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Journal
NORTHWESTERN UNIVERSITY LAW REVIEW, 114(5)

ISSN
0029-3571

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Publication Date
2020

Peer reviewed

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QUALIFIED IMMUNITY'S SELECTION EFFECTS

Joanna C. Schwartz[*]

This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity doctrine plays in attorneys' decisions to file civil rights suits. The Supreme Court has described the "driving force" behind qualified immunity to be its power to dismiss "insubstantial" cases before discovery or trial. Yet in a prior study of almost 1200 Section 1983 cases filed in five federal districts around the country, I found that just seven (0.6%) were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. These findings undermine assumptions about the role qualified immunity plays in filed cases, but leave open the possibility that qualified immunity serves its intended role by screening out insubstantial cases before they are ever filed. Indeed, some have raised this possibility as reason to maintain the status quo.

This Article tests this alternative justification for qualified immunity. I combined the results of my prior study of 1183 cases with surveys of ninety-four attorneys who entered appearances in these cases, and in-depth interviews of thirty-five of these attorneys. I found that qualified immunity almost certainly increases the costs and risks of constitutional litigation, but has a more equivocal effect on attorneys' case selection decisions. Qualified immunity is one of many considerations lawyers take into account when deciding whether to accept a case. Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds. And when lawyers do decline cases because of qualified immunity, they do not appear to be screening out "insubstantial" cases under any plausible definition of the term.

These findings enrich our understanding of the role qualified immunity plays in civil rights cases, contribute to mounting evidence that qualified immunity doctrine fails to achieve its intended policy goals, and support growing calls to better align doctrine with the realities of constitutional litigation.

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INTRODUCTION

Available evidence suggests that only 1% of people who believe they have been wronged by the police ultimately sue.[1] This Article asks what role qualified immunity plays in decisions to forgo litigation by the remaining 99%.

The answer to this question is critically important for an informed understanding of the extent to which qualified immunity doctrine serves its intended policy goals. The Supreme Court has described the "'driving force' behind [the] creation of the qualified immunity doctrine" to be resolving "'insubstantial

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[1] PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 1999 NATIONAL SURVEY 16-20 (2001) (finding that the police had used force against 664,500 people, 87.3% of whom (580,108) believed that the police acted improperly, and just 1.3% of whom (7416) filed a lawsuit regarding the alleged misconduct). If this survey is accurate, it suggests that far fewer grievances involving the police become lawsuits than do grievances involving discrimination, auto accidents, or non-governmental torts. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 52 (1981) (measuring filing rates for different types of claims).

claims' against government officials…prior to discovery"[2] and at summary judgment.[3] But in a recent study of constitutional litigation against law enforcement officers and agencies in five federal districts across the country, I found that qualified immunity only rarely achieves this goal.[4] Just seven (.6%) of the 1183 cases in my dataset were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds.[5] These findings undermine assumptions about the role qualified immunity plays in filed cases, but leave open the possibility that qualified immunity serves its intended function by screening out insubstantial cases before they are ever filed. Indeed, some have raised this possibility as reason to maintain the status quo.[6]

Understanding the impact of qualified immunity on case selection is also key to better understanding the role qualified immunity doctrine plays in civil rights litigation. Based on my finding that few cases are dismissed on qualified immunity grounds, one might assume that the doctrine plays an insignificant role in the litigation of constitutional claims. Yet drawing this conclusion would vastly overstate the implications of that research. Although my study showed that qualified immunity rarely is the formal reason that § 1983 cases against law enforcement end before discovery and trial, it did not answer other important questions—not only concerning the role qualified immunity plays in the decision to file a lawsuit, but also concerning the ways in which the doctrine influences pleading, litigation, and settlement decisions. A complete understanding of the role qualified immunity plays in constitutional litigation requires taking account of these additional litigation effects.

Although understanding the impact of qualified immunity on case selection would help answer whether qualified immunity serves its policy aims and would enrich descriptive accounts of the doctrine, measuring qualified immunity's selection effects is no easy feat. It is conventional wisdom that the majority of

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[2] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

[3] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[4] *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

[5] *See id.*

[6] *See*, *e.g.*, Richard J. Fallon, __ CAL. L. REV. __ (forthcoming) (expressing concerns about "frivolous and distracting litigation" in a world without qualified immunity); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018) ("[Q]ualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging plaintiffs to file section 1983 lawsuits at all….").

grievances never become filed lawsuits.[7] It is also conventional wisdom that it is exceedingly difficult to measure which grievances never become filed suits, or to measure the impact of particular doctrines or other considerations on the case selection process.[8] Some studies have used filed cases and other objective data in combination with presumed models of attorney behavior to estimate selection effects.[9] Others have drawn conclusions from interviews with plaintiffs' attorneys about their filing decisions.[10]

In this Article I combine these two approaches.[11] I examined an original docket dataset of 1183 police misconduct cases filed in five federal districts to better understand the role played by qualified immunity in the litigation of these cases. I also surveyed ninety-four attorneys who entered appearances in these 1183 cases and conducted semi-structured interviews of thirty-five of these attorneys as a way of getting a "ground-level, gestalt sense"[12] of the role qualified immunity plays in constitutional litigation and in case selection decisions.

Based on my docket dataset, surveys, and interviews, I find that qualified immunity almost certainly increases the costs and risks of Section 1983 litigation. Although qualified immunity is rarely the reason that cases end, there remains a risk that cases will be dismissed on qualified immunity grounds—most likely after the parties have completed costly discovery. Litigating the defense is also costly—it was raised in approximately one-third of the cases in my dataset, and was sometimes raised by defendants multiple times. Each time defendants raise qualified immunity, plaintiffs' counsel must take the time to research and

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[7] *See generally* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…*, 15 LAW & SOC'Y REV. 631 (1981); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 52 (1981).

[8] *See*, *e.g.*, David Freeman Engstrom, Twiqbal*'s Empirical Puzzle*, 65 STAN. L. REV. 1203, 1224 (describing the ways in which studies of *Twombly* and *Iqbal* have struggled to account for selection effects); Felstiner et al., *supra* note 7, at 634-36 (describing the "conceptual and methodological difficulties" in measuring the transformation of disputes); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 12 (1983) (describing studying disputes as "difficult to chart. They are not some elemental particles of social life that can be counted and measured. Disputes are not discrete events like births and deaths; they are more like such constructs as illness and friendships, composed in part of the perceptions and understandings of those who participate in and observe them."); Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid,* 32 LAW & SOC. INQ. 233, 242 (2007) ("Despite the legal, social, and political importance of what happens at the bottom of the dispute pyramid, it is difficult to empirically study what happens there.").

[9] *See infra* note 29 (citing studies).

[10] *See infra* note 30 (citing studies).

[11] For a detailed description of my methodology, *see infra* Part II.

[12] Freeman Engstrom, *supra* note 8, at 1238.

brief their motions in opposition. Qualified immunity motions and interlocutory appeals of qualified immunity denials also result in delay—of months or years—while the motions are pending. These delays can increase the cost of preparing for trial, and can weaken a plaintiff's case if witnesses' recollection of the underlying facts gets hazier over time. Apart from the challenges of defeating qualified immunity motions in any given case, qualified immunity makes civil rights practice more challenging in general. Attorneys must learn about and keep abreast of changes in what is generally considered to be an exceedingly complex doctrine, and the specter of interlocutory appeal means that attorneys must be skilled in both trial and appellate advocacy.

One might assume that these costs and risks would discourage plaintiffs' attorneys from filing any cases vulnerable to attack on qualified immunity grounds. If so, and such cases are "insubstantial," the "driving force" behind qualified immunity would be achieved by the doctrine before plaintiffs ever opened the courthouse door. Yet my dockets, surveys, and interviews offer three compelling reasons to conclude that qualified immunity is unnecessary and ill-suited to serve this screening function.

First, my study makes clear that qualified immunity is one of many considerations lawyers take into account when deciding whether to accept a civil rights case. Judges and juries unsympathetic to victims of police misconduct, other procedural and substantive barriers, and the costs of discovery and litigation each raise the costs and risks of bringing these cases. Unsurprisingly, plaintiffs' attorneys—most of whom accept cases on contingency and will bear all litigation costs if they fail—are highly selective and consider all of these challenges when deciding which cases to accept. Accordingly, to the extent that qualified immunity plays a role in attorneys' case selection decisions, it is one of many considerations lawyers take into account.

Second, attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity. Approximately two-thirds of the attorneys I interviewed report that qualified immunity rarely or never causes them to decline cases. These attorneys agree that qualified immunity poses many challenges, but believe that those challenges replicate other case-selection considerations, are too unpredictable to influence filing decisions, can be mitigated by including claims that cannot be dismissed on qualified immunity grounds, or pose risks worth taking in order to advance important interests.

Third, when attorneys decline cases because of qualified immunity, they do not appear to be screening out "insubstantial" cases under any plausible definition of the term. Attorneys I interviewed report declining cases because the cost of litigating qualified immunity outweigh the likely financial rewards, and cases with fact patterns that have not previously been held unconstitutional. One attorney reports that he stopped bringing any Section 1983 cases because immunities pose an insurmountable barrier, and there is circumstantial evidence to suggest the challenges of civil rights litigation—including qualified immunity—may cause many more attorneys to reduce the number of civil rights cases they accept or get out of the business of civil rights litigation altogether. These answers suggest qualified immunity is decreasing the total number of cases filed, but is sorting out cases for reasons other than their merits.

In sum, I find that qualified immunity increases the costs and burdens associated with bringing civil rights cases, but does not do a good job of screening out "insubstantial" cases. These findings could not come at a more important time. In recent years, circuit and district judges around the country, advocacy groups across the political spectrum, and several sitting Supreme Court justices have called on the Court to modify qualified immunity or do away with the defense altogether.[13] These critics argue that qualified immunity bears no resemblance to common law defenses in effect when Section 1983 became law, undermines interests in government accountability, and is both unnecessary and ill-suited to shield government officials who have acted reasonably from financial liability and other burdens of litigation.[14]

One key empirical question left thus far unanswered in this debate is the question asked in this Article: whether qualified immunity fulfills its policy goals by weeding out insubstantial cases before they are filed. My study offers anecdotal yet compelling evidence that qualified immunity cannot be defended on these grounds. It also reveals that the doctrine undermines government accountability in previously unappreciated ways—by discouraging lawyers from filing cases involving novel claims, making it more difficult for lawyers to make a living bringing these cases, and causing lawyers to abandon this line of work. As the Supreme Court considers growing calls to modify or do away with qualified immunity, it should heed this additional evidence of the doctrine's failures.

The remainder of this Article proceeds as follows. Part I describes prevailing models of attorneys' case selection decisions. In Part II, I describe the methodology of my study. Part III draws on the docket dataset, surveys, and interviews to describe the costs and risks of qualified immunity in constitutional litigation. In Part IV, I draw primarily on attorney surveys and interviews to describe the impact of qualified immunity on case selection decisions. And, in Part V, I consider the implications of these findings for descriptions of qualified immunity's role in constitutional litigation, the extent to which qualified immunity doctrine

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[13] *See*, *e.g.*, Alan Feuer, *Advocates From Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018) (describing petition for certiorari in qualified immunity case joined by advocates across the political spectrum); Nicholas Sonnenberg, *Unlikely Allies Train Their Sights on Qualified Immunity*, L.A. DAILY J. (Sept. 21, 2018) (describing criticisms of qualified immunity by Justices Thomas and Sotomayor, as well as the Cato Institute, ACLU, and other groups). For district and circuit court opinions criticizing qualified immunity see, for example, Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willet, J., concurring dubitante); Thompson v. Clark, 2018 WL 3128975 (E.D.N.Y. June 26, 2018); Wheatt v. City of East Cleveland, 2017 WL 6031816 (N.D. Ohio Dec. 6, 2017). For recent criticisms of qualified immunity by Supreme Court justices, see Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

[14] *See* sources cited *supra* note 13; *see also generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (describing each of these arguments against qualified immunity).

achieves its intended policy goals, and proposals to reconsider or do away with qualified immunity.

