Westlaw. *C.f.* David Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. L. REV. 681 (2007) (finding that only 2% of all district court orders appear on Westlaw).

<sup>69</sup> I chose this two-year period because it is a recent period in which most (if not all) cases have been resolved by the time of this Article’s publication.

<sup>70</sup> See Email from Tania Wilson, BloombergLaw Law School Relationship Manager, West Coast, to Kelley Leong (July 8, 2016, 12:18 PM) (“[BloombergLaw] ha[s] everything on PACER. We are also able to obtain docket sheets and documents via courier retrieval (which would fill in the gap of some cases not available electronically).”).

<sup>71</sup> There is a more restrictive code that I could have used to narrow the search: 42 U.S.C. § 1983. However, I found that many Section 1983 cases were not designated in this manner. Accordingly, I used the broader search. It is possible that some Section 1983 cases against state and local law enforcement officers may not be coded 440 – there is, for example a code for “550: Prisoner – Civil Rights” that some incarcerated plaintiffs may use in cases brought against law enforcement officers.

<sup>72</sup> I limited my study to state and local law enforcement agencies identified in the Bureau of Justice Statistics Census of State and Local Law Enforcement. See Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT’L ARCHIVE CRIMINAL JUSTICE DATA (2008), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681> [hereinafter BJS LAWENFORCEMENT CENSUS DATA]. I excluded decisions involving other types of government officials, including some government officials that perform law enforcement functions, including law enforcement employed by school districts, state correctional officers, and federal law enforcement. I have additionally excluded Section 1983 actions brought by law enforcement officials as plaintiffs. Finally, I removed duplicate filings, cases that were consolidated, and cases that were improperly brought against law enforcement agencies located outside of the five districts.

2017]

15

cases that the Supreme Court has decided since 1982, half have involved constitutional claims against state and local law enforcement.<sup>73</sup> Given that the Supreme Court has developed qualified immunity doctrine, and articulated its underlying purposes, primarily in cases involving law enforcement, it makes sense to examine the extent to which the doctrine is meeting its express goals in these types of cases.

Limiting my study to Section 1983 cases against state and local law enforcement also creates some substantive consistency across the cases in my dataset. Most Section 1983 cases against state and law enforcement allege Fourth Amendment violations—excessive force, false arrest, and wrongful searches—and, less frequently, First Amendment violations. Restricting my study to suits by civilians against state and local law enforcement facilitates direct comparison of outcomes in similar cases across the five districts in my study. Finally, much of my own prior research has focused on lawsuits against state and local law enforcement, and maintaining this focus here can allow for future synthesis of my findings.<sup>74</sup>

The resulting dataset includes a total of 1183 cases from these five districts: 131 cases from the Southern District of Texas, 225 cases from the Middle District of Florida, 172 cases from the Northern District of Ohio, 248 cases from the Northern District of California, and 407 cases from the Eastern District of Pennsylvania. For each of these dockets, I tracked multiple pieces of information relevant to this study, including whether the plaintiff sued individual officers and/or the municipality, the relief sought by the plaintiff(s), whether the law enforcement defendant(s) filed one or more motions to dismiss on the pleadings or for summary judgment, whether and when the defendant raised qualified immunity, how the court decided the motions raised by the defendants, whether there was an appeal of the qualified immunity decisions, and how the case was ultimately resolved.<sup>75</sup> Although some of this information was available from the docket sheet, much of the information was obtained by accessing and reading motions and opinions linked to the dockets on BloombergLaw.

Although some of my coding decisions were straightforward, others involved less obvious choices. Because my coding decisions may make most sense when reviewed in context, I have described those decisions in detail in the footnotes accompanying the data.<sup>76</sup> Throughout, my coding decisions were guided by my focus on the role that qualified immunity played in the resolution of cases and the frequency with which the doctrine meets its express goal of shielding government officials from discovery and trial.

---

<sup>73</sup> See Baude, *supra* note 3. In the remaining fourteen cases, two alleged constitutional violations by state corrections officials, six alleged constitutional violations by federal law enforcement, and four asserted constitutional claims against government officials not involved in the criminal justice system. See *id.*

<sup>74</sup> See, e.g., Schwartz, *supra* note 14; Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863-64 (2012); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016).

<sup>75</sup> I tracked additional information as well, including whether the plaintiff was represented, the attorneys involved in the cases, and the law enforcement agencies implicated in the cases. These data are relevant to subsequent related projects I intend to undertake and are not reported in this Article.

<sup>76</sup> See, e.g., *infra* notes 86, 89, 92, 95.



My dataset is comprehensive regarding these five districts—it presumably includes the vast majority of Section 1983 cases filed by civilians against state and local law enforcement in these federal districts over a two-year period, and offers insights about how frequently qualified immunity is raised in these cases, how courts decide these motions, and how the cases are resolved. There are, however, several limitations of the data worth mentioning. First, although I selected these five districts in part to capture regional variation, these five districts may not represent the full range of court and litigant behavior nationwide. The marked differences in my data across districts does, however, suggest a considerable degree of regional variation. Second, the data offer no information about the role of qualified immunity in state court litigation. This is due in part to the fact that BloombergLaw does not offer much information about the litigation of constitutional cases in state courts, to the extent they are litigated there.<sup>77</sup>

Third, although this study sheds light on the litigation of constitutional claims against state and local law enforcement officers, it is difficult to predict what role qualified immunity plays in the litigation of constitutional claims against other types of government employees. It may be that the types of constitutional claims often raised in cases against law enforcement—Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches—are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to plead in a plausible manner (and so could survive a motion to dismiss) and such claims may be particularly prone to factual disputes (making resolution at summary judgment difficult). If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because the Fourth Amendment requires a very fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene.<sup>78</sup> Further research should explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations.

Fourth, qualified immunity may be influencing the litigation of constitutional claims in ways that cannot be measured through the examination of case dockets.<sup>79</sup> For example, my study does not measure how frequently qualified immunity causes people not to file

---

<sup>77</sup> I looked at state court dockets available on BloombergLaw for counties in the Northern District of California and found that very few had any information about motions filed (in the instances that they were not removed to federal court). In addition, federal constitutional cases filed in state court are at least sometimes removed to federal court. In the Northern District of California, 55 of the 248 cases filed during the study period—22.2%—were initially filed in state court and removed to federal court. In the Northern District of Ohio, 59 of the cases were removed from state court, which constitutes 23.8% of the 248 cases filed in federal district court over those two years. In the Southern District of Texas, 27 cases were removed from state court, amounting to 20.6% of the 131 total filings in federal district court. In the Eastern District of Pennsylvania, 63 of the cases were removed from state court, which constitutes 15.5% of the 407 cases filed in federal court over these two years. In the Middle District of Florida, 60 of the cases were removed from state court, which constitutes 26.7% of the 225 cases filed in federal court over these two years. Of course, these figures do not capture how many cases were filed in state court but were not removed.

<sup>78</sup> See Jeffries, *supra* note 6, at 859-60.

<sup>79</sup> See notes 115-119 for further discussion of these remaining questions about the role of qualified immunity in constitutional litigation.

2017]

17

lawsuits. It does not capture information about the frequency with which plaintiffs' decisions to settle or withdraw their claims are influenced by the threat of a qualified immunity motion, or the outcome of a qualified immunity decision. And it does not assess the merits of cases that are never brought or are settled quickly because of qualified immunity. Exploration of these issues are critical to a complete understanding of the role qualified immunity plays in constitutional litigation. I discuss these issues in more depth in Part IV, and future research should explore these questions. Yet this Article illuminates several important aspects of qualified immunity's role in Section 1983 cases. Moreover, by measuring the frequency with which qualified immunity motions are raised, granted, and dispositive, this Article reveals the extent to which the doctrine functions as the Supreme Court expects and critics fear.

### III. FINDINGS

The Supreme Court has explained that a goal of qualified immunity is to “avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.”<sup>80</sup> Logic suggests that qualified immunity will only achieve this goal if four conditions are met.

First, the case must be brought against an individual officer and must seek monetary damages—qualified immunity is not available for claims against municipalities or claims for non-economic relief. Second, the defendant must raise the qualified immunity defense early enough in the litigation that it can protect him from discovery or trial. If the defendant seeks to protect himself from discovery, he must raise qualified immunity in a motion to dismiss or a motion for judgment on the pleadings; if a defendant seeks to protect himself from trial, he can raise qualified immunity at the pleadings or at summary judgment.<sup>81</sup> Third, for a qualified immunity motion to protect government officials against burdens associated with discovery or trial, the court must grant the motion on qualified immunity grounds.<sup>82</sup> Finally, the grant of qualified immunity must completely resolve the case. If qualified immunity is granted for an officer on one claim but not another, that officer will continue to have to participate in the litigation of the case. Even when a grant of qualified immunity results in the dismissal of all claims against a defendant, that defendant may still have to participate in the litigation of claims against other defendants. To be sure, the government official who has been dismissed from the case may no longer feel the same psychological burdens associated with the litigation and may have lesser discovery burdens than he would have had as a defendant, but he may still bear the burdens of participating in some aspects of discovery and trial.

---

<sup>80</sup> *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817-18).

<sup>81</sup> In some instances, motions for summary judgment may be made before the parties have engaged in full-fledged discovery, either because the parties will attach documentary evidence to their Rule 12 motion and the court will convert the motion to one for summary judgment, or because the parties will engage in partial discovery sufficient only to address the qualified immunity question. For further discussion of the frequency with which defendants in my dataset moved for summary judgment without discovery, see *infra* note 88 and accompanying text.

<sup>82</sup> It is possible that a court could deny a qualified immunity motion in part or whole, but the motion could nevertheless influence the courts' other rulings regarding discovery or other pretrial matters. I have not endeavored to measure these secondary effects of denied qualified immunity motions, but they merit further consideration.

This Part describes my findings regarding the frequency with which each of these conditions are met. I empirically examine six topics: the number of cases in which qualified immunity can be raised by defendants; the number of cases in which defendants choose to raise qualified immunity; the stage(s) of litigation at which defendants raise qualified immunity; the ways in which district courts decide qualified immunity motions; the frequency and outcome of qualified immunity appeals; and, finally, the frequency with which qualified immunity is the reason that a case ends before discovery or trial.

#### A. Cases in Which Qualified Immunity Cannot Play a Role

There are certain types of cases in which qualified immunity cannot play a role. The Supreme Court has held that qualified immunity does not apply to claims against municipalities and claims for injunctive or declaratory relief.<sup>83</sup> Accordingly, qualified immunity cannot protect government officials from discovery or trial in cases asserting only these types of claims. In my docket dataset of 1183 cases, 101 cases (8.5%) were brought solely against municipalities and/or sought only injunctive or declaratory relief.<sup>84</sup>

TABLE 1: FREQUENCY WITH WHICH QUALIFIED IMMUNITY CAN BE RAISED, IN FIVE DISTRICTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Total Section 1983 cases filed	131	225	172	248	407	1183
Total Section 1983 cases against municipalities/seeking solely injunctive relief	14	28	13	22	24	101 (8.5%)
Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond	11	42	20	7	23	103 (8.7%)
Section 1983 cases in which QI can be raised by defendants	106	155	139	219	360	979 (82.8%)

Even when cases are brought against individual officers and seek monetary relief, there are some cases in which defendants have no need to raise qualified immunity as a defense—cases dismissed *sua sponte* by the court before the defendants have an opportunity to respond to the complaint. In these types of cases, qualified immunity is unnecessary to protect defendants from discovery and trial. In the five districts in my docket dataset, 103 complaints (8.7%) naming individual law enforcement officers and seeking damages were dismissed *sua sponte* by district courts before defendants answered or responded. Most often, district courts dismissed these cases pursuant to their statutory power to review *pro se* plaintiffs' complaints and dismiss actions they conclude are

<sup>83</sup> See *supra* notes 26-27 and accompanying text.

<sup>84</sup> In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were unable to identify the officers during the pendency of the case. When Doe defendants are identified in the complaint and subsequently named, I count these as cases against individual defendants; when Doe defendants are named but their true identities are never identified, I count these as cases only against the municipality, as the Doe defendants could not raise a qualified immunity defense unless they are identified. In other instances, plaintiffs might have intentionally named only the municipality.

2017]

19

frivolous or meritless.<sup>85</sup> Other cases were dismissed by the court at this preliminary stage because the plaintiffs never served the defendants or failed to prosecute the case, or the court remanded the case to state court for lack of subject matter jurisdiction before the defendants were served or responded.

Qualified immunity can only protect government officials from discovery and trial in cases in which government defendants can raise the defense. Defendants could not raise qualified immunity in 8.5% of cases in my docket dataset because those cases did not name individual defendants and/or seek damages. Qualified immunity was unnecessary to shield government officials from discovery or trial in another 8.7% of cases in my dataset because these cases were dismissed by the district courts before defendants could raise the defense. Accordingly, defendants could raise a qualified immunity defense in a total of 979 (82.8%) of the 1183 Section 1983 complaints filed during the two-year study period in the five districts in my study.