I. A THEORY OF QUALIFIED IMMUNITY'S ROLE IN FILING DECISIONS

The Supreme Court has described qualified immunity as a shield from the burdens of discovery and trial in insubstantial cases.[15] Although the Court's decisions have always suggested that qualified immunity would achieve this goal through the dismissal of filed cases, qualified immunity could also conceivably achieve this goal by discouraging insubstantial cases ever from being filed.[16]

How might qualified immunity discourage insubstantial cases from being filed? Scholars generally expect that a plaintiff will file a case if the likelihood of prevailing and her expected monetary gain is greater than her anticipated costs.[17] The expected recovery in this model equals the amount awarded if the plaintiff prevails (J) discounted by the probability that he will prevail (p), and the costs (C) are the plaintiff's expected litigation costs. So, the plaintiff will file suit if:

$$pJ \geq C$$

This model needs some tweaking to reflect typical attorneys' fee arrangements in the types of cases in which qualified immunity is raised. Attorneys generally accept Section 1983 and *Bivens* cases on contingency, with a provision entitling them to seek their reasonable attorneys' fees from the defendant if the plaintiff prevails.[18] As William Hubbard has observed, attorneys considering

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[15] *See*, *e.g.*, *supra* notes 2 and 3 and accompanying text.

[16] *See supra* note 6.

[17] For a foundational account of this model, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEG. STUD. 55 (1982) (imagining rational economic calculations regarding filing, settlement, and trial depending on the system for allocating litigation costs). *See also*, *e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 22 (2010) (describing models of litigant behavior drawn from law and economics literature that assume "both parties are guided in their decisions at each stage [of litigation] by the expected monetary gain or loss should the case be tried" but also recognizing that "the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money"); 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, 742 (1988) (expecting that plaintiffs in constitutional tort cases "will file suit if the expected recovery from the suit outweighs the expected costs.").

[18] *See generally* Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1 (2008) (describing typical fee arrangements in § 1983 cases); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. §1983 is Ineffective in Deterring*

whether to accept a case on contingency should assess the probability of success (p), the size of a judgment (J), and their fee, measured as a percentage of the judgment (f), against the cost of litigation (C).[19] So, presumably, a plaintiff's attorney will agree to file a suit on contingency if:

$$pfJ \geq C$$

As Hubbard recognizes, this calculation is dynamic and complex. Costs will increase over the course of litigation.[20] The probability of prevailing and the size of an expected judgment may also shift, depending on which judge is assigned to the case, the information unearthed during discovery, and the result of motions to dismiss or for summary judgment. Moreover, if the plaintiff prevails after trial, or the attorney is otherwise authorized to seek fees pursuant to Section 1988, the attorney may be able to recover her reasonable fees from the defendant instead of taking a percentage of the plaintiff's award.[21] An attorney who accepts a Section 1983 case on contingency must conclude that the expected recovery at some stage of the litigation—taking account of all of these contingencies—will outweigh her expected costs at that stage.

If this model accurately reflects attorneys' case selection process, qualified immunity could discourage attorneys from accepting cases by shifting their calculation of risk and reward. Qualified immunity might do so in several different ways. Qualified immunity could increase the risk that a case would be dismissed, thereby decreasing the probability of success (p). Qualified immunity could increase the risk that the plaintiff's case will be dismissed in part, thereby reducing the size of any possible judgment (J). Or qualified immunity could increase the costs of litigation (C). If qualified immunity decreases the probability of success,

Police Brutality, 44 HAST. L.J. 753, 756-57 (1993) (asserting that "most suits are taken on a contingency basis"). More than 72% of the ninety-four attorneys I surveyed for this study reported that they always or usually (70-99% of the time) enter into contingency fee arrangements with plaintiffs in § 1983 cases. Another 4% always take cases on contingency, supplemented with a limited retainer. Twelve percent take cases pro bono, with the ability to seek fees pursuant to § 1988. Another almost ten percent rely on some combination of contingency, contingency with retainer, and pro bono arrangements. Just two of the ninety-four lawyers who responded to my survey always require their clients to pay them by the hour.

[19] *See* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 707 (2016). For an in-depth exploration of contingency fee attorneys' calculation of risk and reward in case selection, see HERBERT M. KRITZER, RISKS, REPUTATIONS AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 67-88 (2004).

[20] Hubbard, *supra* note 19, at 708.

[21] *See* 42 U.S.C. §1988 (allowing reasonable attorneys' fees for prevailing parties in § 1983 cases). *See also* Mark R. Brown, *A Primer on the Law of Attorney's Fees Under* § 1988, 37 THE URBAN LAWYER 663 (2005) (describing various ways attorneys can seek fees under § 1988).

decreases the likely size of a judgment, and/or increases the costs of litigation, prevailing models of attorney case selection decisions suggest attorneys will be less willing to accept cases in which qualified immunity is likely to be raised, and especially unwilling to accept cases where the defense is likely to be successful.

The Supreme Court's stated hope is not that qualified immunity will shield government officials from burdens of discovery and trial in *all* cases, but that it will protect government officials from these burdens in "insubstantial" cases.[22] The Court has not defined what constitutes an "insubstantial" case, however. In some decisions, the Court has suggested that "insubstantial" claims are "baseless" and "frivolous,"[23] brought against "innocent"[24] government officials. In other decisions, the Court has written that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law"[25]—suggesting that qualified immunity's protections should have a broader reach. Putting aside for the moment whether the Court intends qualified immunity to shield

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[22] *See supra* notes 2 and 3 and accompanying text.

[23] Crawford-El v. Britton, 523 U.S. 574, 590 (1998) (explaining that *Harlow*'s "reformulation of the qualified immunity defense" to eliminate consideration of officers' subjective intent was justified by two considerations. "First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been used to shield baseless lawsuits from summary judgment."); Mitchell v. Forsyth, 472 U.S. 511, 553-54 (1985) (Brennan, J. concurring in part and dissenting in part) ("I have no doubt that trial judges employing [*Harlow's*] standard will have little difficulty in achieving *Harlow*'s goal of early dismissal of frivolous or insubstantial lawsuits."); Butz v. Economou, 438 U.S. 478, 507-08 (1978) (noting that qualified immunity is a workable standard for executive officers because "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading….Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.").

[24] *See*, *e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814-15 (1982).

[25] Malley v. Briggs, 475 U.S. 335, 341 (1986). The Roberts Court has cited with approval the notion that qualified immunity should protect "all the plainly incompetent or those who have knowingly violated the law" in Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018); District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018); Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017); White v. Pauly, 137 S. Ct. 548, 551 (2017); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Taylor v. Barkes, 135 S. Ct. 2042 (2015); San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015); Carroll v. Carman, 135 S. Ct. 348, 350 (2014); Stanton v. Sims, 571 U.S. 3, 5 (2013); Messerschmidt v. Millender, 565 U.S. 535, 546 (2012); *Ashcroft*, 563 U.S. at 743.

only the innocent, or also the incompetent and reckless,[26] qualified immunity should decrease the predicted likelihood of success, increase the predicted cost of litigation, and/or reduce the predicted size of judgment in whatever the Court considers to be "insubstantial" cases—such that it discourages attorneys from filing these types of cases—without discouraging the filing of "substantial" cases.

Note that I have focused here on the ways in which qualified immunity might influence an attorney's decision to accept a case. I am assuming for the purposes of this discussion that qualified immunity is unlikely to influence a *pro se* plaintiff's filing calculus. Many people who believe they have been wronged by government officials never sue for a whole host of reasons.[27] People who file lawsuits without legal assistance may be aware that Section 1983 cases are difficult to bring but I assume for the purposes of this discussion that they will be unaware of the precise doctrinal challenges associated with these claims and unfamiliar with the contours of qualified immunity—except to the extent that an attorney who has declined to take their case has described these challenges to them.[28]

II. METHODOLOGY

Several studies have attempted to measure the effects of various doctrines on case filing decisions. Some have used filed cases and other objective data in combination with presumed models of attorney behavior.[29] Others have drawn

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[26] For further discussion of what constitutes an "insubstantial" claim, see *infra* notes 176-178 and accompanying text.

[27] *See*, *e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988) (explaining that people might not sue for a number of different reasons, including "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration."). There is a rich literature examining reasons that grievances may never become filed lawsuits. *See*, *e.g.*, Galanter, *supra* note 8, at 13-16 (describing several studies measuring behaviors and decisions at the bottom of the dispute pyramid).

[28] *See* Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme* Court, 100 CORNELL L. REV. 193, 206 (2014) (studying the effects of *Twombly* and *Iqbal* pleading requirements on case filing decisions and finding that pro se plaintiffs are "comparatively immune to selection effect, because those plaintiffs more slowly adjust by ceasing to pursue some of the cases that could not surmount the new barrier.").

[29] *See*, *e.g.*, Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2032 (2012) (measuring the effects of *Twombly* and *Iqbal* on filing and settlement decisions); Schwab & Eisenberg, *supra* note 17 (examining the effects of § 1988 fee shifting on the decision to file cases).

conclusions from interviews with plaintiffs' attorneys about their filing decisions.[30] In this Article, I combine these two approaches.

First, I examined my dataset of all Section 1983 actions filed against law enforcement defendants[31] over a two-year period in five districts—the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Pennsylvania. I chose these five districts because I expected judges in these districts would vary in their approach to qualified immunity, because a high volume of Section 1983 cases are brought in these districts, and because these districts have law enforcement agencies of comparable sizes.[32] I tracked the frequency with which motions to dismiss and for summary judgment on qualified immunity were raised by defendants, granted by courts, and dispositive. I also tracked the timing and disposition of interlocutory and final appeals of qualified immunity decisions. And I tracked these results for *pro se* and counseled cases.

Next, I surveyed and interviewed plaintiffs' attorneys who entered appearances in the 1183 cases in my docket dataset to gather qualitative data about the role qualified immunity plays in their case selection decisions.[33] A total of 1007 attorneys entered appearances in these 1183 cases—137 attorneys in the Southern District of Texas, 184 in the Middle District of Florida, 173 attorneys in the Northern District of Ohio, 265 attorneys in the Northern District of California, and 248 attorneys in the Eastern District of Pennsylvania. I sent an online survey to each of the 1007 attorneys whose email(s) I could find from court records or

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[30] *See*, *e.g.*, Daniel Nazer, *Conflict and Solidarity: The Legacy of* Evans v. Jeff D., 17 GEO. J. LEGAL ETHICS 499 (2004) (reporting results of interviews with public interest attorneys about the effects of *Evans* on filing and litigation decisions); Julie Savies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997) (interviewing thirty-five plaintiffs' attorneys to understand how Supreme Court decisions interpreting the Civil Rights Attorney's Fees Awards Act of 1976 impacted filing and litigation decisions); THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES AND FEDERAL CIVIL LITIGATION 25 (2010) (interviewing thirty-six attorneys about their litigation practice). Alexander Reinert used this approach to examine the impact of qualified immunity on plaintiffs' attorneys' decisions to file *Bivens* cases. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011). For a discussion of the ways in which this study reaches findings similar to and distinct from Reinert's, *see infra* notes 116, 122, 161, 188 and accompanying text.

[31] For a discussion of my rationale for focusing on lawsuits against law enforcement defendants, see Schwartz, *supra* note 4, at 22.

[32] For further discussion of my rationale for choosing these five federal districts, see *id.* at 19-20.

[33] I focused on plaintiffs' attorneys in my interviews and surveys—instead of uncounseled people with grievances against the police—because I assume that qualified immunity plays a limited role in *pro se* plaintiffs' decisions to file suits. *See supra* note 28 and accompanying text. I received Institutional Review Board approval from UCLA (IRB#16-000470) for this survey and the subsequent interviews.

other sources.[34] The anonymous survey has twenty questions regarding the frequency with which the respondents file police misconduct suits, the percentage of their practice dedicated to these types of cases, the effects of various doctrines on their practice, and what they consider to be the most significant barriers to relief in police misconduct cases. Of the 976 survey requests I sent out, seventy-one emails bounced back, and ninety-four attorneys filled out surveys.[35]

The final question in my online survey asked attorneys to send me their email address if they wished to be contacted for a follow up interview. Fifty-seven attorneys did so. I emailed each of these attorneys, and twenty-five responded and agreed to be interviewed. I then reached out to twenty-five additional attorneys across the five districts, requesting interviews. I chose these attorneys because they had filed three or more cases in their district during the study period and/or because I knew the attorneys' reputation for bringing such cases. Ten of those attorneys agreed to be interviewed. In total, I interviewed thirty-five attorneys—seven attorneys from each of the five districts in my docket dataset.

I conducted semi-structured interviews with each of these thirty-five attorneys to learn more about their case selection decisions, the role qualified immunity doctrine plays in their filing decisions and the litigation of claims against law enforcement more generally, and their views about the challenges and rewards of civil rights litigation. These interviews lasted for between eighteen and eighty-five minutes. All but one was recorded and transcribed. Several attorneys provided me with additional documents and information by email before and after our interviews. I promised these attorneys confidentiality, although several made clear that they were happy for me to use their names.

This mixed-methods approach presents a more complete and nuanced portrait of qualified immunity's role in litigation and case selection decisions than would any single method alone. The docket dataset offers valuable information about the ways in which qualified immunity is raised and decided across the five districts in my study. The attorney surveys and interviews provide insight into how attorneys perceive qualified immunity's costs and risks—key to understanding what role the doctrine plays in attorneys' case selection decisions. Yet all

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[34] I sent the online survey to a total of 976 email addresses, which includes multiple email addresses for some attorneys.

[35] Accordingly, of the 905 survey requests that presumably reached their intended targets, I had a response rate of at least 10.4%. (Some attorneys had multiple email addresses, so the actual response rate is actually somewhat higher.) For some context regarding this response rate, see Scott Keeter et al., *What Low Response Rates Mean for Telephone Surveys*, PEW RESEARCH CENTER (May 15, 2017), http://www.pewresearch.org/2017/05/15/what-low-response-rates-mean-for-telephone-surveys/ (noting that Pew Research telephone surveys have a response rate of 9% and citing research suggesting "response rate is an unreliable indicator of bias"); *see also* Geon Lee et al., *Survey Research in Public Administration: Assessing Mainstream Journals with a Total Survey Error Framework*, 72 PUB. ADMIN. REV. 87 (2011) (reporting that articles are published with survey response rates ranging from 10%-90%+ in public administration).

empirical studies have methodological limitations, and this study is no exception.

First, the study focuses on practices in five federal districts. I chose these five districts in part because I believed the federal and district judges in these circuits would vary in their approach to qualified immunity and other aspects of Section 1983 litigation.[36] But, each year, in federal courts around the country, thousands of lawyers file thousands of Section 1983 cases against law enforcement defendants.[37] I cannot be certain that the ways in which Section 1983 cases are litigated in the five districts in my study are consistent with litigation practices in other federal and state courts, or that the lawyers litigating in these five districts share the views of lawyers litigating these cases around the country.[38]

Second, this study focuses on Section 1983 cases against state and local law enforcement. I focused on lawsuits against law enforcement defendants both because the Court's qualified immunity jurisprudence—particularly in recent years—has largely developed in these types of cases, and because it creates some substantive consistency across the cases in the dataset.[39] I do not know for certain whether these findings about the costs and risks of qualified immunity or the role qualified immunity plays in case selection decisions are equally applicable to other types of civil rights claims. But the attorneys I surveyed and interviewed who brought other types of civil rights claims did not indicate that their litigation or case selection process is different when they bring Section 1983 claims against other types of government defendants.

Third, I cannot be certain that the attorneys I surveyed and interviewed accurately described their views about qualified immunity or the role the doctrine plays in their case selection decisions. One could, for example, imagine that attorneys might exaggerate the damaging effects of qualified immunity to build a case against the doctrine, or underplay the disruptive effect of qualified immunity as a way of demonstrating their skillfulness as litigators. But attorneys were assured confidentiality in their surveys and interviews to minimize self-serving statements and encourage them to speak frankly about their views. A different concern about attorneys' accuracy is that they might inadvertently misperceive

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[36] For further discussion of my reasons for this belief, see Schwartz, *supra* note 4, at 19-20.

[37] Available data indicates that 37,802 "civil rights" cases were filed in federal court in 2017, which includes voting, employment, housing and education cases, among others. *See* U.S. DISTRICT COURTS-CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2016 AND 2017, http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf. Section 1983 cases against law enforcement would likely be included in a subcategory of "civil rights" cases called "other civil rights" cases. There were 14,941 "other civil rights" cases filed in federal court in 2017. *See id.*

[38] For further discussion of this methodological limitation see Schwartz, *supra* note 4, at 23-24.

[39] For further discussion of this methodological choice, see *id.* at 22.

the effects of qualified immunity on their case selection decisions and other aspects of their work. But many of attorneys' verifiable observations—about the frequency with which qualified immunity resulted in case dismissals, for example—were consistent with data from the docket dataset, which should inspire confidence in the accuracy of their other observations.

Finally, I do not know whether the thirty-five attorneys I surveyed and interviewed hold views representative of the 1007 attorneys who entered appearances in the 1183 cases in my docket dataset. Attorneys willing to take the time to fill out surveys and be interviewed might, for example, be especially frustrated about the costs and challenges of Section 1983 litigation, or might be especially committed to Section 1983 litigation as a means of systemic reform. The attorneys I surveyed and interviewed are clearly unrepresentative in one way—they filed more police misconduct cases, on average, than other attorneys who entered appearances in the cases in my dataset.[40] Attorneys who file fewer police misconduct cases may have different views about the costs and risks associated with qualified immunity—or the impact of those costs and risks on filing decisions—than those who file more. But I found no correlation, among the attorneys I interviewed and surveyed, between the volume of cases attorneys filed and their views of civil rights litigation or case selection.

Moreover, despite the overrepresentation in my study of attorneys with a more active civil rights docket, the attorneys in my study have a wide range of experiences litigating police misconduct cases.[41] Some have brought hundreds of police misconduct cases, and others have brought only a few. Some spend virtually all of their time litigating police misconduct suits, and others devote only a small percentage of their time to these cases. Some primarily represent plaintiffs bringing the highest damages cases—those involving wrongful convictions and deadly force. Others usually represent plaintiffs in cases concerning what one attorney referred to as the "smaller indignities" of police stops and frisks.[42] The attorneys I interviewed and surveyed are partners at mid-sized and small firms, solo practitioners, and employed by non-profits. And the attorneys have, combined, several centuries-worth of experience bringing thousands of police misconduct cases on plaintiffs' behalf. Accordingly, these attorneys have a range of perspectives and experiences and offer rich anecdotal evidence with which to begin to understand the role of qualified immunity doctrine in litigation and case selection.

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[40] *See* Appendix Tables 1-3, which reflect the total number of appearances by all of the 1007 attorneys who entered appearances during the two-year study period in my docket dataset (Appendix Table 1); the appearances of attorneys I interviewed during the two-year period in my docket dataset (Appendix Table 2); and the appearances surveyed attorneys reported over a five-year period in police misconduct cases (Appendix Table 3).

[41] *See* Appendix for information about the attorneys I interviewed, including the percentage of time they spend on civil rights cases, the other types of work they take on, their fee arrangements with clients, and their practice setting.

[42] N.D. Cal. Attorney E. *See also* M.D. Fla. Attorney D (describing himself as a "bottom feeder" who has "fought a lot of battles on principle for very small amounts").

III. THE COSTS AND RISKS OF QUALIFIED IMMUNITY

Standard models of case selection assume that an attorney will only file a case if she believes that the likelihood of prevailing and her expected monetary gain is greater than her anticipated costs. Accordingly, assuming these models are accurate, to understand the effects of qualified immunity on case selection one must understand how attorneys believe qualified immunity doctrine affects the cost of litigation (C), the probability of success (*p*), and the size of judgments (J).

In this Part, drawing on my docket dataset of police misconduct suits and my surveys and interviews of attorneys who entered appearances in these cases, I report attorneys' perceptions that qualified immunity increases cost and delay, can decrease the size of judgments, and raises the risk of dismissal—a risk that weighs particularly heavy in the minds of attorneys after they have engaged in costly discovery, motion practice, and interlocutory appeals. The dockets reveal litigation practices consistent with attorneys' perceptions. The dockets also suggest that the costs and risks associated with qualified immunity are greater in some parts of the country than others, and the attorney surveys and interviews were consistent with this regional variation.

A. How Qualified Immunity Affects the Cost of Litigation

When I asked attorneys what role qualified immunity plays in their police misconduct cases, they often complained that the doctrine increases the cost, time, and complexity of litigating these cases. Defendants regularly raise qualified immunity as a defense—they did so in 368 (31.1%) of the 1183 cases in my docket dataset.[43] In sixty of these 368 cases, defendants brought qualified immunity motions two or more times over the course of litigation.[44] It is not particularly burdensome for defendants to raise qualified immunity in a motion to dismiss or summary judgment; they need assert only that plaintiff cannot identify a factually similar case from their circuit or the Supreme Court, or a consensus of factually similar cases, that would put the defendant on notice that his conduct was unlawful.[45] But for plaintiffs effectively to respond to a qualified immunity

[43] Schwartz, *supra* note 4, at 27. Qualified immunity could not be raised in 204 of the cases in my dataset either because the cases were brought against municipalities or sought solely injunctive or declaratory relief (ninety-nine cases), or because the cases were brought against individuals, seeking damages, but were dismissed by the district court before defendants had the opportunity to respond (105 cases). *Id.* Defendants declined to raise qualified immunity in the other 611 cases. *Id.*

[44] *See id.*

[45] *See* Wilson v. Layne, 526 U.S. 603, 617 (1999) (requiring that plaintiffs point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority" to defeat qualified immunity); *Ashcroft*, 563 U.S. at 741 (explaining that defendants violate "clearly established law" only when "'[t]he contours of [a] right [are] sufficiently

motion, they must find factually similar cases—either from their circuit or from multiple other circuits—holding defendants' conduct unconstitutional, and then must brief and argue the motions.

Defendants are also entitled to immediate appeals of qualified immunity denials that turn on questions of law,[46] and brought interlocutory appeals of forty-one (21.7%) of the 189 qualified immunity motions in my docket dataset that were denied in whole or part.[47] Plaintiff's counsel will likely have done much of the relevant qualified immunity research in the district court. But the style of briefing and argument will likely be different in the court of appeals.[48] Attorneys agreed that qualified immunity motions and interlocutory appeals are used by defense counsel to "wear…out"[49] and "beat down the plaintiff's counsel,"[50] and make their lives "somewhat miserable."[51]

Apart from the cost of researching and briefing individual qualified immunity motions, learning about and staying abreast of changes in qualified immunity doctrine is time consuming. Courts and commentators have long observed that qualified immunity is exceedingly complex. The Supreme Court has offered shifting and unclear direction about which courts can "clearly establish" the law, and how factually similar prior precedent must be to put defendants on notice.[52] Circuit courts' distinctive interpretations of the doctrine adds an additional layer

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clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right.'") (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). In some circuits, qualified immunity is treated as an affirmative defense and defendants bear the burden of proving their entitlement to qualified immunity. *See*, *e.g.*, Halsey v. Pfeiffer, 750 F.3d 273, 288 (3d Cir. 2014) ("Unlike some other courts,…we follow the general rule of placing the burden of persuasion at a summary judgment proceeding on the party asserting the affirmative defense of qualified immunity."). Nevertheless, as a matter of practice, it appears to remain plaintiffs' burden to find cases where factually similar conduct was ruled unconstitutional.

[46] *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905-17 (describing the standards for interlocutory appeals of qualified immunity denials and criticizing the practice because it increases cost, delay, and complexity).

[47] Schwartz, *supra* note 4, at 27.

[48] *See* N.D. Ca. Attorney B (describing her dislike of interlocutory appeals in terms of her preference for trial court practice).

[49] M.D. Fla. Attorney B.