### *B. Defendants' Choices: The Frequency and Timing of Qualified Immunity Motions*

Qualified immunity can only protect a defendant from the burdens of discovery and trial if she raises the defense in a dispositive motion. Accordingly, this subpart examines the frequency with which defendants raise qualified immunity, the stage of litigation at which they raise the defense, and the frequency with which qualified immunity is included in defendants' motions to dismiss, motions for judgment on the pleadings, and motions for summary judgment.<sup>86</sup>

TABLE 2: FREQUENCY WITH WHICH QUALIFIED IMMUNITY IS RAISED, IN FIVE DISTRICTS

District	Total Cases Raising QI	Total Cases in which QI could be raised
S.D. TX	58 (54.7%)	106
M.D. FL	84 (54.2%)	155
N.D. OH	65 (46.8%)	139
N.D. CA	73 (33.3%)	219
E.D. PA	87 (24.2%)	360
Total	367 (37.5%)	979

Defendants raised qualified immunity one or more times in 367 (37.5%) of the 979 cases in which defendants could raise the defense. The frequency with which defendants raised qualified immunity varied substantially by district. Defendants in the Southern District of Texas and the Middle District of Florida were most likely to raise the qualified immunity defense; in these districts, defendants brought one or more motions raising

<sup>85</sup> A total of 71 cases were dismissed for on these grounds. *See* 28 U.S.C. § 1915(e). Note that district courts could exercise this power based on a belief that the defendants were entitled to qualified immunity. None of these § 1915(e) dismissals referenced or appeared to rely on qualified immunity as a basis for the decision, however.

<sup>86</sup> Because qualified immunity is an affirmative defense, government defendants may also raise qualified immunity in their answers. I did not track the frequency with which government defendants raised qualified immunity in their answers because my focus is on the frequency with which qualified immunity leads to case dismissal, but found no instances in which a defense raised in an answer led to dismissal without a separate motion raising the defense.

qualified immunity in approximately 54% of the cases in which the defense could be raised. Defendants in the Eastern District of Pennsylvania were least likely to raise the qualified immunity defense; defendants brought one or more motions raising qualified immunity in 24.2% of cases in which the defense could be raised. Defendants in the Northern District of California brought qualified immunity motions in 33.3% of possible cases, and in the Northern District of Ohio defendants raised qualified immunity in 46.8% of possible cases.

I additionally explored the stage(s) of litigation at which qualified immunity was raised. Of the 367 cases in which qualified immunity was raised at least once, defendants in 138 cases raised qualified immunity in one or more motions to dismiss or motions for judgment on the pleadings, and defendants in 270 cases raised qualified immunity in one or more summary judgment motions.<sup>87</sup> Based on my review of motions and opinions available on BloombergLaw, I can confirm only three cases in which defendants included qualified immunity in a motion at or after trial for judgment as a matter of law. My data almost certainly underrepresent the role qualified immunity plays at or after trial, however, as BloombergLaw does not include motions made orally or court decisions issued without a written opinion.

TABLE 3: TIMING OF QUALIFIED IMMUNITY MOTIONS IN FIVE DISTRICTS

District	D raising QI at MTD/pleadings	D raising QI at SJ	D raising QI at or after trial	Total QI motions
S.D. TX	21 (32.8%)	43 (67.2%)	0	64
M.D. FL	51 (50%)	50 (49%)	1 (1%)	102
N.D. OH	17 (25%)	51 (75%)	0	68
N.D. CA	18 (22%)	63 (76.8%)	1 (1.2%)	82
E.D. PA	31 (32.6%)	63 (66.3%)	1 (1.1%)	95
Total	138 (33.6%)	270 (65.7%)	3 (.7%)	411

Across the five districts in my study, defendants raised qualified immunity at summary judgment almost twice as often as they did at the motion to dismiss stage. There is, however, regional variation in this regard. Defendants in the Middle District of Florida were equally likely to raise qualified immunity at the pleadings stage and at summary judgment, whereas in the Northern District of Ohio and the Northern District of California defendants brought three times as many summary judgment motions on qualified immunity grounds as they did motions to dismiss on qualified immunity grounds.

Defendants in forty-four (11.9%) of the 367 cases raised qualified immunity at more than one stage of litigation. Defendants in the Middle District of Florida were most likely

<sup>87</sup> In some cases, defendants made multiple motions to dismiss or for summary judgment on qualified immunity grounds. I have not counted each motion made by the parties. If, for example, defendants moved to dismiss on qualified immunity grounds, the court granted the motion with leave to amend, the plaintiff filed an amended complaint, and defendants moved again to dismiss on qualified immunity, I have not counted the second motion. As another example, if one defendant moves for summary judgment on qualified immunity grounds, and another defendant brings a separate summary judgment motion raising qualified immunity, I have not counted the second motion. I have made this choice because my focus is on the frequency with which defendants invoke qualified immunity at each stage of the litigation, not the total number of motions that are filed at any given stage.

2017]

21

to raise qualified immunity multiple times; they did so in eighteen (21.4%) of the cases in which the defense was raised. Defendants in the other districts were less inclined to raise qualified immunity at multiple stages of litigation; they did so in 9 (12.3%) of the cases in which the defense was raised in the Northern District of California, in 6 (10.3%) of the cases in the Southern District of Texas, in 8 (9.2%) of the cases in the Eastern District of Pennsylvania, and in 3 (4.6%) of the cases in the Northern District of Ohio.

I also sought to calculate how frequently defendants chose to raise qualified immunity motions in all of the cases in which such motions could be brought. This calculation is relatively straightforward regarding motions to dismiss. Defendants could have brought motions to dismiss on qualified immunity grounds in any of the 979 cases in which the defense could be raised, and did so in 138 (14.1%) of these cases.

Calculating the number of possible summary judgment motions on qualified immunity grounds is more complicated. Although defendants could bring a summary judgment motion in any case in which they could offer some evidence in support of their motion, defendants generally do not move for summary judgment without having engaged in at least some formal discovery.<sup>88</sup> It is difficult to discern from case dockets to what extent parties have engaged in discovery, but the dockets do reflect whether a case management order has been issued, which generally sets the discovery schedule and is the first step of the discovery process. If entry of a case management order can serve as a very rough proxy that a case has entered discovery, and if one accepts that defendants in cases that have conducted some discovery could move for summary judgment, then there are 577 cases in my dataset in which defendants could have moved for summary judgment. Defendants brought summary judgment motions on qualified immunity grounds in 270 (46.8%) of these cases.

Finally, I explored how frequently defendants raise other types of defenses in motions to dismiss or for judgment on the pleadings and in summary judgment motions. Qualified immunity is usually one of several arguments defendants make in their motions to dismiss and for summary judgment. Indeed, defendants sometimes move to dismiss or for summary judgment without raising qualified immunity at all.

Of the 419 cases in my docket dataset in which defendants could raise qualified immunity and defendants filed one or more motions to dismiss, defendants in 138 (32.9%) of the motions included a qualified immunity argument.<sup>89</sup> Defendants in the Middle District of Florida were the most likely to raise qualified immunity in motions to dismiss or for judgment on the pleadings—defendants included a qualified immunity argument in 45.1% of their motions, compared with 38.2% of the motions filed by defendants in the Southern District of Texas, 32.7% of the motions filed by defendants in the Northern District of Ohio, 27.2% of the motions filed by defendants in the Eastern District of Pennsylvania, and 21.2% of the motions filed by defendants in the Northern District of California. Motions to dismiss or for judgment on the pleadings that did not raise qualified immunity

---

<sup>88</sup> I located just three cases in my dataset—two from the Southern District of Texas and one from the Northern District of California—in which defendants appear to have moved for summary judgment without first conducting discovery.

<sup>89</sup> I have included in my count of motions to dismiss and for summary judgment instances in which the municipality moved to dismiss, but the individual defendant(s) did not. One could take issue with this choice, as municipalities are not protected by qualified immunity. Yet I included these motions in my calculation because they reflect opportunities in which the law enforcement defendants moved to dismiss, but failed to raise qualified immunity in the motion.

focused instead on arguments that plaintiffs' complaint did not satisfy plausibility pleading requirements, concerned a claim that was barred by a criminal conviction, or otherwise did not state a legally cognizable claim.<sup>90</sup>

FIGURE 1: MOTIONS ON THE PLEADINGS IN FIVE DISTRICTS

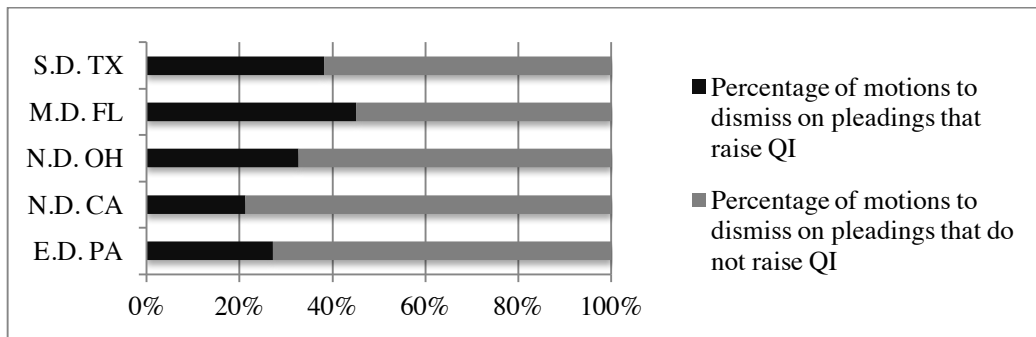
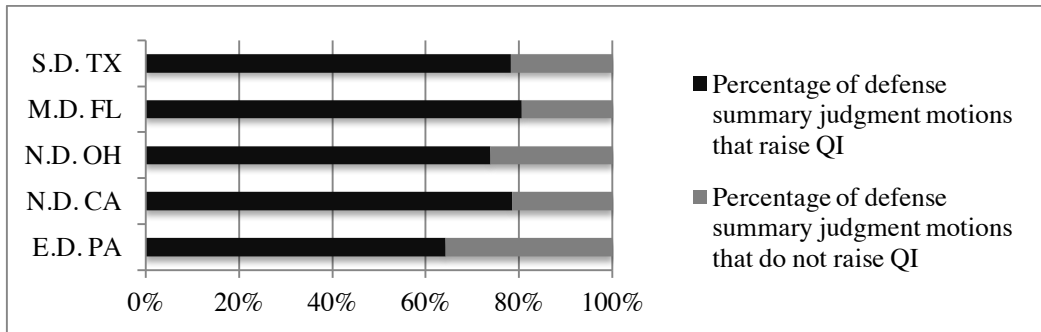


FIGURE 2: SUMMARY JUDGMENT MOTIONS IN FIVE DISTRICTS



Defendants in all five districts were far more likely to include a qualified immunity argument in their summary judgment motions. There were 363 cases in which defendants moved for summary judgment and could raise qualified immunity, and 270 of those cases (74.4%) included an argument based on qualified immunity. There was some variation among the districts in this area as well, although the regional variation was less here than in other aspects of qualified immunity litigation practice.<sup>91</sup>

<sup>90</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (setting out the plausibility pleading standard); *Heck v. Humphrey*, 512 U.S. 477 (1994) (holding that a plaintiff seeking damages for unconstitutional conviction or sentence must have that conviction or sentence declared invalid before a Section 1983 claim can proceed).

<sup>91</sup> Qualified immunity was raised in 64% of summary judgment motions filed in the Eastern District of Pennsylvania; 74% of summary judgment motions filed in the Northern District of Ohio; 78% of summary judgment motions filed in the Southern District of Texas; 79% of summary judgment motions filed in the Northern District of California; and 81% of summary judgment motions filed in the Middle District of Florida.

2017]

23

*C. District Courts' Decisions: The Success Rate of Qualified Immunity Motions*

This subpart examines how frequently district courts grant motions to dismiss and for summary judgment on qualified immunity grounds. As I have shown, qualified immunity is almost always raised in conjunction with other arguments in motions to dismiss or for summary judgment. My focus here is on the way in which the qualified immunity argument is evaluated by the district court.

TABLE 4: SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY IN DOCKET DATASET

	QI Denied	QI GiP	QI Granted	QI in the Alternative/ Fails 1 <sup>st</sup> step	Grant (Not on QI)	GiP (Not on QI or QI in Alt.)	Not Decided	Total
S.D. TX	13 (20.3%)	4 (6.3%)	17 (26.6%)	6 (9.4%)	8 (12.5%)	3 (4.7%)	13 (20.3%)	64
M.D. FL	35 (34.3%)	7 (6.7%)	17 (16.7%)	10 (9.8%)	11 (10.8%)	4 (3.9%)	18 (17.6%)	102
N.D. OH	22 (32.4%)	8 (11.8%)	4 (5.9%)	10 (14.7%)	12 (17.6%)	3 (4.4%)	9 (13.2%)	68
N.D. CA	25 (30.5%)	9 (11%)	8 (9.8%)	11 (13.4%)	8 (9.8%)	6 (7.3%)	15 (18.3%)	82
E.D. PA	33 (34.7%)	1 (1.1%)	4 (4.2%)	14 (14.7%)	22 (23.2%)	6 (6.3%)	15 (15.8%)	95
Total	128 (31.1%)	29 (7.1%)	50 (12.2%)	51 (12.4%)	61 (14.8%)	22 (5.4%)	70 (17%)	411

In the five districts in my docket dataset, defendants raised qualified immunity in a total of 411 motions. Table 4 reflects the way in which district courts resolved those motions.<sup>92</sup> Across the five districts in my study, qualified immunity motions were denied 31.1% of the time. Qualified immunity motions in these five districts were granted in part—on some claims or defendants but not others—7.1% of the time and granted in full on qualified immunity grounds 12.2% of the time. In another 12.4% of the decisions, courts concluded that plaintiff had not met her burden of establishing a constitutional violation and either declined to reach the second step of the qualified immunity analysis (whether a reasonable officer would have believed that the law was clearly established) or granted qualified immunity in the alternative. Courts in 14.8% of the cases granted defendants' motions on other grounds without addressing qualified immunity. And district courts in my study did not decide 17% of the motions raising qualified immunity, usually because the cases settled or were voluntarily dismissed while the motions were pending.