[50] E.D. Pa. Attorney A.

[51] *Id.*

[52] *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 look hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves."); John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

of complexity.[53] It takes a real dedication of time and effort to untangle the doctrine that John Jeffries has called "a mare's nest of complexity and confusion."[54] As one attorney explained, in response to a question about qualified immunity: "[I]t takes an enormous amount of dedication to do these cases properly. I think it takes an enormous amount of experience to do them properly. And there's a huge learning curve."[55]

Qualified immunity motion practice and interlocutory appeals additionally increase the time associated with litigating these cases.[56] In my docket dataset, the interlocutory appeals that were decided on the merits took, on average, 441 days from filing to resolution.[57] Courts can also suspend litigation while qualified immunity motions to dismiss and summary judgment motions are pending. Defendants sought and received formal stays of discovery while eight motions to dismiss on qualified immunity grounds were being decided. In these cases, discovery was stayed for an average of 152 days.[58]

Attorneys were clearly frustrated by these delays in and of themselves,[59] but additionally reported that these delays added to the cost necessary to litigate these cases and could, in some cases, weaken the cases on the merits. Attorneys have the uncomfortable choice of continuing to prepare for an uncertain trial

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[53] Jeffries, *supra* note 52, at 853-54 (describing the Eleventh Circuit's formulation, which Jeffries likes in theory, but which has three different tests for "clearly established" law).

[54] *Id.* at 852.

[55] M.D. Fla. Attorney C.

[56] *Accord* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2063, 2082 (2018) (finding that the median time from filing to trial was longer in cases in which qualified immunity was raised, which he found "unsurprising, because one would assume that cases involving qualified immunity would take longer to resolve, given the opportunity for motion practice and interlocutory appeal.").

[57] Of the forty-one interlocutory appeals I tracked in my docket dataset, one was dismissed for lack of jurisdiction, and sixteen were withdrawn.

[58] *See* Butcher v. City of Cuyahoga Falls, 11-cv-0939 (N.D. Ohio 2011) (case stayed eighty-eight days while motion for judgment on the pleadings pending); Belniak v. Florida Highway Patrol, 12-cv-1334 (M.D. Fla. 2012) (case stayed twenty-six days while motion to dismiss pending); Simmons v. Rutherford, 12-cv-0946 (M.D. Fla. 2012) (case stayed 171 days while motion to dismiss pending); Holton v. Blankinship, 11-cv-0325 (M.D. Fla. 2011) (case stayed sixty-three days while motion to dismiss pending); Stiles v. Judd, 12-cv-2375 (M.D. Fla. 2012) (case stayed 199 days while motion to dismiss pending); Harvey v. Montgomery County, 11-cv-1815 (S.D. Tex. 2011) (case stayed 121 days while motion to dismiss pending); Hinojosa v. Sandlin, 12-cv-0012 (S.D. Tex. 2012) (case stayed 334 days while motion to dismiss pending); Shabazz v. City of Houston, 11-cv-1125 (S.D. Tex. 2011) (case stayed 213 days while motion was pending).

[59] *See*, *e.g.*, E.D. Pa. Attorney A ("I'm particularly irked when frivolous qualified immunity claims which are shut down by the district court on summary judgment end up being the subject of interlocutory appeal. So you've got to spend another six to twelve months or longer dealing with that.").

while the case is on interlocutory appeal, or grow unfamiliar with the case in the year or more that it is on appeal and re-learn its details in preparation for trial.[60] Witnesses' recollections of critical facts may fade over the months or years that qualified immunity motions are litigated and appealed.[61] And interlocutory appeals require attorneys to brief and argue their cases in the court of appeals—a setting less familiar and comfortable than district court for some attorneys.[62]

My docket dataset suggests some regional variation in the costs associated with litigating qualified immunity. Defendants in the Southern District of Texas and Middle District of Florida raised qualified immunity in a greater percentage of cases than defendants in the other three districts.[63] Defendants in the Southern District of Texas and the Middle District of Florida are more likely to raise qualified immunity at the motion to dismiss stage than are defendants in the other three districts, and are more likely to raise qualified immunity at multiple stages of the litigation process.[64] And courts in the Southern District of Texas and the Middle District of Florida grant stays of discovery while qualified immunity motions are pending more often than courts in the other districts.[65] By each of these metrics, the costs of litigating qualified immunity are higher in the Southern District of Texas and the Middle District of Florida than in the other three districts in my study. But plaintiffs in the Northern District of Ohio bear one type of qualified immunity-related cost more than those in any other district; defendants

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[60] *See*, *e.g.*, M.D. Fla. Attorney E (describing preparing jury instructions, his witness list, and exhibits while the denial of qualified immunity is on interlocutory appeal).

[61] *See* Alphonse A. Gerharrdstein, *Making a Buck While Making a Difference*, 21 Mich. J. Race & L. 251, 264 (2016) ("Interlocutory appeals cause witness' memories to face or disappear…"); Almighty Supreme Born Allah v. Milling, 2018 WL 3388317 (2018), *Brief of Cross-Ideological Groups on Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit* [hereinafter *Cross-Ideological Amicus Brief*] at *19 ("The resources required to see [interlocutory appeals] through may render the effort untenable, with financial outlays compounding as evidence grows stale. These effects will be especially pronounced for claims promising only modest monetary recovery.").

[62] *See*, *e.g.*, N.D. Cal. Attorney B (explaining that interlocutory appeals are challenging in part because "we're trial lawyers and we don't want to be appellate lawyers").

[63] *See* Schwartz, *supra* note 4, at 29.

[64] *See id.* at 33, 35.

[65] Of the twenty-three qualified immunity motions to dismiss in the Southern District of Texas, three (13%) cases were stayed while the motions were pending. Of the fifty-nine qualified immunity motions to dismiss in the Middle District of Florida, four (6.8%) cases were stayed while the motions were pending. Of the seventeen qualified immunity motions to dismiss in the Northern District of Ohio, one (5.8%) case was stayed while the motion was pending. There were thirty motions to dismiss on qualified immunity grounds brought in the Eastern District of Pennsylvania and fourteen motions to dismiss on qualified immunity grounds brought in the Northern District of California; no cases were stayed while any of these motions were pending.

in the Northern District of Ohio are far more likely immediately to appeal denials of qualified immunity.[66]

Attorneys' reports of the costs associated with qualified immunity are consistent with the regional variation apparent in the docket dataset. Attorneys from the Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio reported that defendants usually raise qualified immunity at summary judgment.[67] In contrast, attorneys from the Southern District of Texas and Middle District of Florida reported that defendants regularly raise qualified immunity in both motions to dismiss and at summary judgment.[68] Attorneys from Texas and Florida described defendants' efforts to stay proceedings while motions to dismiss raising qualified immunity were pending,[69] and attorneys from Ohio complained bitterly about delays associated with interlocutory appeals.[70]

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[66] Defendants in Northern District of Ohio brought interlocutory appeals in seventeen of thirty-five (48.6%) partial or full denials of qualified immunity. In contrast, defendants in the Southern District of Texas brought interlocutory appeals in five of twenty-six (19.2%) partial or full denials of qualified immunity; defendants in the Middle District of Florida and the Northern District of California brought interlocutory appeals in nine of forty-three (20.9%) partial or full denials of qualified immunity; and defendants in the Eastern District of Pennsylvania brought interlocutory appeals in one of forty (2.5%) partial or full denials of qualified immunity.

[67] *See*, *e.g.*, N.D. Cal. Attorney F (explaining that defendants usually include qualified immunity in their summary judgment motions); N.D. Ohio Attorney C ("I don't think I've ever had a police misconduct case where defendants counsel did not file a motion for summary judgment and which is based in part on qualified immunity. So absolutely qualified immunity is a huge issue in these types of cases."); N.D. Ohio Attorney F ("[I]n the deadly force cases, or excessive force cases, they don't really come up so much in the motions to dismiss. It's the murkier legal case situations like, wrongful convictions, and exonerations, and Brady claims, and falsification, and malicious prosecution…."); N.D. Ohio Attorney G ("I can't think of one [case] that was dismissed at the motion to dismiss stage…we still get a qualified immunity motion at summary judgment in almost every case.").

[68] *See*, *e.g.*, M.D. Fla. Attorney B (explaining that qualified immunity motions are "coming up earlier and earlier."); S.D. Tex. Attorney B (reporting that defendants raise qualified immunity in motions to dismiss "every single time without fail….Every kind of police case, every time.").

[69] *See* M.D. Fla. Attorney B (explaining that defense attorneys "always try" to get stays while qualified immunity motions are pending but "I would say that maybe once or twice in all the cases that I can think of they were actually able to get stays."); S.D. Tex. Attorney B (describing that "the first thing [defendants] do is file a motion to dismiss and since the court will not allow discovery in a…case where they assert qualified immunity prior to ruling on a motion to dismiss, you're just hamstrung because you can't get the discovery before suit.").

[70] *See*, *e.g.*, N.D. Ohio Attorney E ("[Qualified immunity] gives the defendants the ability to call timeout in the middle of litigation….defendants get a free shot [to get the case dismissed through an interlocutory appeal] and they often take it."); N.D. Ohio Attorney

B. How Qualified Immunity Affects the Probability of Success

Attorneys also expressed concern that a successful qualified immunity motion could cause their case to be dismissed.[71] In my docket dataset, I found that this happened relatively rarely.[72] Just seven (.6%) of the 1183 cases in my dataset were dismissed at the motion to dismiss stage on qualified immunity grounds, and just thirty-one (2.6%) of the 1183 cases in my dataset were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds.[73] But the likelihood of dismissal on qualified immunity is greater in some districts than in others. Cases in the Southern District of Texas had the highest risk of dismissal on qualified immunity grounds—9.2% of cases filed in the Southern District of Texas were dismissed on qualified immunity grounds. In contrast, 6.7% of cases filed in the Middle District of Florida, 2.3% of cases in the Northern District of Ohio, 1.2% of cases in the Northern District of California, and 1% of cases in the Eastern District of Pennsylvania were dismissed on qualified immunity grounds.[74]

Attorneys from the different districts described the likelihood of dismissal on qualified immunity grounds in a manner consistent with the regional variation seen in the docket dataset. In the Eastern District of Pennsylvania and Northern District of California, attorneys reported that defendants regularly raised qualified immunity—particularly in false arrest cases—but that qualified immunity

F (describing interlocutory appeals as "a tactic that most of the defense lawyers just feel they have to use...they don't care if they are shut down [on appeal], because at least they get the benefit of the delay.").

[71] *See*, *e.g.*, M.D. Fla. Attorney F (explaining that he does not want to get "bounced" on qualified immunity).

[72] *See generally* Schwartz, *supra* note 4. Although my study did not consider the role of qualified immunity at trial, Alexander Reinert has recently studied this question by looking at 287 cases in which qualified immunity was raised, jury instructions were proposed, and the case went to or through a jury trial. Reinert, *supra* note 56. Consistent with my findings about the impact of qualified immunity when raised in motions to dismiss and at summary judgment, Reinert found that "qualified immunity rarely plays a significant role in jury trials." *Id.* at 2088.

[73] Schwartz, *supra* note 4. When one eliminates pro se filings from the dataset, just .2% of the 910 cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 3.3% were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds.

[74] If one looks only at represented plaintiffs, the results are approximately the same: Ten of 104 (9.6%) counseled cases filed in the Southern District of Texas were dismissed on qualified immunity grounds, compared with twelve of 148 (8.1%) counseled cases filed in the Middle District of Florida, four of 131 (3.1%) counseled cases filed in the Northern District of Ohio, three of 187 (1.6%) counseled cases filed in the Northern District of California, and four of 340 (1.2%) counseled cases filed in the Eastern District of Pennsylvania.

motions were infrequently granted.[75] Attorneys in these districts reported that they could avoid dismissal on qualified immunity grounds if they could create an issue of fact, and reported that excessive force cases were rarely if ever dismissed on qualified immunity grounds.[76] In contrast, attorneys from the Southern District of Texas and the Middle District of Florida thought dismissal on qualified immunity grounds was a realistic possibility in all types of cases.[77]

Even when the absolute risk of dismissal on qualified immunity grounds is relatively small, the risk of dismissal can loom large in attorneys' minds. If an attorney takes a case on contingency and that case is dismissed, the attorney will lose all the money she invested in the case. As one attorney explained:

> [I]f you're going to federal court you're committing for one attorney, I mean, each case is a fairly substantial amount of time and a substantial amount of funds for the client….There's nothing worse than championing a client's claim for two or three years and having it turn out to be a zero. That's not good use of the attorney time—especially if you're on contingency fee. It's not a good use of the client's time—they end up unhappy, they get their hopes up, they turn down mediation money and then get nothing. That's not, that's not desirable for anybody.[78]

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[75] *See*, *e.g.*, E.D. Pa. Attorney A (explaining that if he gathers the evidence necessary to create a factual dispute that defeats summary judgment, the "great bulk of the judges here are going to follow the law and not grant qualified immunity in most cases."); E.D. Pa. Attorney E (reporting that defendants do raise qualified immunity, but "it doesn't work [in the Eastern District of Pennsylvania] for the most part."); N.D. Cal. Attorney A (reporting that "defense attorneys will always include a qualified immunity section of their summary judgment motions" but "with more video…we can create triable issues of fact and the qualified immunity defense, so long as we have an expert and they have an expert, does not tend to be disposing of as many of these cases.").

[76] *See*, *e.g.*, E.D. Pa. Attorney A ("I think that the law is so well developed...that it's really tough...to lose...an excessive force case on qualified immunity grounds."); E.D. Pa. Attorney D ("I have never heard of a motion for qualified immunity in just excessive force [cases] here. Not just my cases but any cases."); E.D. Pa. Attorney G ("If we think [force used by an officer] is unreasonable, I don't think qualified immunity deters us in those cases."); N.D. Cal. Attorney G (explaining that, in excessive force cases, "there are a lot more cases and even though, you may not have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution when she struck that person while he was on the ground in handcuffs or with one handcuff on with his face down, right?").

[77] *See*, *e.g.*, M.D. Fla. Attorney D (explaining that defendants raise qualified immunity "every time, even if it's not valid they'll take a stab at it, they'll take a run at it."); S.D. Tex. Attorney B (reporting that qualified immunity is raised at the motion to dismiss stage in "[e]very kind of police misconduct case," including excessive force cases).

[78] M.D. Fla. Attorney D.

Although cases are infrequently dismissed in the Eastern District of Pennsylvania and the Northern District of California on qualified immunity grounds, defendants in these districts generally raised qualified immunity at summary judgment, after they had invested in costly discovery and motion practice.[79] Lawyers in these districts expressed concern that they would spend significant time and money in discovery, only to have the case dismissed on qualified immunity grounds at summary judgment.[80]

C. *How Qualified Immunity Affects the Size of Judgments*

Attorneys also reported that qualified immunity may decrease the size of judgments. In seventy-nine of the 1183 cases (6.7%) in my dataset, district courts granted qualified immunity motions in whole or part, but additional parties or claims remained in the case. In some of these cases, courts may have dismissed the higher damages claims on qualified immunity grounds, even as they allowed some claims to proceed.[81]

In other cases, courts dismissed plaintiffs' federal claims on qualified immunity grounds but allowed plaintiffs' parallel state law claims to proceed.[82]

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[79] *See supra* notes 64, 67 and accompanying text.

[80] *See*, *e.g.*, N.D. Ca. Attorney B (explaining that attorneys need to factor in the fact that their case may be delayed by motion practice and interlocutory appeals, and that attorneys "have to factor in the appeal, and especially now with the courts going the way they are and your chances are reducing by having that level of uncertainty intervening."); E.D. Pa. Attorney D (explaining that a concern in case selection is "whether I think I'm going to get two years down the road, a year down the road, and then they file a qualified immunity [motion] and I'm out.").

[81] For example, in Porter v. City of Santa Rosa, 11-cv-4886 (N.D. Cal. Oct. 3, 2011), the district court dismissed plaintiff's § 1983 claims against defendant police officers, leaving only his *Monell* claim against the City of Santa Rosa. Plaintiff's counsel stopped responding to defendant's communications, and the case was dismissed for failure to prosecute. In Killian v. City of Monterey, 12-cv-5418 (N.D. Cal. Oct. 19, 2012), the plaintiff alleged that he was falsely arrested for driving under the influence after he was found asleep in his car. He brought claims for unreasonable search and seizure, excessive force, malicious prosecution, and violation of due process and equal protection. The court granted defendants qualified immunity for all but the equal protection claim. *See* Order Granting-in-Part Defendants' Motion for Summary Judgment (Dec. 13, 2013). Given the claims that were dismissed and the claim that remained, the summary judgment order appears to have decreased the case's value. The parties subsequently entered settlement negotiations, and the plaintiff approved—but later refused to sign—the settlement agreement. Plaintiff's counsel then withdrew from the case and the last claim was dismissed.

[82] In a few cases, plaintiffs voluntarily dismissed their federal claims while qualified immunity motions were pending, so their state law claims were remanded to state court. *See*, *e.g.*, Joseph v. City of Orlando, 12-cv-0131 (M.D. Fla 2012); Cooks v. Bailey, 12-

Even though these state law claims concerned the same conduct as the federal claims that were dismissed, plaintiffs may have been able to recover less for the state law claims than they could have for the federal claims. For example, Florida caps damages for state law claims at $300,000.[83] Accordingly, when federal claims are dismissed on qualified immunity grounds, the total potential recovery—including attorneys' fees—is limited to $300,000. This cap can diminish the potential size of recovery or discourage plaintiffs from continuing to pursue their claims.[84] Plaintiffs whose federal claims are dismissed also lose their opportunity to seek attorneys' fees under Section 1988.[85]

IV. QUALIFIED IMMUNITY AND CASE SELECTION

Attorneys across the five jurisdictions in my study report qualified immunity increases the cost, complexity, and delay associated with Section 1983 litigation. There is regional variation in attorneys' views about the likelihood of dismissal on qualified immunity grounds—variation that tracks my findings in the docket dataset. But in all districts, even in districts where the actual risk of dismissal on qualified immunity grounds is lowest, attorneys fear that cases will be dismissed on qualified immunity grounds at summary judgment or interlocutory appeal of a summary judgment denial—after attorneys have invested time and money in discovery. Partial dismissals of cases on qualified immunity grounds can also reduce the potential value of the case.

Some attorneys report—and my docket dataset suggests—that concerns about the costs and risks of qualified immunity may cause plaintiffs' attorneys to encourage their clients to settle during litigation.[86] But do those same costs

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cv-0869 (M.D. Fla. 2012); Glass v. City of St. Petersburg, 12-cv-2405 (M.D. Fla. 2012); Forde v. The Home Depot, 11-cv-5823 (E.D. PA 2011).

[83] *See* FL Stat §768.28 (2016).

[84] In one case in my docket dataset, *Spann v. Verdoni*, a Sarasota County deputy sheriff shot and killed a 20-year-old after he and a friend rang the deputy's doorbell late at night as a prank. The district court granted the deputy qualified immunity on the federal claims and remanded the state claims to state court. *See* Summary Judgment Order, *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Nov. 27, 2012). The decedent's family's attorney informed me that his clients "made the decision not to pursue an action in State court" because the damages cap "severely restrict[ed] potential damages." E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Apr. 4, 2011), to author (Mar. 2, 2017, 10:15 AM) (on file with author).

[85] *See supra* note 21 and accompanying text.

[86] *See*, *e.g.*, Email from N.D. Ohio Attorney B to author (Jan. 18, 2018, 11:14 AM) (reporting that concerns about qualified immunity caused clients to settle a case because they "did not want to either win and have [defendants] appeal or us lose and us appeal—this would have stopped the case dead in the water for approximately a year and a half."). *See also* Schwartz *supra* note 4, at 36, 40 (observing that 17% of qualified immunity

and risks influence plaintiffs' attorneys' case selection decisions? Theories of case selection expect that lawyers accepting cases on contingency will be less inclined to accept cases where the anticipated costs exceed the likely return.[87] So, one would assume that attorneys would be less likely to accept cases where defendants are likely to raise qualified immunity in pretrial motions, and particularly unlikely to accept cases vulnerable to dismissal on qualified immunity grounds.

The docket dataset can only measure the effects of qualified immunity on case selection in an indirect way—by comparing the role of qualified immunity in *pro se* and counseled cases. If one assumes that attorneys—but not *pro se* plaintiffs—evaluate the costs and risks of qualified immunity when deciding whether to file a case, and decline to file cases where those costs and risks are high, one might expect that *pro se* plaintiffs would more often file cases vulnerable to dismissal on qualified immunity grounds, and more of their cases would, in fact, be dismissed on qualified immunity. My docket dataset does not support this theory. *Pro se* plaintiffs were successful far less often than represented plaintiffs,[88] and cases brought by *pro se* plaintiffs were, on average, dismissed earlier in the course of litigation.[89] But defendants raised qualified immunity in the same percentage of *pro se* and counseled cases (37.6%). And three times more counseled cases than *pro se* cases were dismissed on qualified immunity grounds.[90] Courts were more likely to grant defendants' motions to dismiss and for summary judgment in cases brought by *pro se* plaintiffs—but they were less likely to grant those motions on qualified immunity grounds. These data suggest that *pro se* plaintiffs are far less likely to succeed, but that neither defendants nor courts view *pro se* cases as more vulnerable to dismissal on qualified immunity. This evidence is consistent with my view that qualified immunity is neither necessary nor well-suited to dismiss filed cases before discovery or trial,[91] but does not foreclose the possibility that attorneys' concerns about qualified immunity cause them to file more "substantial" cases than plaintiffs proceeding *pro se*.

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motions, 39% of interlocutory appeals, and 26.9% of final appeals of qualified immunity decisions were voluntarily dismissed while pending, presumably because the cases settled). *See also* Joanna C. Schwartz, *After Qualified Immunity* (on file with author) (describing the possibility that the threat of qualified immunity dismissals encourages plaintiffs to settle).

[87] *See supra* note 17 and accompanying text.

[88] Just 16.1% of cases (44 out of 273) brought by *pro se* plaintiffs ended with a settlement, voluntary dismissal, or plaintiff verdict, whereas 71% of cases (637 out of 910) brought by represented plaintiffs ended with one of these outcomes.

[89] A total of 41.4% of *pro se* cases (113 out of 273) were dismissed *sua sponte* before the defendant answered, as compared to 1.4% of cases (13 out of 910) brought by represented plaintiffs. And 19% (52) of *pro se* plaintiffs' cases were dismissed at the motion to dismiss stage, as compared to 4.5% (41) of cases brought by represented plaintiffs.

[90] A total of 3.5% of counseled cases and 1.5% of *pro se* cases were dismissed on qualified immunity.

[91] *See* Schwartz, *supra* note 4, at 53-57.

Accordingly, to better understand the role qualified immunity plays in plaintiffs' attorneys' case selection decisions, I asked each of the thirty-five attorneys I interviewed to describe the considerations they take into account when deciding whether to take a case. Attorneys' responses to this question, and our subsequent discussions, lead me to three observations about the role qualified immunity plays in these attorneys' case selection decisions.

First, the attorneys I interviewed all take a number of different factors into account when deciding whether the potential benefits of a case outweigh its costs and risks—including whether the judge and jury will find the plaintiff sympathetic and credible, the strength of the evidence supporting the plaintiff's claims, the costs of litigating the case, and the amount of recoverable damages. So, to the extent that attorneys are assessing the costs and risks of qualified immunity at case selection, they do not consider these costs and risks in a vacuum.

Second, attorneys do not necessarily decline cases vulnerable to motion practice or dismissal on qualified immunity. Thirteen lawyers I interviewed report that they do not take qualified immunity into account when selecting cases, and another eleven report rarely declining cases because of qualified immunity. These twenty-four attorneys agreed that qualified immunity increases the risks, costs, and complexities of Section 1983 litigation, but offered several reasons why they do not select cases based on whether qualified immunity might be raised or successful.