<sup>92</sup> I have coded decisions in a way that focuses on the role of qualified immunity in the decision. If a defendant's motion raises multiple arguments and qualified immunity is granted but all other bases for the motion are denied, I coded that decision as granted on qualified immunity grounds. Conversely, if defendant's motion raises multiple arguments and qualified immunity is denied and all other bases for the motion are granted, I coded that decision as denied on qualified immunity. Included in the "QI Granted in Part" column are decisions in which one or more defendants who have moved to dismiss on qualified immunity grounds were awarded qualified immunity, but qualified immunity was denied for some defendants or claims. If a motion is granted by a court but the decision clearly states that the motion was granted because the plaintiff has failed to establish a constitutional violation, or states that the motion is granted on qualified immunity in the alternative, I have included those decisions in a separate category—"QI in the Alternative/Fails 1<sup>st</sup> Step." In the "Grant/GiP (Not on QI)" category are decisions in which the motions are granted in full or in part on grounds other than qualified immunity—this category includes decisions in which the district court does not mention qualified immunity, or mentions qualified immunity but states that the decision is not based on qualified immunity grounds.



There was substantial variation in courts' decisions across the districts in my study. The Southern District of Texas had the lowest rate of qualified immunity denials (20.3%). In the remaining four districts, judges denied qualified immunity in 30-35% of the cases in which the defense was raised. The Southern District of Texas also had the highest rate of qualified immunity grants: Courts in the Southern District of Texas granted qualified immunity motions in part or full on qualified immunity grounds in 32.9% of the cases in which the defense was raised. In contrast, courts in the Eastern District of Pennsylvania granted only 5.3% of the qualified immunity motions in whole or part on qualified immunity grounds.<sup>93</sup>

TABLE 5: RULINGS ON MOTIONS ON THE PLEADINGS THAT RAISED QUALIFIED IMMUNITY IN FIVE DISTRICTS

	QI Denied	QI Granted in Part	QI Granted	QI in the Alternative/ Fails 1 <sup>st</sup> step	Grant (Not on QI)	GiP (Not on QI or QI in Alt.)	Total
S.D. TX	5 (31.3%)	1 (6.3%)	5 (31.3%)	1 (6.3%)	3 (18.8%)	1 (6.3%)	16
M.D. FL	20 (50%)	1 (2.5%)	5 (12.5%)	1 (2.5%)	9 (22.5%)	4 (10%)	40
N.D. OH	4 (30.8%)	1 (7.7%)	0	4 (30.8%)	2 (15.4%)	2 (15.4%)	13
N.D. CA	5 (33.3%)	5 (33.3%)	0	1 (6.7%)	1 (6.7%)	3 (20%)	15
E.D. PA	12 (44.4%)	0	2 (7.4%)	3 (11.1%)	8 (29.6%)	2 (7.4%)	27
Total	46 (41.4%)	8 (7.2%)	12 (10.8%)	10 (9%)	23 (20.7%)	12 (10.8%)	111

TABLE 6: RULINGS ON SUMMARY JUDGMENT MOTIONS THAT RAISED QUALIFIED IMMUNITY IN FIVE DISTRICTS

	QI Denied	QI Granted in Part	QI Granted	QI in the Alternative/ Fails 1 <sup>st</sup> step	Grant (Not on QI)	GiP (Not on QI or QI in Alt.)	Total
S. D. TX	8 (22.9%)	3 (8.6%)	12 (34.3%)	5 (14.3%)	5 (14.3%)	2 (5.7%)	35
M.D. FL	14 (32.6%)	6 (14%)	12 (27.9%)	9 (20.9%)	2 (4.7%)	0	43
N.D. OH	18 (39.1%)	7 (15.2%)	4 (8.7%)	6 (13%)	10 (21.7%)	1 (2.2%)	46
N. D. CA	20 (39.2%)	4 (7.8%)	8 (15.7%)	9 (17.6%)	7 (13.7%)	3 (5.9%)	51
E.D. PA	20 (38.5%)	1 (1.9%)	2 (3.8%)	11 (21.2%)	14 (26.9%)	4 (7.7%)	52
Total	80 (35.2%)	21 (9.3%)	38 (16.8%)	40 (17.6%)	38 (16.7%)	10 (4.4%)	227

I additionally evaluated differences in courts' decisions at the motion to dismiss and summary judgment stages, removing those motions that were never decided. Parsing the data in these ways reveal differences in the ways courts evaluate qualified immunity at

<sup>93</sup> The differences in the frequency with which qualified immunity is denied (column one in table 4) across the five districts are not statistically significant ( $\chi^2 = 4.61$ ,  $p=.33$ ). However, the differences in the frequency with which qualified immunity is granted or granted in part (columns three and four in table 4) across the five districts are statistically significant ( $\chi^2 = 20.98$ ,  $p<.001$ ). The differences in the frequency with which motions are granted or granted in part on grounds other than qualified immunity (columns four, five, and six in table 4) across the five districts are also statistically significant ( $\chi^2 = 10.63$ ,  $p=.03$ ).

2017]

25

these stages. Of the 111 motions to dismiss raising qualified immunity that courts decided, courts granted sixty-five (58.6%) of the motions in whole or part. Twenty (30.8%) of those sixty-five full or partial grants were decided on qualified immunity grounds. Of the 227 summary judgment motions raising qualified immunity that courts decided, courts granted 147 (64.8%) in whole or part. Fifty-nine (40.1%) of those 147 full or partial grants were decided on qualified immunity grounds. In other words, courts were more likely to grant summary judgment motions than motions to dismiss, and courts were more likely to grant summary judgment motions on qualified immunity grounds than they were to grant motions to dismiss on qualified immunity grounds. But courts more often than not granted both types of motions on grounds other than qualified immunity.

Parsing the data in this way also reveals striking regional variations. Of the motions to dismiss raising qualified immunity that were decided, courts in the Southern District of Texas granted more than 31% of the motions in full, whereas courts in the Northern District of Ohio and the Northern District of California granted *none* in full. Similarly, of the summary judgment motions raising qualified immunity that were decided, courts in the Southern District of Texas granted more than 34% of the motions in full, whereas courts in the Eastern District of Pennsylvania granted fewer than 4% of the motions in full.

#### *D. Circuit Courts' Decisions: The Frequency and Success of Qualified Immunity Appeals*

A complete examination of the role qualified immunity plays in constitutional litigation must examine the frequency and outcome of qualified immunity appeals. Defendants can appeal denials of qualified immunity immediately, and any qualified immunity decision can be appealed after a final judgment in the case.

TABLE 7: INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY DENIALS IN FIVE DISTRICTS

	Total Appeals	Affirmed	Reversed	Affirmed in Part	Withdrawn/Dismissed without decision	Pending
S.D. TX	5	3	0	0	2	0
M.D. FL	9	3	3	0	3	0
N.D. OH	15	5	1	2	7	0
N.D. CA	9	2	0	0	5	2
E.D. PA	1	0	1	0	0	0
Total	39	13 (33.3%)	5 (12.8%)	2 (5.1%)	17 (43.6%)	2 (5.1%)

Defendants immediately appealed thirty-nine of the 179 qualified immunity decisions in my docket dataset that were denied or granted in part—and thus could have been appealed at this stage of the litigation—an appeal rate of 29.2%. Across the five districts in my dataset, one-third of the lower courts' decisions on interlocutory appeal were affirmed, 17.9% were reversed or reversed in part, and 43.6% were withdrawn or dismissed by the parties without a decision by the court of appeals.

TABLE 8: OUTCOMES OF FINAL APPEALS OF QUALIFIED IMMUNITY DECISIONS IN FIVE DISTRICTS

	Total Appeals by Plaintiff(s)	Affirmed	Reversed	Affirmed in Part	Withdrawn/ Dismissed without decision	Pending
S.D. TX	10	7	0	0	2	1
M.D. FL	7	4	0	0	3	0
N.D. OH	5	3	2	0	1	0
N.D. CA	1	1	0	0	0	0
E.D. PA	1	1	0	0	0	0
Total	24	16 (66.7%)	2 (8.3%)	0	6 (25%)	1 (4.2%)

I also tracked the frequency with which plaintiffs appealed qualified immunity grants after a final judgment in the case.<sup>94</sup> Plaintiffs appealed twenty-four (30.4%) of the seventy-nine decisions granting defendants' qualified immunity motions in whole or part. Among these twenty-four appeals, lower court decisions granting qualified immunity were affirmed two-thirds of the time, reversed 8.3% of the time, and withdrawn 25% of the time.

#### *E. The Impact of Qualified Immunity on Case Dispositions*

A final question concerns the frequency with which qualified immunity results in the dismissal of Section 1983 cases. There are multiple ways to frame this inquiry. First, there is the question of which cases should be counted in the numerator—cases dismissed on qualified immunity grounds. I have included qualified immunity grants in this category unless the court ended its qualified immunity analysis after concluding that the plaintiff could not establish a constitutional violation, or granted the motion on qualified immunity in the alternative.<sup>95</sup> Although the question of whether a constitutional violation occurred is the first step of the qualified immunity analysis, this question would need to be resolved in the absence of qualified immunity. And although a court's decision to grant qualified immunity in the alternative may influence its dispositive holding in some manner, the qualified immunity decision was not formally necessary to resolve the case.

In addition, I have counted a case as dismissed on qualified immunity grounds only if the entire case has been dismissed as a result of the motion. One might assume that a grant of qualified immunity will always end a case. Yet there are multiple scenarios in which a case can continue after a grant of qualified immunity. At the pleadings stage, a court may grant a motion to dismiss on qualified immunity but also grant the plaintiff an opportunity to amend her complaint.<sup>96</sup> Not all defendants will necessarily move for qualified

<sup>94</sup> There is only one case in the docket dataset in which a defendant appealed a qualified immunity decision at the end of the case; that appeal was still open and is not included in Table 8.

<sup>95</sup> If these cases are included in my count, the number of cases dismissed on qualified immunity grounds increases from fifty to 101: A total of twenty-three cases in the Southern District of Texas; twenty-seven cases in the Middle District of Florida; fourteen cases in the Northern District of Ohio; nineteen cases in the Northern District of California; and eighteen cases in the Eastern District of Pennsylvania.

<sup>96</sup> This occurred in one case in my dataset. *See Daleo v. Polk County Sheriff*, 11-cv-2521 (M.D. Fla. 2011).

2017]

27

immunity,<sup>97</sup> or a defendant may move for qualified immunity regarding some but not all claims against him.<sup>98</sup> State law claims may also remain for which qualified immunity is not available, and these claims may proceed in federal court or be remanded to and pursued in state court.<sup>99</sup> In addition, municipalities cannot assert qualified immunity; accordingly, if there is a municipality named in the case at the time qualified immunity is granted, the case will continue.<sup>100</sup> Under each of these circumstances, government officials still face the possibility that they will be required to participate in discovery and trial as defendants, representatives of the defendants' agency and/or witnesses to the events in question.<sup>101</sup> Because open cases will continue to expose law enforcement defendants to the possibility of discovery and trial, qualified immunity has not fully served the purpose that is the "'driving force' behind creation of" the doctrine in these cases.<sup>102</sup>

---

<sup>97</sup> This occurred in four cases in my dataset. *See* Tarantino v. Canfield, 12-cv-0434 (M.D. Fla. 2012); Brivik v. Law, 11-cv-2101 (M.D. Fla. 2011); Terrell v. City of La Marque, 11-cv-0229 (S.D. Texas 2011) (note that a claim against the municipality also remained, *infra* note 100); Roberts v. Knight, 12-cv-1174 (S.D. Tex. 2012).

<sup>98</sup> This occurred in four cases in my dataset. *See* Jones v. City of Lake City, 11-cv-1210 (M.D. Fla. 2011); Kelly v. Papanos, 11-cv-0626 (S.D. Tex. 2011); Castillo v. City of Corpus Christi, 11-cv-0093 (S.D. Tex. 2011); Snowden v. City of Philadelphia, 11-cv-5041 (E.D. Pa. 2011).

<sup>99</sup> State law claims remained in federal court in two cases in my dataset. *See* Stephenson v. McClelland, 11-cv-2243 (S.D. Tex. 2011); McKay v. City of Hayward, 12-cv-1613 (N.D. Cal. 2012) (note that a municipal liability claim also remained, *see supra* note 100). There are eight cases in my dataset—six in the Middle District of Florida, one in the Northern District of Ohio, and one in the Eastern District of Pennsylvania—in which the federal claims were dismissed on qualified immunity grounds and state law claims were remanded to state court. I have sought information about whether plaintiffs continued to litigate these claims in state court by contacting plaintiffs' attorneys in these cases. Attorneys in two cases confirmed that they pursued the state claims in state court, and both cases resulted in settlements in state court. *See* Email from Jerry Theophilopoulos, attorney for plaintiffs in *Merricks v. Adkisson*, 12-cv-1805 (M.D. Fla. 2012), to author (Mar. 13, 2017, 6:50 AM) (confirming that plaintiff refiled the case in state court after the federal claims were dismissed on qualified immunity grounds, and that the case settled at mediation for \$30,000); Email from Nicholas Noel, attorney for plaintiffs in *O'Neill v. Kerrigan*, 11-cv-3437 (E.D. Pa. 2011), to author (Mar. 2, 2017, 12:18 PM) (confirming that case was refiled in state court and settled after the federal claims were dismissed on qualified immunity grounds). Attorneys in two cases confirmed that the cases were not refiled in state court. *See* Email from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, 11-cv-0707 (M.D. Fla. 2011), to author (Mar. 2, 2017, 10:15 AM) (reporting that the state claims were not refiled in state court after summary judgment was granted on the federal claims) Email from Cynthia Conlin, attorney for plaintiffs in *Olin v. Orange County Sheriff*, 12-cv-1455 (M.D. Fla. 2012), to author (Mar. 2, 2017, 10:31 AM) (reporting that plaintiff did not pursue state law claims in state court after federal claims were dismissed on qualified immunity grounds). I sought but did not receive information about the other four cases.