Third, when attorneys do decline cases vulnerable to motion practice and dismissal on qualified immunity, they appear to do so for several reasons unrelated to the cases' merits. Attorneys I interviewed report declining cases where the cost of litigating qualified immunity outweighs the likely financial rewards, cases with fact patterns that have not previously been held unconstitutional, and cases involving certain types of claims—especially false arrest claims—where attorneys believe they must produce evidence of intentional misconduct to defeat qualified immunity motions. One attorney I interviewed reports that he has stopped accepting Section 1983 cases because immunities pose an insurmountable barrier, and circumstantial evidence suggests that the challenges of civil rights litigation—including qualified immunity—may cause many more lawyers to decrease the number of civil rights cases they file or get out of the business of civil rights litigation altogether. Qualified immunity does appear to reduce the total number of civil rights cases filed, but does not appear to do a good job of weeding out only insubstantial cases.

In this Part, I describe each of these findings in more detail.

A. Qualified Immunity Is One of Many Case Selection Considerations

When I asked attorneys what factors they take into consideration when deciding whether to accept a case, five volunteered qualified immunity as a consideration and another seventeen agreed, when asked, that qualified immunity played a role. But every attorney I interviewed described multiple factors related to the probability of success, anticipated size of judgment, and cost of litigation that inform their decisions.

1. Considerations Related to the Probability of Success

Many attorneys I surveyed and interviewed believe that judges and juries are more sympathetic to police officer defendants and generally hostile to plaintiffs' claims.[92] This perceived preference for government defendants can cause judges and juries to dismiss plaintiffs' claims or award plaintiffs minimal damages.[93] Accordingly, attorneys look for cases and plaintiffs that judges and juries might find compelling. Part of this calculation concerns the underlying facts of the case. Attorneys report that they look for cases where the facts not only establish a constitutional violation, but are "horrific" or "outrageous."[94] As one attorney explained, "I mean, if I'm shocked, I figured then maybe some jurors will be shocked."[95]

Attorneys also look for cases with evidence that skeptical judges and juries will find convincing. Ideally, the police department's own reports establish that the police officer had engaged in wrongdoing.[96] If not—and it will be the officer's word against the plaintiff's—attorneys report that they are more likely to take a case if there is a video or other evidence to corroborate the plaintiff's claims and undermine the claims of the officer(s).[97]

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[92] For further discussion of attorneys' perceptions about judges and juries, *see* Schwartz, *supra* note 86.

[93] *See id.*

[94] *See*, *e.g.*, M.D. Fla. Attorney A ("[T]he conduct has to be somewhat egregious [and] the client didn't provoke the conduct or cause what happened to him."); M.D. Fla. Attorney B ("You're looking for cases where the facts are horrific."); N.D. Cal. Attorney C (explaining that he considers "how outrageous the conduct looks on the video…").

[95] N.D. Cal. Attorney C.

[96] *See*, *e.g.*, M.D. Fla. Attorney C ("[T]here has to be a constitutional claim that I can prove. It's helpful but not necessarily dispositive that when you read the police report, if you assumed everything is accurate that the cops still loses, which means that they have to lie their way out of it, and they're not bashful about that - but that's at least a good starting point.").

[97] *See*, *e.g.*, E.D. Pa. Attorney G ("[T]he excessive force cases we bring, we've got – we almost always have something more than our client's versions whether it's on video or a photograph or very strong medical documentation or a witness."); S.D. Tex. Attorney A ("Your typical tackling cases, or putting them to the ground, those are extremely difficult without some sort of video or witnesses or things of that nature, at least to illustrate that it's not necessary…"); N.D. Cal. Attorney A ("There has to be a good witness to your version of events. Like this one I was just looking at there's a guy who's on probation and an officer seized him and sees he has a gun in his waistband and he was just talking with a friend. And the guy ran and of course the officer says he turns around and points the gun at him. So I need either a good witness or a video that gives us some evidence that that didn't happen."); M.D. Fla. Attorney C ("if it turns out that the police report does at least allege something that rises to the level of a criminal offense, then do I have independent witnesses or objective evidence like a videotape that supports the argument that the police officer was dishonest in how they wrote their report.").

Attorneys also report considering whether the plaintiff would be compelling to a jury. Attorneys want clients that juries will find sympathetic,[98] and therefore reported preferring plaintiffs who are "likeable," "credible," and "articulate."[99] Some attorneys will not represent someone who was convicted of the underlying offense; in a false arrest case, a conviction or guilty plea bars a Section 1983 claim, but attorneys report declining excessive force cases where the plaintiff was convicted of a crime in connection with the incident for fear that a jury will not find them sympathetic or credible.[100] Some lawyers report that they will not represent a plaintiff who has *ever* been convicted of a crime, for fear that a jury will not believe them, or will award minimal damages because they have already been in the criminal justice system.[101]

2. Concerns Related to the Amount of Damages

Despite the availability of attorneys' fees if a plaintiff prevails at trial, plaintiffs' civil rights attorneys generally expect that they will be paid a percentage of their client's settlement (if they are paid at all).[102] Accordingly, attorneys have strong incentives to accept cases with high potential damages.[103] Unsurprisingly, then, many attorneys reported that the amount of recoverable damages plays a

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[98] *See*, *e.g.*, M.D. Fla. Attorney D (describing several cases brought on behalf of senior citizens who had interactions with the police).

[99] *See*, *e.g.*, E.D. Pa. Attorney F ("My number one consideration is whether it's a case that I could take to trial and win. So, I look at who the plaintiff is and what they tell me about what happened to them. Do they sound credible?"); E.D. Pa. Attorney C ("credibility of the plaintiff is of course paramount"); N.D. Cal. Attorney C ("part of it is the overall circumstances the client who is the client, do I think the client is likable, or do I think the jury would like the client. That's not necessarily a deal breaker but it's nice…[if] somebody is going to come across sympathetic and articulate"); S.D. Tex. Attorney B (describing the credibility of the plaintiff or complainant as a factor when deciding whether to take a case).

[100] *See*, *e.g.*, E.D. Pa. Attorney E (reporting that he will not take a case if the plaintiff was "convicted of the underlying crime"); M.D. Fla. Attorney C ("I tend to shy away from people who have not prevailed in the criminal arena…if it's a use of force case, I'm far less likely to be concerned about the outcome in the criminal case, because I've known since the very beginning, people can be – can be guilty, and just beaten senseless.").

[101] *See*, *e.g.*, M.D. Fla. Attorney A ("Generally, I won't take a case if it's somebody that's ever been arrested before or spent time in jail because, usually, the only real damage you have is their loss of liberty and the trauma of going through the jail process and having charges pending. If somebody's already had that in the past, then it's not as traumatic or worth it in my opinion to take those cases.").

[102] *See supra* notes 19-21 (describing attorney fee arrangements).

[103] Some attorneys do, however, accept cases with lower potential damages. For a discussion of variation in attorneys' case selection criteria, *see* Schwartz, *supra* note 8692.

significant role in their case selection decisions,[104] and several lawyers report declining cases with low damages.[105] As one attorney explained,

> [O]bviously a death case or severe injury cases, I'm going to take a longer look at the case. But if it's a simple, like, they called me a name, or they used a derogatory term or – I spent – they kept me in the back of their car for four hours. I'm not going to take a case like that, but if there's—if there's a significant injury then I will.[106]

Another attorney put it more bluntly: "[I]t sounds crass. But we say, 'Well, is there blood on the street? Because if there isn't, why are we doing it?'"[107]

3. Concerns Related to the Cost of Litigation

When plaintiffs' attorneys receive a portion of their client's settlement, they must subtract from their award the costs they invested in litigating the case. Accordingly, lawyers estimate how much they will need to spend on a case before prevailing, and qualified immunity is one of many costs associated with these cases. For example, one attorney reported considering the need for an expert when deciding whether a case made financial sense to accept.[108] Two attorneys reported considering where the law enforcement agency is, and how long it will

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[104] *See*, *e.g.*, E.D. Pa. Attorney C ("[O]f course we look at damages"); N.D. Cal. Attorney A ("Well, there has to be some damage, obviously. Nominal damages don't get us anything in these cases, so you have to have some damage."); M.D. Fla. Attorney B ("Obviously you're looking for cases where the damages are significant"); S.D. Tex. Attorney B (describing the "severity of the injury" as one of the considerations when deciding whether to take a case).

[105] *See*, *e.g.*, N.D. Ohio Attorney C ("[A]lways one of the issues is, you know, "Were they physically assaulted by the police officer?" and if they say they're not, I'm happy for them. No one wants someone to be violently assaulted by a police officer. But by the same token there's quite a lesser chance that I will take the case. So, they have to illustrate to me some type of tangible and somewhat substantial damages…."); N.D. Ohio Attorney G ("Sometimes it's just the damages are really, really low."); M.D. Fla. Attorney F ("[I]f someone is just arrested, I'm not a big fan of those. Frankly, it's not worth my time."); S.D. Tex. Attorney C (explaining that the main factor going into a decision about whether to take a case "is the extent of the injuries, a lot of people get handcuffed or falsely arrested or whatever, or even taken to jail for a few hours or overnight. It's kind of like getting hit by a car but you don't sustain any personal injury so they don't have any kind of injuries. I'll let those go…"). *Accord* KRITZER, *supra* note 19, at 84 (reporting that, for contingency fee attorneys, "lack of liability and inadequate damages (singly or together) are the dominant reasons for declining cases, accounting for about 80 percent.").

[106] S.D. Tex. Attorney D.

[107] M.D. Fla. Attorney E.

[108] *See* M.D. Fla. Attorney E.

take to travel to and from the department and the courthouse.[109] Some lawyers reported considering which jurisdiction is involved because different defense counsel have different approaches to defending these cases. As one attorney explained: "[T]he agencies matter, they do. Some of them you just know that you're going to have to go all the way, and you got to make the decision, am I going to go all the way."[110]

4. Weighing the "Cornucopia of Factors"

No lawyer described all of these factors as relevant to their analysis, but every lawyer reported that some combination of these factors played into their case selection process. And several lawyers noted one area of strength can make

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[109] *See* M.D. Fla. Attorney B ("You know distance might make a difference, so it's kind of a -- you know -- mathematical calculation of miles divided by my damages or -- or you know whatever the formula is…I've done some pretty serious police cases in Key West which is you know like 14 -- 12 to 14 hours from here."); N.D. Cal. Attorney D (explaining that "distance and location…is somewhat important."); M.D. Fla. Attorney D (reporting that the federal court house is an hour from her office).

[110] M.D. Fla. Attorney E. *See also* N.D. Cal. Attorney E (explaining that the City of San Jose offers very low settlements before trial because they want "to discourage lawyers from bringing Section 1983 claims," but attorneys representing the county of Santa Clara "are willing to offer reasonable money to resolve the case sometimes" because "they look at it a little bit more from a business point of view"); M.D. Fla. Attorney F (reporting considering which jurisdiction is involved when deciding whether to take a case "because your chances of getting a resolution, your shot of getting in front of a jury…become more limited when you're…dealing with a government entity like City of Jacksonville."); M.D. Fla. Attorney D (explaining that some contract defense attorneys' compensation is capped at $50,000, so the attorney "runs 'em around until they've gotten themselves paid $50,000 and then they'll start talking about settlements.").

up for weaknesses in another area.[111] Ultimately, several lawyers could not explain what causes them to take a case.[112] As one described, "it's a little like, how the United States Supreme Court defined pornography way back in the day—they can't define it, but they know when they see it."[113]

For lawyers who report considering qualified immunity when selecting cases, it is one among many considerations related to the likelihood of recovery, the amount of recovery, and the cost of litigation. As one attorney explained, qualified immunity "is part of a bunch of factors…[j]udge, type of government sued, criminal history of the plaintiff, plaintiff's personality, and damages to name a few."[114] Although "QI is always a negative weighing against a case," it is among "a cornucopia of factors [he considers] in deciding whether to take a case."[115]

B. *Why Some Lawyers Rarely or Never Decline Cases Because of Qualified Immunity*

Thirteen of the lawyers I interviewed reported that they do not consider qualified immunity at case selection. Another eleven reported that they do consider

[111] *See*, *e.g.*, N.D. Cal. Attorney C ("I will usually start with the victim's injuries, either it's a serious injury or the video is outrageous or both…"); S.D. Tex. Attorney C ("[I]f someone is being a total jerk, like if they're running a bunch of stop signs and they get pulled over which, say, which would be a justified stop, but they, they get beat up, those cases, typically jurors don't like those cases. I'll look at those really hard and I got to have really good damages in a case like that where the party is being obnoxious or causing a lot of ultimate events that happen to him."); M.D. Fla. Attorney C ("the stronger the Fourth Amendment violation, perhaps the less strong the client needs to be. Like, they can have obviously a horrific history of arrests, but if they're a proven innocent person, if the case isn't defensible, absent the police having to contradict what's in their police reports, I'll probably do it. Unless the person is just such a jerk that I never – they'll never be happy with anything that I do."); N.D. Ohio Attorney D ("I take cases for the following reasons. Number one, I really like the client and the client has a great case, the facts are -- really demonstrate abuse and excessive of force. I take the case because I don't like the client necessarily, but the facts are great. I take the case because – I'll take a case because everything sucks not only knowing that I don't like the client, but the issue is so important that I feel the need to litigate it which I am criticized for by my office because I lose money, but it fulfills me.").