<sup>100</sup> This occurred in three cases in my dataset. Terrell v. City of La Marque, 11-cv-0229 (S.D. Texas 2011) (note that claim against other defendants who did not raise qualified immunity also remained, *supra* note 97); Porter v. City of Santa Rosa, 11-cv-4886 (N.D. Cal. 2011); McKay v. City of Hayward, 12-cv-1613 (N.D. Cal. 2012) (note that state law claims also remained against the individual defendants, *see infra* note 99).

<sup>101</sup> *See supra* note 34 and accompanying text, describing the Court's concerns about burdens on government officials who are not named defendants.

<sup>102</sup> Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citing Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

TABLE 9: IMPACT OF QUALIFIED IMMUNITY IN FIVE DISTRICTS, BY STAGE OF LITIGATION

	Total cases raising QI on the pleadings	Total QI Grants on the pleadings	Case dismissals on QI at the pleadings	Total cases raising QI at summary judgment	Total QI Grants at SJ	Case Dismissals on QI at SJ	Total QI Appeals By Ds	Total Reversals	Case Dismissals From Appeal
S. D. TX	21	5	4	43	12	8	5	0	0
M.D. FL	51	5	3	50	12	9	9	3	2
N.D. OH	17	0	0	51	4	3	15	1	1
N. D. CA	18	0	0	63	8	3	9	0	0
E.D. PA	31	2	1	63	2	1	1	1	1
Total	138	12	8	270	38	24	39	5	4

As Table 9 shows, there are fifty cases in my dataset in which district courts granted in full defendants' dispositive motions on qualified immunity grounds. Of those fifty cases, thirty-two (64%) were dismissed as a result of the qualified immunity decision. Two-thirds of qualified immunity grants at the pleadings led to case dismissals, and 63.2% of qualified immunity grants at summary judgment led to case dismissals. Defendants brought thirty-nine interlocutory appeals of qualified immunity denials, and courts of appeals reversed five (12.8%) of those decisions. All five reversals were of summary judgment decisions, and four of the five resulted in case dismissals. In total, qualified immunity led to dismissal of thirty-six cases in my dataset.

The next question, when thinking about the impact of qualified immunity on case disposition, is how to frame the denominator—the universe of cases against which to measure the frequency with which qualified immunity results in the dismissal of a case. It is my view that the broadest definition of the denominator—all 1183 Section 1983 cases filed against law enforcement—offers the most accurate picture of the role qualified immunity plays in Section 1983 litigation. Yet, as I will show, there are at least three ways to frame the denominator and each answers a different question about the extent to which qualified immunity achieves its intended goals.

One way to think about the impact of qualified immunity is to consider the frequency with which a defendant's motion to dismiss, for summary judgment, or for judgment as a matter of law on qualified immunity grounds actually leads to the dismissal of a case—whether because the motion is granted or because the motion is denied at the district court but reversed on appeal. Presumably, a defendant will only bring a qualified immunity motion when two conditions are met: He has a nonfrivolous basis for the motion, and he believes that the costs of bringing the motion are justified by the likelihood of success or some other benefit associated with the motion. Accordingly, this framework assesses the frequency with which qualified immunity results in the dismissal of cases in which both of these things are true.

Defendants brought 411 qualified immunity motions in a total of 367 cases in the five districts in my study: Defendants raised qualified immunity in 138 cases at the motion to dismiss stage, and raised qualified immunity in 270 cases at summary judgment. Courts granted 8.7% of the qualified immunity motions raised on the pleadings, and 5.8% of the motions resulted in case dismissals. Courts granted 14.1% of the qualified immunity motions raised at summary judgment, and 8.9% of the motions resulted in case dismissals. Defendants brought thirty-nine interlocutory appeals of qualified immunity denials, courts of appeals reversed five (12.8%) of those decisions, and four of the five were dismissed as a result. In total, thirty-six (8.8%) of the 411 qualified immunity motions raised by

defendants in my dataset resulted in case dismissals, and 9.8% of the 367 cases in which qualified immunity was raised were dismissed on qualified immunity grounds.

Another way to assess the impact of qualified immunity on case outcomes is to examine what percentage of the 979 cases in my dataset in which qualified immunity could be raised were in fact dismissed on qualified immunity grounds. One objection to this framing might be that it includes cases defendants declined to challenge on qualified immunity grounds. But this does not necessarily mean that qualified immunity motions would have been unsuccessful in these cases—it means only that defendants in these cases concluded that the costs associated with raising the defense were not justified by the likelihood of success or other benefits of bringing the motions. Moreover, this broader framework illustrates the frequency with which qualified immunity doctrine serves its intended and expected role of shielding government officials from burdens associated with litigation and trial. Evaluated in this manner, qualified immunity appears less frequently successful. Qualified immunity was the basis for dismissal in 3.7% of the 979 cases in which the defense could be raised: Just eight (.8%) of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and twenty-eight (2.9%) of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.

Indeed, if one truly wishes to evaluate the role that qualified immunity plays in the resolution of constitutional claims against law enforcement, the most appropriate calculation is the percentage of all 1183 cases in my dataset that are dismissed on qualified immunity grounds. This approach includes cases that could not be resolved on qualified immunity grounds—either because the cases were brought only against municipalities or sought only equitable relief. But to the extent that the Court views qualified immunity doctrine as a shield for all government officials—not only defendants—from burdens associated with discovery and trial, a true evaluation of qualified immunity’s role should take account of all the cases in which government officials must participate. Qualified immunity was the basis for dismissal in approximately 3% of the 1183 cases in my dataset: .7% of cases were dismissed on qualified immunity grounds at the motion to dismiss stage and 2.4% of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.<sup>103</sup>

My data show that qualified immunity is rarely the formal reason that Section 1983 cases are dismissed. How, then, are Section 1983 suits against law enforcement resolved? Table 10 reports case outcomes for the 1183 cases in the five districts in my study. If one adopts the standard definition of plaintiff “success” to include jury verdicts, settlements, and voluntary or stipulated dismissals, the plaintiffs in my dataset succeeded in 685 (57.9%) of cases.<sup>104</sup> This success rate is similar to the results of Theodore Eisenberg and Stewart Schwab’s studies of non-prisoner Section 1983 cases.<sup>105</sup> The remaining 41.1% of

<sup>103</sup> These findings are consistent with another study that used dockets to track case outcomes in *Bivens* actions. See Reinert, *supra* note 11.

<sup>104</sup> See Reinert, *supra* note 11, at 812 n.13 (describing the common definition of “plaintiff success” in similar studies). Even those who adopt this standard definition recognize that it is likely overinclusive—at least some of these cases are settled or withdrawn on terms unfavorable to the plaintiff. See *id.*

<sup>105</sup> Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 730 (1988) (finding that “[n]onprisoner constitutional tort cases succeeded about half the time” in their study of filings in three districts); Theodore Eisenberg & Stewart J. Schwab, *The Reality of*

cases resolved in various ways: 261 (22%) were dismissed on motions to dismiss, at summary judgment, or at or after trial on grounds other than qualified immunity; 117 (9.9%) were dismissed before defendants answered; forty-five (3.8%) were dismissed for failure to prosecute; another forty-five (3.8%) were dismissed for other reasons or remain open (2%). Thirty-six (3%) were dismissed on qualified immunity grounds.

TABLE 10: CASE DISPOSITIONS IN FIVE DISTRICTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA
Settlement/R.68 Judgment	39	59	68	101	218
Voluntary/stipulated dismissal	29	38	40	44	39
Sua sponte dismissal before defendant responds	12	47	27	11	20
Dismissed as sanction	1	1	0	0	3
Dismissed for failure to prosecute	0	7	7	24	7
Remanded to state court	0	7	0	4	3
Motion to dismiss granted (not based on QI)	11	21	12	18	27
Summary judgment granted (not based on QI)	18	14	16	22	33
Directed verdict for D (not based on QI)	0	0	0	1	2
<b>MTD granted based on QI</b>	<b>4 (3.1%)</b>	<b>3 (1.3%)</b>	<b>0</b>	<b>0</b>	<b>1 (.2%)</b>
<b>SJ granted based on QI</b>	<b>8 (6.1%)</b>	<b>9 (4%)</b>	<b>3 (1.7%)</b>	<b>3 (1.2%)</b>	<b>1 (.2%)</b>
<b>QI granted at R.50</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	
<b>QI granted on appeal</b>	<b>0</b>	<b>2 (.9%)</b>	<b>1 (.6%)</b>	<b>0</b>	<b>1 (.2%)</b>
Case open, stayed, or on appeal	3	0	1	5	6
Trial – plaintiff verdict	0	0	1	2	4
Trial – defense verdict	6	11	0	12	37
Split verdict	0	1	0	0	2
Other	0	5	1	1	7
<b>Total cases</b>	<b>131</b>	<b>225</b>	<b>172</b>	<b>248</b>	<b>407</b>

My data do not capture how frequently qualified immunity influences plaintiffs' decisions to settle, or how frequently cases are—but need not have been—decided on qualified immunity grounds. Instead, my data reflect the frequency with which a grant of qualified immunity formally ends a case. There is, once again, marked regional variation in the frequency with which qualified immunity leads to the dismissal of section 1983 actions.<sup>106</sup> But, despite this regional variation, it appears that grants of qualified immunity

*Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 682 (finding that “[t]he success rate for counseled cases (which eliminates nearly all prisoner cases) is about one-half” in their study of the Central District of California).

<sup>106</sup> See Table 10; see also *infra* note 112 and accompanying text (describing this variation).

2017]

31

motions infrequently end Section 1983 suits before discovery, and are also infrequently the reason suits are dismissed before trial.

#### IV. IMPLICATIONS

In this Part, I consider the implications of my findings for ongoing discussions about the extent to which qualified immunity doctrine serves its underlying purposes and its proper scope. First, I consider the impact of my findings on prevailing assumptions about the role qualified immunity plays in the litigation of Section 1983 claims. Next, I consider why qualified immunity disposes of so few cases before trial. I then consider the implications of my findings for ongoing discussions about the extent to which qualified immunity serves its intended purposes. Finally, I suggest ways qualified immunity doctrine might be adjusted to comport with available evidence about the role the doctrine plays in constitutional litigation.

##### *A. Descriptions of Qualified Immunity's Role in Constitutional Litigation*

The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate—it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial. Commentators similarly believe that qualified immunity is often raised by defendants, usually granted by courts, and causes many cases to be dismissed.<sup>107</sup>

My study shows that, at least in filed cases, qualified immunity rarely functions as expected. Defendants could not or did not need to raise qualified immunity in 17.2% of the 1183 cases in my docket dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed *sua sponte* by the court before the defendants had an opportunity to answer. Defendants raised qualified immunity in motions to dismiss in only 14.1% of the cases in the docket dataset in which the defense could be raised.<sup>108</sup> Courts granted those motions to dismiss on qualified immunity grounds 8.7% of the time, but those grants were not always dispositive because additional claims or defendants remained. As a result, just eight of the 1183 cases in my docket dataset were dismissed at the motion to dismiss stage on qualified immunity grounds.

Qualified immunity more often prevented cases from proceeding past summary judgment. Defendants were more likely to include qualified immunity in motions for summary judgment than in motions to dismiss, and courts were more likely to grant summary judgment motions on qualified immunity grounds.<sup>109</sup> Moreover, courts of appeals reversed five denials of summary judgment motions and granted qualified immunity in

---

<sup>107</sup> See *supra* note 6 and accompanying text.

<sup>108</sup> There was a total of 975 cases in which qualified immunity could be raised, and defendants raised motions to dismiss or on the pleadings on qualified immunity grounds in 137 of those cases. See Tables 2-3.

<sup>109</sup> See Table 3 (showing that 66% of qualified immunity motions were made at summary judgment); Table 6 (showing that 19% of qualified immunity motions made at summary judgment were granted).



these cases. Yet qualified immunity motions at the summary judgment stage rarely shield government officials from discovery because most summary judgment motions require at least some depositions or document exchange.<sup>110</sup> And grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial—such decisions by the district courts or courts of appeals disposed of plaintiffs’ cases just twenty-eight times across the five districts in my study, amounting to just 2.4% of the 1183 cases in my dataset.

My data do suggest considerable regional differences in the litigation and adjudication of qualified immunity across the country. Scholars have observed that the federal circuits interpret qualified immunity standards differently.<sup>111</sup> My findings indicate that regional differences in qualified immunity expand beyond the formal doctrine. Defendants in the Southern District of Texas and the Middle District of Florida were more likely to raise qualified immunity than defendants in the Eastern District of Pennsylvania and the Northern District of California; courts in the Southern District of Texas and the Middle District of Florida were more likely to grant defendants’ qualified immunity motions than were judges in the Eastern District of Pennsylvania and the Northern District of California; and grants of qualified immunity ended more cases in the Southern District of Texas and the Middle District of Florida than in the Eastern District of Pennsylvania and the Northern District of California. But even in the Southern District of Texas—the district in my dataset most likely to dismiss cases on qualified immunity grounds—3.1% of all suits were dismissed on qualified immunity grounds at the motion to dismiss stage, and 6.1% of all suits were dismissed at summary judgment on qualified immunity grounds.<sup>112</sup> Unless the vast majority of law enforcement officer defendants in the Southern District of Texas are “plainly incompetent” or have “knowingly violate[d] the law,” qualified immunity is not playing its expected role even the district in my dataset most sympathetic to the defense.<sup>113</sup>

Although qualified immunity is rarely the reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement. For example, qualified immunity may discourage people from ever filing suit. Available evidence suggests that just one percent of people who believe they have been harmed by the police file lawsuits against law enforcement.<sup>114</sup> We do not know how frequently qualified immunity doctrine plays a role

---

<sup>110</sup> See *supra* note 81 and accompanying text.

<sup>111</sup> Blum, *supra* note **Error! Bookmark not defined.**, at 924 (“One has to look hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.”); Jeffries, *supra* note 6, at 852 (“[D]etermining whether an officer violated ‘clearly established’ law has proved to be a mare’s nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court.”); Jeffries, *supra* note 47, at 250 n.151 (“There is considerable variation among the circuits. The Ninth Circuit often construes qualified immunity to favor plaintiffs and is often reversed for that reason. The Eleventh Circuit leans so far in the other direction that it has been called the land of ‘unqualified immunity.’”); Wilson, *supra* note 40, 445 (describing circuit variation in the ways circuit courts analyze whether the law is clearly established); Nielson & Walker, *supra* note 55, at 40-41 (finding regional variation in the frequency with which circuit courts exercise their discretion under *Pierson* to decide whether a constitutional violation occurred).

<sup>112</sup> See Table 10.

<sup>113</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>114</sup> See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863-64 (2012).

2017]

33

in the decision not to sue. But available evidence suggests that qualified immunity often plays a role in plaintiffs' attorneys' decisions about whether to accept potential clients. When Alexander Reinert interviewed plaintiffs' attorneys about qualified immunity in *Bivens* cases, attorneys reported that "the qualified immunity defense play[s] a substantial role at the screening stage."<sup>115</sup> Attorneys described being discouraged from accepting civil rights cases both because qualified immunity motions can be difficult to defeat, and because the costs and delays associated with litigating qualified immunity in district courts and on appeal can make the cases too expensive or time-consuming to litigate.<sup>116</sup> But attorneys also described qualified immunity as one of many factors they considered when deciding whether to accept a case, and we do not know how attorneys weigh these different considerations.<sup>117</sup>

Even when cases are filed, qualified immunity may influence litigation decisions in ways that are not easily observable through docket review. For example, it may be that a pending qualified immunity motion will cause a plaintiff to settle her claims. Consistent with this theory, seventy (17%) of qualified immunity motions in my dataset were never decided, presumably because the parties settled while the motions were pending.<sup>118</sup> Of the sixty-three qualified immunity appeals in my dataset, twenty-three (36.5%) were withdrawn, which suggests many of those cases settled while on appeal.<sup>119</sup> When the Supreme Court has described the ways in which it expects qualified immunity shields government officials from discovery and trial, it has never suggested that the doctrine might serve this function by discouraging people from filing lawsuits or pursuing their claims. But these are certainly ways in which qualified immunity could achieve this goal.

A complete understanding of the frequency with which qualified immunity protects government officials from discovery and trial would measure these other potential litigation effects. For the time being, available evidence suggests that qualified immunity may make it more difficult for plaintiffs to secure representation and may encourage plaintiffs to settle, but is very infrequently the formal reason that cases end.

### B. *Why Qualified Immunity Disposes of So Few Cases*

The Supreme Court designed qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law,"<sup>120</sup>—why, then, does it lead to the dismissal of so few cases? One possibility is that qualified immunity doctrine discourages people from filing cases that are unlikely to meet qualified immunity's exacting standard.<sup>121</sup> This theory may partially explain why qualified immunity plays a more diminished role in filed cases than one might expect. But even if qualified immunity has this selection effect, one would assume that plaintiffs would continue to file cases in which qualified immunity motions *might* be successful. Consistent with this theory, defendants brought qualified

---

<sup>115</sup> Reinert, *supra* note 11, at 492.

<sup>116</sup> *Id.* at 493-94.

<sup>117</sup> *Id.*

<sup>118</sup> See Table 4.

<sup>119</sup> See Tables 7 and 8.

<sup>120</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>121</sup> See *supra* notes 115-119 and accompanying text. For further discussion of selection effects, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

immunity motions in over one-third of the Section 1983 cases in which the defense could be raised, and courts granted motions raising qualified immunity in full or part 62.5% of the time. Yet courts only granted 23.4% of these motions in part or whole on qualified immunity grounds, and qualified immunity only resulted in the dismissal of 3.7% of the cases in which the defense could be raised. Although the threat of qualified immunity may cause some people not to sue, this selection effect does not answer why qualified immunity plays a relatively limited role in the resolution of motions raising qualified immunity and plays such an insignificant role in the disposition of cases that are filed.

The Supreme Court's decisions suggest another theory that could partially explain why qualified immunity disposes of few cases: because courts improperly deny defendants' qualified immunity motions. For this reason, and because of the "importance of qualified immunity 'to society as a whole,'" the Supreme Court has taken the unusual step of "often correct[ing] lower courts when they wrongly subject individual officers to liability."<sup>122</sup> Yet qualified immunity grant rates are lower than expected even in the circuits generally believed to be the most amenable to qualified immunity: 33% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Southern District of Texas, and 24% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Middle District of Florida.<sup>123</sup> Moreover, only 9.2% of cases from the Southern District of Texas and 6.6% of cases from the Middle District of Florida were actually dismissed on qualified immunity grounds. Unless one believes that the Southern District of Texas and the Middle District of Florida, as well as the Fifth and Eleventh Circuits, are regularly flouting the letter and spirit of the Supreme Court's qualified immunity doctrine, this is an unconvincing—or at least incomplete—explanation for these findings.

My data suggest two additional explanations for why qualified immunity disposes of so few cases—the doctrine is not well suited to dismiss many claims before trial, and qualified immunity is often unnecessary to serve its intended role.

### *1. Qualified Immunity is Ill-Suited to Dispose of Cases*

One reason that qualified immunity motions are infrequently dispositive may be that the doctrine is ill-suited to dispose of many cases before trial. Although qualified immunity doctrine creates a seemingly unsurpassable standard for plaintiffs, the standards for review at the motion to dismiss and summary judgment stages may prevent courts from granting defendants' motions. At the motion to dismiss stage, a defendant's qualified immunity motion should be denied so long as the plaintiff has plausibly alleged a violation of a clearly established right.<sup>124</sup> As one district judge from the Middle District of Tennessee observed,

---

<sup>122</sup> *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

<sup>123</sup> *See* Table 4.

<sup>124</sup> Some courts do allow for a qualified immunity motion after limited discovery. I have not attempted to measure the frequency with which courts in my datasets limited discovery in anticipation of a qualified immunity motion. But as one district court observed, "[i]mmunity-related discovery as to the objective reasonableness of a public official's actions usually encompass most of the factual disputes in a case. One expects this to be the case, as the defendant's actions must be assessed in light of the circumstances surrounding them. For this reason, defendants frequently elect to reserve their fact-based qualified immunity arguments until after general discovery has been completed." *Watkins v. Hawley*, 2013 WL 3357703, at \*1 (S.D. Miss. July 3, 2013).

2017]

35

The rationale for the existence of qualified immunity is to avoid imposing needless discovery costs upon government officials, so determining whether the immunity applies must be made at an early stage in the litigation. At the same time, the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court. Since plaintiffs are not required to anticipate a qualified immunity defense in their pleadings, and since at this stage of the litigation the exact contours of the right at issue—and thus the degree to which it is clearly established—are unclear, the Sixth Circuit advises that qualified immunity should usually be determined pursuant to a summary judgment motion rather than a motion to dismiss.<sup>125</sup>

This is a common refrain in circuit courts across the country,<sup>126</sup> and decisions in my dataset.<sup>127</sup>

District courts also find that factual disputes prevent resolution on qualified immunity grounds at summary judgment. Alan Chen has argued that the Supreme Court’s qualified immunity decisions “have embedded a central paradox into the doctrine”: Although the Court repeatedly writes that “qualified immunity claims can and should be resolved at the earliest stages of litigation,” it ignores the fact that these determinations “inherently entail nuanced, fact-sensitive, case-by-case determinations involving the

---

<sup>125</sup> *Turner v. Weikal*, 2013 WL 3272481, at \*3 (M.D. Tenn. June 27, 2013) (citations omitted).

<sup>126</sup> *See, e.g.*, *Field Day v. Cty. of Suffolk*, 463 F.3d 167, 191–92 (2d Cir. 2006); *Newland v. Reehorst*, 328 F. App’x 788, 791 n.3 (3d Cir. 2009); *Owens v. Baltimore City State’s Attorneys’ Office*, 767 F.3d 379, 396 (4th Cir. 2014); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976); *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015); *Alvarado v. Litscher*, 267 F.3d 648, 651–52 (7th Cir. 2001); *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002).

<sup>127</sup> *See, e.g.*, *Coldwater v. City of Clute*, No. 3:12-cv-00028, at 15 (S.D. Tex. Aug. 30, 2012) (“Accepting the allegations in her Amended Complaint as true, the Court cannot conclude, at least at this juncture in the litigation, that the conduct of these Defendants was objectively reasonable in the light of then clearly established law.”); *Dudley v. Borough of Upland*, No. 12-cv-05651 at 2 (E.D. Pa. Jul. 19, 2013) (“Without discovery, I cannot determine whether the Officers acted reasonably. For instance, it is unclear what the Officers knew about the warrant when they arrested Plaintiff and whether the warrant bore an expiration date... Viewing the factual allegations in the light most favorable to Plaintiff, it may have been objectively unreasonable that the Officers failed to look into the validity of a 2 ½-year-old warrant. Accordingly, I cannot yet determine whether the Officers are entitled to qualified immunity.”); *Mantell v. Health Professionals*, 11-cv-01034, at 6 (N.D. Ohio Jan. 5, 2012) (“[T]he Court takes no stance on whether discovery will ultimately support these allegations against any of the moving defendants and the issues may appropriately be revisited during summary judgment practice in this matter. However, for the purposes of a motion to dismiss, the complaint properly pleads deliberate indifference and precludes a finding of qualified immunity at this time.”); *Nishi v. Cty. of Marin*, No. 4:11-cv-00438, at 4 (N.D. Cal. May 11, 2011) (“[R]esolution of the qualified immunity defense frequently raises issues of fact that are more appropriately determined at a later stage. While such a defense may thus very well prove viable at a future stage of these proceedings, it does not present an adequate basis for dismissal here.”); *Pippin v. Kirkland*, No. 8:12-cv-00776, at 3 (M.D. Fla. July 3, 2012) (“[A]ccepting all factual allegations in the Complaint as true, it is not possible to determine whether Defendant Kirkland is entitled to qualified immunity.”)

application of general legal principles to a particular context.”<sup>128</sup> My data offer anecdotal evidence to support Chen’s observation. In the five districts in my study, courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds.<sup>129</sup> In these decisions, courts again recognized the benefits of resolving qualified immunity at the earliest possible stage and qualified immunity’s intended role as protection from discovery and trial. Yet courts found that factual disputes made summary judgment inappropriate.

The Supreme Court’s recent decision in *White v. Pauly* provides additional anecdotal evidence of this underappreciated phenomenon. In *White v. Pauly*, the Supreme Court recently held it would be appropriate to grant summary judgment on qualified immunity grounds to an officer who shot and killed a suspect without first identifying himself and ordering the suspect to drop his gun because “no settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the defendant] confronted here.”<sup>130</sup> The decision has been described as evidence that the Supreme Court “wants fewer lawsuits against police to go forward.”<sup>131</sup> This may well be true. Yet the decision in *White v. Pauly* did not end Daniel Pauly’s lawsuit; as Justice Ginsburg notes in her concurrence, the Court’s decision “leaves open the propriety of denying summary judgment” to Officer White, whose

---

<sup>128</sup> Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006). See also Jeffries, *supra* note 47, at 252.