[112] *See*, *e.g.*, M.D. Fla. Attorney C ("I cannot wrap my arms around what it is that causes me to think that this is the case I can work with."); E.D. Pa. Attorney F ("[I]n the same way that the court considers the totality of circumstances, that's kind of how I consider the cases…").

[113] M.D. Fla. Attorney C.

[114] Email from S.D. Tex. Attorney F to author (June 9, 2018, 7:53 AM).

[115] Email from S.D. Tex.

Attorney F to author (June 9, 2018, 7:29 AM).

qualified immunity at case selection, but rarely decline cases because of qualified immunity. These twenty-four attorneys recognized that qualified immunity was often raised in civil rights cases, often made litigation more complex and costly, and sometimes resulted in dismissal. Nevertheless, they offered four reasons why they rarely decline cases because of qualified immunity.

1. Other Considerations Duplicate the Challenges of Qualified Immunity

One reason that qualified immunity did not play a dominant role in these attorneys' case selection decisions is that other concerns duplicate and thereby minimize qualified immunity concerns.[116] For example, several attorneys reported that concerns about judges' and juries' predisposition against police misconduct suits cause them to select cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds.[117] As an attorney from the Eastern District of Pennsylvania explained, "In the intake of the case I want to know that—qualified immunity or not—that if I tell the story of what happened here the person who is sitting on the other side hearing that story is going to go, 'Really, they did that?' If I don't get that reaction that's going to be a difficult case."[118] As another attorney from the Eastern District of Pennsylvania explained:

> When I say qualified immunity is not a major factor, I think that's because on excessive force particularly we're pretty careful to begin with, putting aside any possible qualified immunity. I think our screening is such that – because we know particularly with juries…we want to make sure we've got a pretty strong claim. And that will incorporate almost always enough evidence to show what the officer claims to have happened isn't true and, therefore, no qualified immunity.[119]

In response to a question about whether qualified immunity played into his case selection decisions, an attorney from the Northern District of Ohio offered a similar answer:

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[116] Alexander Reinert's interviews with plaintiffs' attorneys who bring *Bivens* cases revealed a similar perspective. *See* Reinert, *supra* note 30, at 493 ("[M]ultiple respondents indicated that they only accepted the most egregious cases for representation, which made it unlikely that qualified immunity would play a role.").

[117] *See*, *e.g.*, M.D. Fla. Attorney A ("[T]he conduct has to be somewhat egregious [and] the client didn't provoke the conduct or cause what happened to him."); M.D. Fla. Attorney B ("You're looking for cases where the facts are horrific."); N.D. Cal. Attorney C (explaining that he considers "how outrageous the conduct looks on the video…"). For further discussion of attorneys' concerns about judges' and juries' lack of sympathy to civil rights plaintiffs, see Schwartz, *supra* note 8692.

[118] E.D. Pa. Attorney B.

[119] E.D. Pa. Attorney G.

> We're always evaluating, "Can we win?" If we think we can win, then we're not worried about the situation where it's close. Qualified immunity, I guess would affect the marginal case where you're not sure you're going to win and if it's close enough, the judge might say, "Well, I think the defendant's right in good faith." But even just talking it through and thinking about it, I don't think qualified immunity affects our case selection.[120]

Several attorneys agreed that they only take cases with egregious facts and clear constitutional violations because judges and juries tend to be very sympathetic to police and qualified immunity does not tend to be an issue in these types of cases.[121]

2. *Case Strategy Can Limit the Costs and Risks of Qualified Immunity*

A second reason that qualified immunity appears not to be a driving factor in case selection decisions for some lawyers is that they have figured out how to structure cases in ways that limit the impact of the doctrine.[122] Attorneys report including federal claims that cannot be dismissed on qualified immunity grounds—including claims for injunctive relief and claims against municipalities—when they think qualified immunity could be an issue.[123]

Other attorneys report filing state law claims instead of or in addition to Section 1983 claims to minimize the threat of qualified immunity. As one attorney from the Middle District of Florida explained:

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[120] N.D. Ohio Attorney E.

[121] *See*, *e.g.*, N.D. Cal. Attorney B (reporting that qualified immunity is not "where my decision point is…because it's all—I see it as so similar to whether you would win at trial."); N.D. Ohio Attorney C ("It's kind of hard to argue that the officer has qualified immunity if the victim says the officer beat the crap out of the person. I don't see how I can argue qualified immunity for that…that's another reason why I'm looking for more those types of cases."); N.D. Ohio Attorney E (explaining that proving the constitutional violation and showing it is clearly established is part of the "same inquiry. If we think we can win, we think we can win."); N.D. Ohio Attorney F (agreeing that qualified immunity is a consideration "but that doesn't scare me as much as what the case looks like if you're going to trial…If we feel that the case is actually good in terms of what happened, and there are disputed facts, we don't worry. [W]e know [the qualified immunity motion is] going to come most likely. But we factored that in, I mean, it's just part of the litigation."); M.D. Fla. Attorney A (explaining that qualified immunity "really doesn't even come in as the factor" when selecting cases because he only takes cases with "clear constitutional violations.").

[122] Accord Reinert, *supra* note 30, at 493 (observing that some civil rights attorneys avoid qualified immunity by filing cases in state court).

[123] *See*, *e.g.*, E.D. Pa. Attorney G (explaining that he might not bring a damages claim regarding a right that is not clearly established, but might pursue a claim seeking injunctive relief); S.D. Tex. Attorney E (explaining that he can avoid qualified immunity by suing the municipality).

> [T]here are clearly instances where police officers find incredibly unique ways to violate people's rights, and I know that qualified immunity from the outset is going to be a problem. It may or may not deter me from accepting the case. But more commonly I'll try to find a way to work around it.[124]

This attorney explains he will "work around" qualified immunity by bringing a state law claim instead of a Section 1983 claim. He explains:

> I can think of instances where I filed cases in the federal court, got the wrong judge. I voluntarily dismissed and refiled in the state court…. I'm always going to try to squeeze some money out of it in the state court if qualified immunity is going to be an impenetrable barrier.[125]

An attorney from the Eastern District of Pennsylvania described the same strategy, observing that, "[w]hen we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don't have to run up against the [qualified immunity] doctrine."[126] As another attorney explained, qualified immunity is "not the end-all be-all….[I]t's a barrier but it's a barrier to go around and if you're in litigation that's all you do every day all day anyway."[127]

3. *The Risks of Qualified Immunity Are Unpredictable*

Some attorneys reported that qualified immunity played a limited role in their case selection decisions because courts' application of the doctrine is so unpredictable. Several observed that the judges in their jurisdiction had widely varying views of the doctrine, and so the dangers of qualified immunity often depended on which judge was assigned the case.[128] As one attorney from California explained, "qualified immunity is an issue everywhere, but it has more to

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[124] M.D. Fla. Attorney C.

[125] *Id*.

[126] E.D. Pa. Attorney C.

[127] M.D. Fla. Attorney D.

[128] *See*, *e.g.*, N.D. Cal. Attorney B ("[M]y feeling is it depends on the judge you get more than the case law that's out there."); N.D. Cal. Attorney E (explaining that qualified immunity does not play a role in case selection in part because "it depends on the judge. And then it depends on you know, your panels in the Ninth circuit….A case looks cool today on qualified immunity in two weeks might look pretty bad. So, I don't even think about it."); M.D. Fla. Attorney C (explaining that qualified immunity does not influence his case filing decisions because "it…depends on which judge you get…and you're not going to know who the judge is until you file the case.").

do with what judge you get than the facts of the particular case."[129] And as an attorney from Florida explained:

> It's almost a luck of the draw. If you get a certain judge, you think, "All right, I'm going to survive summary judgment." Other judges you get, you think, "All right, I know…I'm going to have a summary judgment against me and I'm going to have to file at the Eleventh Circuit and get it reversed."[130]

Because these attorneys believe different judges apply qualified immunity differently, and attorneys cannot know which judge will hear their case until they file, they have concluded that it is too difficult to predict the costs and risks of qualified immunity on a particular case before filing. The costs and risks of qualified immunity may affect these attorneys' litigation strategy and settlement calculations, but does not influence their assessments about whether to file any given case.

4. Lawyers Willingly Accept Cases Vulnerable to Dismissal on Qualified Immunity

Several attorneys reported that they accept some cases, knowing they might be dismissed on qualified immunity grounds, because they hope the cases will have other types of benefits—they might clearly establish the law for future cases, reveal facts in discovery that could be used in future cases, or reveal facts that would be meaningful to the plaintiff.[131] Other attorneys report filing cases they know are vulnerable to dismissal on qualified immunity grounds simply because the cases are too important not to bring.[132] As one lawyer explained:

> [W]e are constantly bringing cases where we contend that the officer either had a person in custody and increased the risk of harm to the

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[129] N.D. Cal. Attorney C.

[130] M.D. Fla. Attorney A.

[131] *See*, *e.g.*, S.D. Tex. Attorney C ("[I]f someone comes in and they get the crap beat out of them, or something happened to their spouse or kid or whatever I'll still take it to just create a paper trail about the particular agency or about the particular officer so that if something happens again, then there will be something more for someone else."). *See also* Alexander A. Reinert, *Screening out Innovation: The Merits of Meritless Litigation*, 89 IND. L. J. 1191 (2014) (describing the ways meritless—as opposed to frivolous—litigation can reveal valuable facts or help advance future changes in the law).

[132] *See*, *e.g.*, M.D. Fla. Attorney G (reporting that he does not "shy away" from cases that might be dismissed on qualified immunity "because I think there's some value in bringing these cases. I really do. I'm not in the majority I can promise you."); N.D. Ohio Attorney F ("[T]here are areas where we feel that the case is important as to take the risk of losing on qualified immunity, just litigating it.").

> person or through some affirmative act dramatically increased the risk of harm…those are gut cases that we feel we have to pursue because in our book the officer conduct is terrible and we need to – if we can come up with a theory, we're going to pursue it. But those are going to be out there as high-risk cases.[133]

An attorney from the Middle District of Florida offered a similar perspective:

> I don't think [qualified immunity] plays that much [of a role in case selection]. I don't think much at all. I mean, I get excited if I find an Eleventh Circuit case that says that [the right is] clearly established ….But I don't shy away from [cases] because I'm afraid I'm going to lose because I think there's some value in bringing these cases. I really do.[134]

Relatedly, attorneys explained that qualified immunity did not dissuade them from bringing cases because civil rights litigation is inherently risky, and qualified immunity is one of many risks in these cases. An attorney from the Northern District of California reported that qualified immunity was a challenge he signed up for by deciding to litigate civil rights cases.