<sup>129</sup> See, e.g., *Martin v. City of Reading*, 118 F. Supp. 3d 751, 765-67 (E.D. Pa. 2015) (“Because qualified immunity is ‘an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.’ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). However, as the Court of Appeals for the Third Circuit recently observed in a case involving a claim of excessive force that arose out of the use of a Taser, ‘if there are facts material to the determination of reasonableness in dispute, then that issue of fact should be decided by the jury.’ . . . Thus, affording Defendant Errington qualified immunity at this time is inappropriate in light of the genuine dispute between the parties of the facts bearing on his entitlement to immunity. Accordingly, Defendant Errington’s Motion for Summary Judgment based on the doctrine of qualified immunity is denied.”); *Hayes v. City of Tampa*, 2014 WL 4954695 at \*8-9 (M.D. Fla., Oct. 1, 2014) (“[C]onstruing the record as a whole in favor of Hayes, whether Hayes’s ‘stance, demeanor and facial expressions’ justified Miller’s use of a taser is a genuine issue of material fact.”); *McKissic v. Miller*, 37 F. Supp. 3d 907, 918 (N.D. Ohio 2014) (“[W]hen the facts as alleged by the Plaintiff and supported by some evidentiary materials, are taken to be true, there remains a question of fact as to whether Officer Miller’s actions constituted excessive force in violation of the Fourth Amendment of the U.S. Constitution.”); *Bui v. City of San Francisco*, 61 F. Supp. 3d 877, 902 (N.D. Cal. 2014) (“[B]ased on the evidence presented by both sides, the court cannot decide as a matter of law whether it would have been ‘clear to a reasonable officer that his conduct was unlawful in the situation he confronted,’ *Saucier*, 533 U.S. at 202, because it is unclear what the situation was. In these circumstances, the court must deny Defendants’ motion insofar as it asks the court conclude that the officers are entitled to qualified immunity.”); *Nunez v. City of Corpus Christi*, 12-cv-0092, Opinion on Summary Judgment Motion (S.D. Tex. Aug. 7, 2013) (denying qualified immunity because “there is considerable dispute regarding the timing of Hobbs’ shots, the position of the vehicle at the time the shots were fired, and the immediacy of the threat posed to Officer Hobbs.”).

<sup>130</sup> 2017 WL 69170 (Jan. 9, 2017).

<sup>131</sup> Feldman, *supra* note 5.

2017]

37

qualified immunity motion is the subject of the Court's opinion, based on various factual disputes about his conduct.<sup>132</sup>

Plaintiffs' decisions about how to frame their cases also makes qualified immunity ill-suited to dispose of cases in some instances. Defendants could not raise qualified immunity defense in 8.5% of the cases in my study because the plaintiffs did not sue an individual officer for money damages.<sup>133</sup> Even in cases in which defendants could raise qualified immunity, plaintiffs' other pleading decisions sometimes diminished the impact of qualified immunity on these cases. In the vast majority of cases asserting claims against individual officers for money damages, plaintiffs also included claims against municipalities, claims for injunctive relief, and/or state law claims that could not be dismissed on qualified immunity grounds.<sup>134</sup> Even when a plaintiff brings a claim for damages against an individual defendant (for which qualified immunity is available), the defendant raises a qualified immunity defense, and the court grants the motion, claims against the municipality, claims for injunctive relief, and state law claims may remain.<sup>135</sup>

## 2. *Qualified Immunity is Unnecessary to Dispose of Cases*

My data also suggest that qualified immunity may lead to the dismissal of few cases because cases are so often resolved on other grounds. Qualified immunity could not be raised in 8.7% of the cases in my study because the judges dismissed the cases sua sponte before the defendants could answer. In these cases, qualified immunity doctrine was unnecessary to shield defendants from discovery and trial.

Qualified immunity was also often unnecessary to dispose of cases at the motion to dismiss stage. Defendants in the cases in my dataset clearly held this view: Even when defendants could raise qualified immunity at the motion to dismiss stage, they often chose not to do so.<sup>136</sup> More often than not, when defendants moved to dismiss they did not include a qualified immunity argument. Instead, defendants moved to dismiss for failure to plausibly plead their claims or failure to assert a constitutional violation, among other grounds. Even when defendants raised qualified immunity at the motion to dismiss stage, and courts concluded that the cases should be dismissed, courts often resolved the motions on other grounds. Courts granted, in whole or part, sixty-six out of the 138 (47.1%) motions to dismiss or for judgment on the pleadings that raised qualified immunity. Of those sixty-six grants, twenty (30.3%) motions were granted on qualified immunity grounds, and forty-six (69.7%) were granted on grounds other than qualified immunity.<sup>137</sup>

---

<sup>132</sup> *White v. Pauly*, 580 U.S. \_\_\_\_ (2017).

<sup>133</sup> See Table 1 (reporting that 11% of plaintiffs in the Southern District of Texas and 12% of plaintiffs in the Middle District of Florida filed cases for which defendants could not raise qualified immunity, as compared to 9% of plaintiffs in the Northern District of California, 8% of plaintiffs in the Northern District of Ohio, and 6% of plaintiffs in the Eastern District of Pennsylvania).

<sup>134</sup> In the Southern District of Texas, 99 of the 105 cases that named individuals also named municipalities as defendants; in the Middle District of Florida, 149 of the 154 cases that named individuals also named municipalities as defendants; in the Northern District of Ohio, 129 of the 139 cases that named individuals also named municipalities as defendants; and in the Eastern District of Pennsylvania, 357 of the 359 cases that named individuals also named municipalities as defendants.

<sup>135</sup> See *supra* notes 96-100 and accompanying text (for examples of these cases in my dataset).

<sup>136</sup> See Figure 1.

<sup>137</sup> See Table 5.

Qualified immunity played a more substantial role at summary judgment. Defendants raised qualified immunity arguments in most of their summary judgment motions. And when courts granted defendants' summary judgment motions in whole or part, they relied on qualified immunity 40.1% of the time.<sup>138</sup> But, in almost 60% of these summary judgment grants, courts decided the motions on other grounds. When the Supreme Court discusses qualified immunity, it appears to presume that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead, my study illustrates that there are other tools that parties can—and often do—use to resolve Section 1983 cases before trial.<sup>139</sup>

\*\*\*

My data offer no definitive explanations for why cases are infrequently dismissed on qualified immunity grounds. Instead, this Subpart offers some hints that merit further exploration. My data suggest that qualified immunity doctrine is ill-suited in some cases and unnecessary in others to serve its intended role.

One important, related observation is that the failure of qualified immunity to dispose of many cases is the product of decisions made by multiple actors in Section 1983 litigation against law enforcement—judges, defendants, and plaintiffs. Moreover, there is at least some evidence to suggest that district judges' inclination to grant qualified immunity motions may influence defendants' and plaintiffs' litigation decisions. In jurisdictions with district judges who most often granted defendants' qualified immunity motions—the Southern District of Texas and the Middle District of Florida—defendants brought qualified immunity motions more frequently, and plaintiffs more frequently crafted their cases in ways that prevented defendants from raising the defense. Conversely, in jurisdictions with district judges who less frequently granted defendants' qualified immunity motions—the Eastern District of Pennsylvania and the Northern District of California—defendants less frequently brought qualified immunity motions, and plaintiffs less frequently crafted their cases to avoid the defense. This observation is further reason to explore the scope of regional variation in the litigation of constitutional claims against law enforcement, as well as the extent to which judges', defendants', and plaintiffs' attorneys' decisions may influence each other.

### *C. Implications for the Balance Struck by Qualified Immunity*

The Supreme Court has explained that qualified immunity is intended to balance “the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>140</sup> Many have argued, and I agree, that the Court's qualified immunity doctrine puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated.<sup>141</sup> My research offers an additional reason to believe that the Supreme Court has gotten the balance wrong: Qualified immunity doctrine does not appear to be particularly necessary or well-suited to protect government officials “from harassment, distraction, and liability when they perform

---

<sup>138</sup> See Table 6.

<sup>139</sup> Accord Fallon, *supra* note 62, at 504 (observing that other mechanisms can be used to achieve the goals of qualified immunity).

<sup>140</sup> Pearson v. Callahan, 555 U.S. 223, 231 (2009).

<sup>141</sup> See generally, e.g., Blum, Chemerinsky & Schwartz, *supra* note 8; Reinhardt, *supra* note 7.

2017]

39

their duties reasonably.”<sup>142</sup> This observation makes it even more difficult to justify the burdens the doctrine appears to place on plaintiffs.

### 1. *Interests in Protecting Government Officials*

The Supreme Court explained in *Harlow* that qualified immunity was necessary to protect government officials from four harms: 1) “the expenses of litigation”; 2) “the diversion of official energy from pressing public issues”; 3) “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’”; and 4) “the deterrence of able citizens from acceptance of public office.”<sup>143</sup> The Court has relied on no empirical evidence to support its conclusions that these threats exist, or that qualified immunity can protect against them. Although questions remain about the government interests served by qualified immunity, this study—and my prior research—offer reasons to believe that qualified immunity doctrine is often unfit to provide some of these protections, and often unnecessary to provide others.

The first—and frequently repeated—justification for qualified immunity is that it protects government officials from the burdens of financial liability. But my prior research has shown that qualified immunity is unnecessary to serve this role—virtually all law enforcement defendants are provided with counsel free of charge, and are indemnified for settlements and judgments entered against them.<sup>144</sup> In the six-year period from 2006 to 2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just .02% of the dollars awarded to plaintiffs in police misconduct suits. In thirty-seven small and midsized agencies, no officer contributed to settlements or judgments to plaintiffs awarded during this period. Officers were indemnified even when they were disciplined, fired, and criminally prosecuted for their misconduct. And no officer paid a penny of the punitive damages awarded to plaintiffs in these jurisdictions. I could confirm only two jurisdictions in which officers contributed to settlements and judgments during the study period—New York City and Cleveland.<sup>145</sup> In these jurisdictions, the median contribution was \$2250, and no officer contributed more than \$25,000.<sup>146</sup> Given this evidence, qualified immunity cannot be justified as a means of protecting officers from financial burdens of personal liability.

In recent years, the Supreme Court has described the “‘driving force’ behind creation of the qualified immunity doctrine” to be resolving “‘insubstantial claims’ against government officials...prior to discovery.”<sup>147</sup> But qualified immunity resulted in the dismissal of just .7% of the cases in my dataset before discovery, and resulted in the dismissal of just 3% of the 1183 cases in my dataset before trial.

---

<sup>142</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>143</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted).

<sup>144</sup> *See Schwartz*, *supra* note 14.

<sup>145</sup> *See id.* at 926. An officer was not indemnified for a \$300 punitive damages judgment in Los Angeles, but the officer never paid the award. And officials believed—but could not confirm—that employees of the Jacksonville Sheriff’s Office and the Illinois State Police may have been required to contribute to a settlement during the study period.

<sup>146</sup> *Id.* at 939.

<sup>147</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987)).



Indeed, qualified immunity may actually increase the costs and delays associated with Section 1983 litigation. Although qualified immunity was the reason just 3% of the cases in my dataset ended, the defense was raised by defendants in 37% of the cases in my study—and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals. Each time qualified immunity is raised by a defendant, it must be researched, briefed, and argued by the parties and decided by the judge. And litigating qualified immunity is no small feat. Although qualified immunity’s focus on whether law is clearly established as an objective matter and disregard for officers’ subjective intent was intended to simplify and streamline the qualified immunity analysis, courts and commentators agree that the shift has made the qualified immunity analysis more complicated in several ways.<sup>148</sup> Judges have described qualified immunity as one of the most complex areas of law that they face.<sup>149</sup>

The time and effort necessary to resolve qualified immunity arguably would arguably further the goals of qualified immunity doctrine if it effectively protected defendants from discovery and trial. But in the five districts in my study, just 8.8% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. The remaining 91.2% of qualified immunity motions brought by defendants required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial.

Even in the 8.8% of cases in which qualified immunity motions resulted in case dismissals, it is far from certain that qualified immunity saved the parties’ and the courts’ time. As Alan Chen has observed, when considering the efficiencies of qualified immunity, “the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case.... The pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by the defense.”<sup>150</sup> In this study, I have not calculated how much time was spent litigating qualified immunity motions, or compared that time with the amount of time spent preparing for and conducting a trial. Yet, given the complexity of qualified immunity doctrine, the use of interlocutory appeals of qualified immunity denials, the fact that most trials in my docket dataset lasted just a few days, and the possibility that a case will settle instead of going to trial even when qualified immunity is denied, it is fair to assume that qualified immunity likely does not save much time even when it results in the dismissal of a case.

In *Pearson*, the Supreme Court wrote that the *Saucier* two-step qualified immunity analysis “disserv[e]s the purpose of qualified immunity” when it “forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.”<sup>151</sup> Given the costs and delays associated with qualified immunity motion practice and infrequency which qualified immunity motions result in dismissal of Section 1983 cases, the doctrine arguably disserves its own purposes.

Although qualified immunity doctrine appears to do little to shield defendants from burdens associated with litigation in filed cases—and may in fact increase the amount of time spent on a substantial number of those cases—my data leave open the possibility that qualified immunity doctrine shields government officials from burdens associated with

---

<sup>148</sup> See *supra* note **Error! Bookmark not defined.** and accompanying text.

<sup>149</sup> See *supra* note 40 and accompanying text.

<sup>150</sup> See Chen, *supra* note 62, at 101.

<sup>151</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (citation omitted).

2017]

41

discovery and trial in other ways, namely by causing people never to file insubstantial claims or to settle them quickly.<sup>152</sup> The fact that qualified immunity doctrine *might* be serving its intended purpose in these ways does not mean that it is actually doing so, however, and at least two pressing questions would have to be answered before qualified immunity doctrine could be justified on these grounds.

First, what are the merits of cases that are never filed or settled quickly because of qualified immunity? To the extent that qualified immunity doctrine discourages people from filing or pursuing insubstantial cases, the doctrine is meeting its express goals.<sup>153</sup> But to the extent that the doctrine discourages people from filing or pursuing meritorious cases because the briefing and interlocutory appeals associated with qualified immunity would be too expensive, the doctrine is not sorting cases in the way anticipated by the Court. Although more research is necessary to explore this question, available evidence offers reason for concern. Professor Reinert's interviews with attorneys who bring *Bivens* actions suggest that people with strong claims may sometimes be unable to find a lawyer because the cost of litigating qualified immunity is too high or because the conduct at issue has not been clearly established by prior cases.<sup>154</sup> Some people who do file their cases may settle at a discount, not because their cases are weak but because they do not have the funds to litigate qualified immunity in the district court or on interlocutory appeal.

Second, how frequently does qualified immunity cause plaintiffs not to file or to settle insubstantial cases? The costs associated with litigating qualified immunity, and the difficulty of overcoming a qualified immunity motion may cause plaintiffs not to file some insubstantial cases. But there are a number of other considerations that may cause plaintiffs not to file such cases, including rigorous pleading requirements, stringent standards for proving underlying constitutional violations, and the amount of damages the plaintiff is likely to recover if successful.

My data show that qualified immunity rarely shields government officials from burdens associated with discovery and trial in filed cases. It may be that the doctrine serves its goal of resolving “‘insubstantial claims’ against government officials...prior to discovery” by causing people never to file cases or to settle their cases quickly.<sup>155</sup> This hypothesis merits further inquiry. At this point, however, there is no evidence to support this hypothesis, and some evidence to suggest that qualified immunity doctrine may not be sorting out only insubstantial cases. Much more would need to be learned about qualified immunity's effects on filing and settlement decisions before the doctrine could be justified on these grounds.

The Supreme Court has mentioned, but dwelled little upon, two other possible benefits of qualified immunity doctrine—that it lessens “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’” and that it lessens “the deterrence of able citizens from acceptance of public office.”<sup>156</sup> Although I have not empirically examined the support for either of these concerns, available evidence offers reasons for skepticism

---

<sup>152</sup> See *supra* Part IV.A.3 and accompanying text for a discussion of these remaining questions.

<sup>153</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982) (discussing qualified immunity's goal of preventing “insubstantial claims” from proceeding to trial).

<sup>154</sup> See *generally* Reinert, *supra* note 11.

<sup>155</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987)).

<sup>156</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (citations omitted).

about both. The Court has written that dangers of overdeterrence should dissipate for officials who are not financially responsible for settlements and judgments.<sup>157</sup> Consistent with this observation, studies have found that “the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices.”<sup>158</sup> There also is no reason to believe that civil liability plays a sizable role in people’s decisions to apply to become police officers. Police departments around the country report difficulties finding recruits, but the threat of being sued is not included among the long list of reasons police officials believe people are not applying to join their forces.<sup>159</sup> More research is necessary to explore whether and to what extent qualified immunity doctrine benefits government officials in these ways. But evidence that is currently available concerning the role of qualified immunity in constitutional litigation does not justify the doctrine’s highly restrictive standards.

Perhaps the Court believes that qualified immunity doctrine serves other interests that it has failed to mention. Even if officers are almost always indemnified, qualified immunity doctrine may cause cases to be dismissed—or never filed—and thereby reduce the costs of litigation for the municipalities that end up paying the settlements and judgments on behalf of their officers.<sup>160</sup> Qualified immunity doctrine may encourage the development of constitutional law because it allows courts to announce new constitutional rules without fear of subjecting defendants to financial liability.<sup>161</sup> On the other hand, the Supreme Court’s qualified immunity doctrine—which allows courts to grant qualified immunity without stating whether officers have violated the law—may further an interest in decreased judicial regulation of law enforcement.<sup>162</sup> In this Article, I do not evaluate the sensibility of or empirical support for any of these alternative justifications for qualified immunity. None have been relied upon by the Court. To the extent that these or other policy

---

<sup>157</sup> *Owen v. City of Independence*, 445 U.S. 622, 654, 656 (1980) (explaining that the overdeterrence rationale for qualified immunity “loses its force” when “the damages award comes not from the official’s pocket, but from the public treasury.”)

<sup>158</sup> VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 7 (4<sup>th</sup> ed. 2006) (citing several studies). *See also* Schwartz, *supra* note 14, at 942-43 (discussing studies).

<sup>159</sup> *See, e.g.*, Yamiche Aleindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015); Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC NEWS (July 10, 2016); Edmond DeMarche, *‘Who Needs This?’ Police Recruits Abandon Dream Amid Anti-Cop Climate*, FOX NEWS (Sept. 20, 2015); Daniel Denvir, *Who Wants to Be a Police Officer?*, CITYLAB (Apr. 21, 2015); Mori Kessler, *Thinning Blue Line: Police See Declines in Applicants*, ST. GEORGE NEWS (Dec. 13, 2015), <http://www.stgeorgeutah.com/news/archive/2015/12/13/mgk-thinning-blue-line-police-decline/#.WA7V7DKZORs>; John Vibes, *Surprised? Some Police Departments Experiencing Sharp Decline in New Applicants*, FREE THOUGHT PROJECT (Feb. 20, 2015); William J. Woska, *Police Officer Recruitment: A Public-Sector Crisis*, POLICE CHIEF MAG. (Apr. 2016).

<sup>160</sup> *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007).

<sup>161</sup> *See, e.g.*, John C. Jeffries, *supra* note 47, at 247 (“Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout.”)

<sup>162</sup> In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Supreme Court suggested that the increasing professionalism of law enforcement agencies limited the need for courts to discipline officers for constitutional violations. *See id.* at 598 (“Another development over the past half-century that deters civil rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”).

2017]

43

interests are motivating the Supreme Court's qualified immunity jurisprudence, the Court should be explicit about those motivations so that courts, practitioners, and scholars can evaluate the sensibility of these interests and measure the extent to which qualified immunity advances them. Until then, we are left with the justifications for qualified immunity doctrine that the Court has offered, and available evidence that suggests the doctrine is unnecessary to serve some of qualified immunity's key goals and ill-suited for others.

## 2. *Interests in Government Accountability*

My research indicates that filed lawsuits are rarely dismissed on qualified immunity grounds. As I have argued, this finding suggests that qualified immunity doctrine is rarely achieving its intended function as a shield for government officials from discovery and trial in filed cases. What are the implications of this finding for the other side of qualified immunity's balance—described by the Court both as “the importance of a damages remedy to protect the right of citizens”<sup>163</sup> and “the need to hold government officials accountable when they exercise power irresponsibly”<sup>164</sup>? Commentators have long criticized qualified immunity doctrine for protecting government officials at the expense of Section 1983's accountability goals. If qualified immunity is not doing much to further government officials' interests, does that mean that the doctrine is not compromising interests in government accountability?

Evidence that few cases are dismissed on qualified immunity grounds suggests that the direst descriptions of qualified immunity's impact on plaintiffs perhaps go too far. Critics assert that qualified immunity closes the courthouse door for plaintiffs.<sup>165</sup> Yet, my study suggests that qualified immunity doctrine appears to close the courthouse door far less frequently than critics have assumed—at least once a case is filed. My findings do not, however, undermine other concerns raised about the impact of qualified immunity on plaintiffs' claims.

Qualified immunity doctrine may harm plaintiffs' interests in vindicating their rights in ways that cannot be observed from my data. As I have mentioned, qualified immunity doctrine may discourage people from filing their cases or may cause them to settle or withdraw their claims.<sup>166</sup> If qualified immunity had this effect only on insubstantial cases, the doctrine would be achieving its intended role, albeit in a manner unexpected by the Court. But if qualified immunity is causing people not to file or to settle meritorious cases, as available anecdotal evidence suggests, then the doctrine is not allowing people to vindicate their rights and hold government accountable.<sup>167</sup>

Moreover, my findings do not undermine other common critiques of the doctrine—that it is unnecessarily confusing, insulates blameworthy officials, and leads to constitutional uncertainty and stagnation. Even though qualified immunity is infrequently the reason cases end, the confusion inherent in the doctrine may still make qualified immunity more expensive to litigate and may mean that there are inconsistencies in courts' applications of the doctrine. Qualified immunity's disregard for officials' subjective intent

---

<sup>163</sup> Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

<sup>164</sup> Pearson v. Callahan, 555 U.S. 223, 231 (2009).

<sup>165</sup> See *supra* notes 6-8 and accompanying text.

<sup>166</sup> See *supra* notes 153-154 and accompanying text.

<sup>167</sup> See *id.*

may still shield bad actors from liability, even if the dismissal of claims against those bad actors do not dispose of many cases. And the Supreme Court's decision in *Pearson* to allow lower courts to grant qualified immunity without deciding whether a constitutional right has been violated may still lead to constitutional uncertainty—particularly in cases involving new technologies or practices.<sup>168</sup>

*McKay v. City of Hayward*,<sup>169</sup> a case from the Northern District of California in my docket dataset, illustrates these concerns. On May 29, 2011, officers from the Hayward Police Department used a police dog to track an armed suspect who had robbed a restaurant.<sup>170</sup> The dog guided the officers to an eight-foot wall. Without any warning, the officers lifted the dog over the wall. On the other side of the wall was the backyard of a mobile home belonging to Jesse Porter, an 89-year-old who had no connection to the robbery. The dog bit Porter on the leg, leaving a wound so severe that Porter's leg had to be amputated. Mr. Porter was then moved into a residential care facility, where he died two months later. Mr. Porter's children sued the involved officers and the City of Hayward under federal and state law.

At summary judgment, the district court in *McKay* granted the officers qualified immunity.<sup>171</sup> The court found that, to survive summary judgment, the plaintiffs had to be able to show that the failure to warn before seizure by a police dog constitutes a Fourth Amendment violation. The court surveyed Ninth Circuit case involving police dogs and found that “[n]o Ninth Circuit case holds explicitly that failure to warn before seizure by a police dog constitutes a violation of the Fourth Amendment.”<sup>172</sup> The court surveyed other circuits and found some variation: The Fourth and Eighth circuits had held that the failure to give a warning before using a police dog violates the Fourth Amendment, but the Eleventh, Seventh, and Tenth circuits have held that failure to warn before deploying a police dog was “not dispositive of the reasonableness of seizing an individual with a police dog.”<sup>173</sup> Because of this variation among circuits, the court in the Northern District of California concluded that the unconstitutionality of their conduct had not been clearly established.

The decision granting qualified immunity in *McKay* did not shield government officials from burdens associated with either discovery or trial. In *McKay*'s case, qualified immunity was raised at summary judgment; after the officers had already participated in discovery. The motion was granted less than two weeks before trial was scheduled to begin.<sup>174</sup> Moreover, even after the court granted qualified immunity to the individual officers, the officers still faced the prospect of trial. In addition to the Section 1983 claims

---

<sup>168</sup> See, e.g., Matthew Slaughter, *First Amendment Right to Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015) (describing circuit variation in analysis of the right to record the police); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012) (describing circuit variation in analysis of qualified immunity for claims involving electronic control devices).

<sup>169</sup> *McKay v. City of Hayward*, Docket No. 3:12-cv-01613 (N.D. Cal. Mar. 30, 2012).

<sup>170</sup> Facts of the case are taken from the district court's summary judgment decision. See *Kay v. City of Hayward*, 949 F. Supp. 2d 971 (2013).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 983.

<sup>173</sup> *Id.* at 984.

<sup>174</sup> *McKay v. City of Hayward*, Docket No. 3:12-cv-01613, Case Management Minutes (N.D. Cal., June 13, 2013).

2017]

45

against the two individual officers, the plaintiffs brought state law claims against the individual officers and state and federal claims against the City—the qualified immunity defense did not apply to any of these claims. In the days following the court’s summary judgment decision, the parties drafted and submitted voir dire questions, multiple motions in limine, and briefs regarding whether the trial should be separated into three stages.<sup>175</sup> The case settled and the court entered a conditional dismissal the day trial was scheduled to begin.<sup>176</sup>

Although the district court’s qualified immunity decision in *McKay* did not shield officials from discovery and was not formally the reason the case did not go to trial, it likely increased the amount of time spent by the attorneys for the plaintiffs and defendants.<sup>177</sup> The district court’s decision granting qualified immunity in *McKay* may also have ripple effects that extend far beyond the parties to the litigation. The district court in *McKay* found that it was not clearly established in the Ninth Circuit that deploying police dogs without a prior warning violates the Constitution. This decision may cause lawyers to decline to represent people with similar claims. One could argue that qualified immunity is serving its intended role by discouraging people from bringing Section 1983 cases when the underlying constitutional rights have not been clearly established. But this position goes farther than the Court’s own justification for qualified immunity doctrine: to protect government officials from insubstantial claims.<sup>178</sup> A case based on a constitutional violation that has not yet been clearly established is not without merit; it is, simply, that no prior court has decided the constitutional issue.

Uncertainty about the constitutionality of deploying a police dog without a prior warning may also influence police departments’ policy and training decisions. Although the Supreme Court appears confident that police departments can regulate themselves,<sup>179</sup> police officials look to court decisions to guide their policies and trainings. Were, for example, the Ninth Circuit to hold that officers should give prior warnings before using police dogs, departments in the jurisdiction of the Ninth Circuit would likely train their officers to issue warnings under these circumstances.<sup>180</sup> Without such a decision, and with the *McKay* court’s conclusion that there is no clearly established constitutional right to

---

<sup>175</sup> See *McKay v. City of Hayward*, Docket No. 3:12-cv-01613, Docket Entries 76-79.

<sup>176</sup> See *McKay v. City of Hayward*, Docket No. 3:12-cv-01613, Order of Conditional Dismissal (N.D. Cal., June 24, 2013).

<sup>177</sup> In some cases, the grant of qualified immunity might cause plaintiffs to settle instead of going to trial, or cause plaintiffs to settle for an amount smaller than they would have otherwise accepted. In this case, the plaintiffs’ attorney reported that the qualified immunity grant had a “negligible” impact on the value of the case because the *Monell* claim remained and, “[u]nlike many civil rights cases, we had good evidence to support the *Monell* claim....” Email from Matthew D. Davis (Nov. 28, 2016, 9:18 AM).

<sup>178</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982) (discussing qualified immunity’s goal of preventing “insubstantial claims” from proceeding to trial).

<sup>179</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006) (asserting that the rise of police professionalism and internal discipline reduces the need for the exclusionary rule to deter police misbehavior).

<sup>180</sup> For examples of instances in which court decisions have influenced police department policies and trainings, see, for example, Joanna C. Schwartz, *Who Can Police the Police?* 2016 CHI. L. F. 437, at 452 n.53, 455 n.68; POLICE EXECUTIVE RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (2016) (explaining that after the Fourth Circuit held that using a taser repeatedly in drive-stun mode was unconstitutional, “several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW policies” in response to the decision).

such a warning, departments may be less likely to train their officers to give such warnings.<sup>181</sup>

#### *D. Moving Forward*

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might “justify reconsideration of the balance struck” in its qualified immunity decisions.<sup>182</sup> My research has, indeed, undermined the Court’s assumptions about the purposes served by qualified immunity doctrine. Although the Supreme Court repeatedly describes qualified immunity doctrine as a means of shielding government officials from the costs and burdens of litigation, I have found officers are virtually always indemnified, and that qualified immunity is rarely the reason that Section 1983 cases end. Future research can explore whether qualified immunity causes plaintiffs not to file or pursue insubstantial claims, or advances the doctrine’s goals in other ways. At this point, however, available evidence is inconsistent with the Court’s assumptions about the role qualified immunity plays in constitutional litigation. In an ideal world, all open empirical questions about Section 1983 litigation would be answered before any applicable doctrine was adjusted. But it is my view the perfect should not be the enemy of the good.<sup>183</sup> Available evidence contradicts the Supreme Court’s assumptions, and it is time for the Court to reconsider the balance it has struck.

Given the Supreme Court’s apparent interest in shielding law enforcement from lawsuits, the Court might conclude based on my findings that they should further strengthen qualified immunity doctrine to protect defendants. Setting aside the question of whether such a shift is desirable, I am not convinced that it is feasible. As a preliminary matter, it is hard to imagine how the Court could make qualified immunity doctrine any stronger than it already is.<sup>184</sup> Perhaps the Court believes that lower courts are not applying qualified immunity doctrine as expansively as they should. Indeed, the Court’s flurry of recent summary reversals suggests that it is attempting to encourage lower courts to follow course.<sup>185</sup>

But even if all judges applied qualified immunity doctrine as expansively as does the Supreme Court, there is reason to believe that qualified immunity doctrine would still not play its intended role in many cases filed against law enforcement. Plaintiffs will still often be able to plead a plausible entitlement to relief at the motion to dismiss stage, and will still often be able to raise factual disputes at summary judgment that prevent dismissal on qualified immunity grounds. Plaintiffs will continue to include claims against municipalities, claims for declaratory or injunctive relief, and state law claims in their cases that cannot be resolved on qualified immunity grounds.<sup>186</sup> And defendants will still

---

<sup>181</sup> See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580-81 (2008) (observing that, when a United States Supreme Court decision removed the exclusionary rule as a remedy for conduct that violated California constitutional law—searching garbage without a warrant—police in California were “trained to ignore” California law).

<sup>182</sup> *Anderson v. Creighton*, 483 U.S. 635, 642 n.3 (1987).

<sup>183</sup> See Schwartz, *supra* note 14, at 961.

<sup>184</sup> See *supra* notes 43-**Error! Bookmark not defined.**, and accompanying text (describing recent shifts in the doctrine).

<sup>185</sup> See Baude, *supra* note 3.

<sup>186</sup> The Court could conceivably hold that qualified immunity can be asserted by municipalities and in claims for injunctive and declaratory relief. But the Court has already clearly held that qualified

2017]

47

sometimes conclude that it is not worth their time to bring qualified immunity motions because the motions would not have merit, or because it makes more sense to raise other types of defenses, or to settle. Presumably the number of cases dismissed on qualified immunity grounds would increase to some extent, but given litigation dynamics and other applicable doctrines and rules, there would remain many cases in which qualified immunity would never shield government officials from discovery and trial. Qualified immunity is the Supreme Court's hammer. But many civil rights damages actions against law enforcement are not nails.

Instead of spending its scarce time and resources trying to strengthen qualified immunity's protections of government officials, my findings should cause the Supreme Court to reconsider what role qualified immunity should continue to play in the litigation of constitutional claims. Some have argued that the Court should do away with qualified immunity altogether, given the slim historical basis for qualified immunity doctrine.<sup>187</sup> This Article and my prior research further undermine the current justifications for qualified immunity doctrine, as it appears unnecessary and ill-suited to achieve its core policy objectives.

Even if the Court does not eliminate qualified immunity, my research buttresses others' arguments that fundamental shifts to the doctrine are in order. Qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.<sup>188</sup> The fact that the doctrine virtually never shields government officials from financial liability, and rarely shields government officials from discovery and trial in filed cases, is further reason to reconsider some of the most confounding aspects of the doctrine.

At a minimum, the Court could undo adjustments to qualified immunity doctrine that were expressly motivated by an interest in shielding government officials from discovery and trial in filed cases. In *Harlow*, for example, the Court eliminated consideration of officers' subjective intent because it believed doing so could "avoid subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."<sup>189</sup> This study shows that the Court's elimination of the subjective prong of qualified immunity in *Harlow* should be viewed as a failed experiment. The decision in *Harlow* appears to have done little to shield government officials from discovery and trial in filed cases. Returning the subjective prong to qualified immunity analysis would also address a serious concern with the doctrine. Currently, government officials acting in bad faith or with knowledge of the unconstitutionality of their behavior can be shielded from liability simply because a prior case did not proscribe their conduct. If the subjective prong was restored to the qualified immunity analysis, government officials would not be entitled to qualified immunity if they knew or should have known that their conduct was unlawful.

---

immunity is inapplicable to both types of claims. And the Court has no power to create a qualified immunity defense for state claims.

<sup>187</sup> Baude, *supra* note 3; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

<sup>188</sup> See generally *infra* Part I.B.

<sup>189</sup> Mitchell, 472 U.S. at 526 (quoting Harlow, 457 U.S. at 817-18).



A recent Supreme Court case, *Mullenix v. Luna*, illustrates how returning the subjective prong to qualified immunity might address some of the gravest concerns about the doctrine.<sup>190</sup> The facts relevant to *Mullenix* began when Tulia Police Department officers attempted to arrest Israel Leija Jr. for violating misdemeanor probation.<sup>191</sup> Leija fled the scene in his car and officers from several agencies participated in the pursuit. Officers set up spike strips on the highway to puncture Leija's tires as he drove by—a strategy they had been trained to use in just this type of situation. Texas Department of Public Safety Trooper Chadrin Mullenix decided that instead of setting up spike strips he would try to disable Leija's car by shooting at it.<sup>192</sup> He had received no training in shooting at a car to disable it and was instructed by his supervisor not to do so.<sup>193</sup> Nevertheless, Mullenix fired six rounds at Leija's car as it passed under the bridge where Mullenix was standing. Leija died, with one of the shots determined to be the cause of death.<sup>194</sup> Soon after the shooting, Mullenix remarked to his supervisor, "How's that for proactive?"—an apparent reference to a conversation they had had early in the day in which the superior had criticized the officer for not taking enough initiative.<sup>195</sup>

The district court denied Mullenix's motion for summary judgment on qualified immunity grounds, Mullenix filed an interlocutory appeal, and the Fifth Circuit affirmed the district court. The Supreme Court granted Mullenix petition for certiorari and reversed. The Court did not answer whether Mullenix violated the Constitution but instead held that prior cases had not clearly established that his conduct was unconstitutional.<sup>196</sup> In reaching this conclusion, the Court reviewed several of its prior decisions in cases against law enforcement officers who shot fleeing suspects: In one of the cases, *Brousseau v. Haugen*, the Court granted qualified immunity without deciding the underlying constitutional question, and in two of the cases, *Scott v. Harris* and *Plumhoff v. Rickard*, the Court found no Fourth Amendment violation.<sup>197</sup> "Far from clarifying the issue," the Court explained, these cases "reveal the hazy legal backdrop against which Mullenix acted."<sup>198</sup> Given the Court's prior decisions, the Court concluded: "[W]e cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did."<sup>199</sup> Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis.<sup>200</sup>

In her dissent, Justice Sotomayor argued that Mullenix's "rogue conduct" was clearly unconstitutional, and criticized the majority for requiring a case too similar on the facts. Sotomayor wrote that Mullenix's "how's that for proactive?" statement played no role in her qualified immunity analysis, but expressed concern that the comment reflected the impact of the Court's qualified immunity doctrine on policing more generally.

---

<sup>190</sup> 136 S.Ct. 305 (2015).

<sup>191</sup> *Id.* at 306.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 307.

<sup>195</sup> *Id.* at 316 (Sotomayor, J., dissenting).

<sup>196</sup> *Id.* at 312.

<sup>197</sup> *Id.* at 309-11.

<sup>198</sup> *Id.* at 309.

<sup>199</sup> *Id.* (citing *Malley*, 475 U.S. at 341).

<sup>200</sup> *Id.* at 316 (Sotomayor, J., dissenting).

2017]

49

[T]he comment seems to me revealing of the culture this Court’s decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor’s express order to ‘stand by.’ By sanctioning a ‘shoot first, think later’ approach to policing, the Court renders the protections of the Fourth Amendment hollow.<sup>201</sup>

Restoring the subjective prong to the qualified immunity analysis would presumably change the outcome of a case like *Mullenix*.<sup>202</sup> Mullenix’s “how’s that for proactive?” statement would become relevant to the qualified immunity analysis, and would presumably constitute at least triable evidence of bad faith.<sup>203</sup> Returning the subjective prong to the qualified immunity analysis would also have broader implications for the development of constitutional law. Assuming Mullenix’s statement was evidence of bad faith, the Court would be forced to decide whether a jury could find that he violated the Constitution. Accordingly, restoring the subjective prong of the qualified immunity analysis would force the Court to clarify the “hazy legal backdrop” it has created in cases involving the shooting of fleeing suspects.<sup>204</sup> Such clarification would assist not only future plaintiffs but also law enforcement agencies attempting to create policies and trainings applicable to such circumstances. Finally, restoring the subjective prong would address Justice Sotomayor’s concern that the Court’s qualified immunity doctrine “supports” a police culture that tolerates the use of deadly force “for no discernible gain and over a supervisor’s express order to ‘stand by.’”<sup>205</sup>

At this point, it is impossible to predict what impact these proposed changes to qualified immunity doctrine would have on the litigation of constitutional claims against law enforcement. Perhaps relaxing qualified immunity standards would dramatically increase the number of suits filed against the police, or increase the number of filed cases that were settled or tried. On the other hand, these changes might inspire courts to place other limits on plaintiffs’ abilities to bring Section 1983 claims to maintain the status quo. Richard Fallon has observed that adjustments to qualified immunity may influence other aspects of constitutional doctrine—and this is certainly a possible outcome of my proposed adjustments.<sup>206</sup> For example, if restoring the subjective prong of the qualified immunity analysis causes more plaintiffs to file lawsuits against law enforcement, courts may further tighten pleading standards to eliminate more cases before discovery, or otherwise heighten the standards for proving constitutional violations. This Article does not predict how changes to qualified immunity doctrine might influence the collection of doctrines relevant to constitutional litigation, or suggest ways in which they should ideally relate. Instead, the suggestions I offer are motivated by a less lofty ambition—to achieve greater consistency among qualified immunity doctrine’s structure, intended policy goals, and actual role in constitutional litigation.

---

<sup>201</sup> *Id.*

<sup>202</sup> Other adjustments to qualified immunity doctrine could have similar effects. *See, e.g.*, Jeffries, *supra* note 6 (recommending that courts deny qualified immunity for clearly unconstitutional behavior).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 309.

<sup>205</sup> *Id.*

<sup>206</sup> *See* Fallon, *supra* note 62, at 486-89.

## CONCLUSION

In recent years, the Supreme Court has dedicated an outsized portion of its docket to qualified immunity motions in cases against law enforcement because, it has explained, the doctrine is so “important to ‘society as a whole.’”<sup>207</sup> But the Court relies on no evidence to back up this fervently-held position. Instead, my research shows that qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement. Qualified immunity doctrine is unnecessary to shield law enforcement officers from financial liability, and the doctrine infrequently protects government officials from burdens associated with discovery and trial in filed cases. Further exploration of dynamics unobservable through my dataset could reveal other ways in which qualified immunity influences the litigation of civil rights actions against law enforcement. At this point, however, available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals. The Supreme Court, as well as lower courts, should adjust their qualified immunity decisions to comport with this evidence.

---

<sup>207</sup> *White v. Pauly*, 580 U.S. \_\_\_\_ (2017) (citing *City and County of San Francisco v. Sheehan*, 135 S. Ct. U.S. 1765, 1774 n. 3 (2015)).