> [Qualified immunity] comes with the territory and you have to just be prepared to go up to the Ninth Circuit because there's going to be many cases if you win on qualified immunity, they're going to appeal, and if you lose, you're going to appeal, so…that's just part of the equation. If you aren't ready for that you shouldn't be doing these cases.[135]

Indeed, attorneys described civil rights litigation as a very financially risky line of work and reported that attorneys who litigate these cases are generally willing to work at a discount or loss because they believe in the underlying principles.[136]

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[133] N.D. Ohio Attorney G. *See also* N.D. Ohio Attorney F (pointing to the same types of in-custody death cases as cases "where we feel that the case is important as to take the risk of losing on qualified immunity.")

[134] M.D. Fla. Attorney G.

[135] N.D. Cal. Attorney C.

[136] *See*, *e.g.*, E.D. Pa. Attorney D ("Personally I enjoy [constitutional litigation] but [qualified immunity is] why a lot of attorneys won't do it. You're not going to make a lot of money from it. You can, but you have to stick with it and it is…sometimes tough-going and, as I said, it's not for the faint-hearted. You have to be dedicated to it."); N.D. Cal. Attorney B ("[T]hese cases don't pay, you know…I basically had to be ready to retire before I could financially take these cases."); N.D. Cal. Attorney C (observing that some people in the Northern District of California have made money bringing civil rights cases, but "you don't do [this work] because you become a lawyer and you want to get rich. It's, you know, you do it because it's a calling."); N.D. Cal. Attorney D ("[Civil

Models of case selection assume that attorneys and plaintiffs are rational economic actors and so will not file a case in which the financial risks outweigh the benefits. Scholars regularly recognize that these models do not capture non-economic motivations for filing suit, but nevertheless rely on the model to predict filing decisions.[137] Yet, for many attorneys I interviewed, decisions about which police misconduct cases to take—and decisions to pursue this line of work more generally—are not guided exclusively or primarily by economic calculations. Many of these same attorneys are not dissuaded from taking cases by the risk of dismissal on qualified immunity grounds.

C. *The Cases Some Lawyers Decline Because of Qualified Immunity*

Although all attorneys I interviewed reported that qualified immunity increases the costs and risks of Section 1983 litigation, and twenty-two attorneys I interviewed agreed that qualified immunity is among their considerations when selecting cases, just eleven agreed that concerns about qualified immunity cause them to decline cases with any regularity.[138] These attorneys described three types of cases that they were inclined to reject because of concerns about qualified immunity.

First, several attorneys explained that qualified immunity made them less likely to accept a case if there is not a prior decision holding similar facts to be

rights litigation is] not lucrative, and it has to be a labor of love, because anyone who is doing it simply to carve out a niche to make money, simply is not making money as effectively as they could be, and is going to be disappointed by it."); N.D. Ohio Attorney D ("I get that people don't want to do [police misconduct litigation] because there's easier ways to make money. You know you could be a candy salesman selling M&Ms or Snickers and have a route and you'll have a more consistent income than some civil rights lawyers…."); M.D. Fla. Attorney A ("I look at [civil rights cases] as more of a community service, quite frankly."); M.D. Fla. Attorney D ("[B]asically anything else will make you more money.").

[137] *See*, *e.g.*, FARHANG, *supra* note 17, at 22 (recognizing that "the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money"); Hubbard, *supra* note 19, at 712-13 (describing the possibility that some lawyers are not motivated by financial calculations of risk and reward).

[138] *See*, *e.g.*, E.D. Pa. Attorney A ("We don't take a case that seems pretty clear to us it's going to run into serious immunity issues."); E.D. Pa. Attorney D ("[T]he false arrests—if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove. If I think that the individual officers are going to get out on qualified immunity, I will decline it."); N.D. Cal. Attorney A ("I have to determine what the story is going to be at trial…so I can determine whether or not we're actually going to get by summary judgment on a qualified immunity issue"); N.D. Ohio Attorney A ("The immunity doctrines are everything in real world litigation."); M.D. Fla. Attorney E ("I married a lot of bad brides over the years….And that has resulted in some painful losses over the years. Where QI gets granted and you're just shaking your head like, how. So now, I'm - I would - I'm definitely not gun shy. I'm just more cautious before I get involved....").

unconstitutional.[139] Presumably, the existence of helpful precedent will always militate in favor of accepting a case. But the Supreme Court's qualified immunity doctrine creates a particularly forceful pressure to find a prior case on point. The Court has repeatedly stated that government officials violate clearly established law only when "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right."[140] Some attorneys reported declining cases when they could not find factually similar precedent because of concerns about qualified immunity.[141] But, one attorney made clear, he would be willing to take a case involving a "de minimus violation" if there is a prior case on point.[142]

Second, several attorneys reported that qualified immunity doctrine discourages them from taking cases where they interpret the qualified immunity standard to require intentional misconduct.[143] Attorneys repeatedly used false arrest cases as an example; although an officer has violated the Fourth Amendment if he arrests without probable cause, he is entitled to qualified immunity if he had "arguable probable cause"—meaning he reasonably, though mistakenly, thought there was probable cause to arrest.[144] In one attorney's view, plaintiffs have to show that defendants "were fabricating evidence" to defeat a qualified immunity motion in a false arrest case.[145] Several attorneys offered examples of false arrest cases that they declined because the plaintiff could not show that the officers engaged in intentional or unreasonable wrongdoing.[146] These same lawyers were

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[139] N.D. Ca. Attorney D ("[I]t seems like if there is not a case directly on point indicating that the law was clearly established to constitute a violation…then you risk being dumped on summary judgment because of qualified immunity.")

[140] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (alteration in original) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

[141] *See*, *e.g.*, E.D. Pa. Attorney G.

[142] *See* N.D. Ca. Attorney D.

[143] Presumably, any claim requiring proof of intent will be more difficult to prove. *See generally* Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 (2018). In false arrest cases, the constitutional violation does not require proof of intentional misconduct, but attorneys believe defeating a qualified immunity motion does.

[144] *See*, *e.g.*, Lawrence v. Gwinnett County, 557 Fed. Appx. 864 (11th Cir. 2014).

[145] E.D. Pa. Attorney D.

[146] *See*, *e.g.*, E.D. Pa. Attorney A ("[T]here's not a day that goes by that I don't get a call from somebody who was just acquitted because it turns out that the person who said that they robbed them or stole from them or assaulted them had made it all up and that the police arrested them anyway. And you know, these kinds of cases have qualified immunity written all over them. The police rely on a report. They have no reason to suspect that the person's making it up....We don't take a case that seems pretty clear to us that it's going to run into serious immunity issues."); E.D. Pa. Attorney C ("the issue of qualified immunity for us usually goes to false arrest type situations…"); E.D. Pa. Attorney D ("The cases that I primarily decline are those dealing with just strictly false arrests. If I

less concerned about qualified immunity for other types of cases—repeatedly noting that qualified immunity played little role in their decisions about whether to accept excessive force cases.[147]

Third, attorneys explained that the costs of defending against qualified immunity inform their assessment of whether a case makes financial sense to accept. As an attorney from the Northern District of California explained:

> [T]hey're going to appeal every single time that their qualified immunity motion is denied and that adds two years minimum to the litigation and I mean this case I'm about to try in February was up on appeal for three years at least. So that's something that goes into the decision like, whereas you used to think okay if I go through discovery, I get what I want, we go to mediation, this case could be over in two years, now you have to figure minimum five years before you get to trial…. [W]e're trial lawyers and we don't want to be appellate lawyers. We want to win at trial and now you have to factor in the appeal…. It just makes. . . the case that more difficult.[148]

Attorneys sharing this view are presumably more likely to decline low damages cases because the attorney's expected recovery would be smaller than the expected cost of litigating the qualified immunity defense.[149]

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decline them at all - and I would say there is a small percentage of those that I decline - but the ones that I do decline, the false arrests if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove."); N.D. Cal. Attorney G ("In the false arrest arena, that is more problematic than in the excessive force arena."); M.D. Fla. Attorney E ("I just spent this morning on the phone on a DUI case with the ex-cop in New York that got arrested for DUI. And he's got so much righteous indignation. And a lot of it is properly placed….But at the end of the day…he's probably going to have to pay me hourly to litigate that case, because I don't see a happy ending under QI, because DUI is an opinion-based crime for the large part.").

[147] *See*, *e.g.*, E.D. Pa. Attorney A (explaining that he is "certainly less concerned" about qualified immunity in excessive force cases); E.D. Pa. Attorney D (explaining that there is "no qualified immunity" in excessive force cases); E.D. Pa. Attorney G (explaining that his analysis of excessive force cases would be no different in a world without qualified immunity, but that in cases involving probable cause there might be "somewhat of an uptick in the cases we would bring."); N.D. Cal. Attorney G ("In the false arrest arena, [qualified immunity] is more problematic than in the excessive force arena.").

[148] N.D. Cal. Attorney B. Note, though, that this attorney concluded that qualified immunity is not where her "decision point" is. *See also* N.D. Ohio Attorney C (describing his concern about cases going up on interlocutory appeal, but reporting that qualified immunity has more to do with what judge you get than the facts of the particular case....").

[149] *See*, *e.g.*, Email from N.D. Ohio Attorney B to author (Jan. 8, 2018, 11:14 AM) (explaining that, because he "work[s] for an unrestricted legal services program and receive[s] a salary…[he] can take cases that private lawyers won't take because they're not financially rewarding enough to justify the work….I imagine private lawyers trying

D. *Does Qualified Immunity Screen Out Lawyers?*

Qualified immunity may also cause lawyers to reduce the number of civil rights cases they bring and discourage some attorneys from filing civil rights cases altogether. One attorney I interviewed reported that concerns about qualified immunity had caused him to stop taking Section 1983 cases.[150] This attorney has a diverse civil practice which at one point included a few civil rights cases. He filed one Section 1983 case in the Southern District of Texas during the study period with a colleague from Dallas.[151] Whenever he has co-counseled a civil rights case with that colleague, they "brief and brief" the cases on qualified immunity, but the cases "get pitched at summary judgment."[152] He has not filed any police misconduct cases since 2012; in fact, he reports that he is "out of the business for the most part of suing the government. Simply because of all the immunities it is too difficult to be successful against them."[153]

I do not know how often lawyers stop bringing Section 1983 cases because of the challenges and burdens associated with qualified immunity doctrine. My study almost certainly underrepresents attorneys so discouraged by qualified immunity that they have decided not to bring additional cases—attorneys no longer practicing are less likely to be captured in the docket dataset, and those that are may be less likely to volunteer to participate in a survey or interview about civil rights litigation. But I found a great deal of evidence to suggest that the challenges of civil rights litigation—including qualified immunity—may have caused lawyers to decrease the number of civil rights cases they take or stop taking these cases altogether.

Several attorneys I interviewed reported that they knew of personal injury and criminal defense attorneys who took one or two Section 1983 cases and then decided to stop bringing the cases because they were simply too challenging. As one attorney from Florida observed, "I think there's a lot of one and two and out….[T]here's only so much money you can lose before you figure out that it's not the right way to go."[154] Other attorneys reported that they had reduced the number of civil rights cases they accept—or had begun requiring clients to pay

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to make a living have to make some hard decisions about whether to bring a case and whether to assert claims that might end up with qualified immunity fights.").

[150] *See* S.D. Tex. Attorney G.

[151] *Id*.

[152] *Id.*

[153] *Id.*

[154] M.D. Fla. Attorney C. *See also* M.D. Fla. Attorney A ("Not many people take these cases because you really don't make any money on them."); M.D. Fla. Attorney E (explaining that there are "very few [lawyers] who can make a living just doing these claims."); M.D. Fla. Attorney G (suggesting that eliminating qualified immunity "would encourage other lawyers to take these cases.").

some or all of their fees—because the cases are expensive to litigate and difficult to win.[155] Even attorneys who have been bringing police misconduct cases for decades and are experts in the field report that these cases are money losers.[156]

Responses from surveyed attorneys tell a similar story. Although the attorneys I surveyed filed more cases, on average, than the 1007 attorneys who entered appearances in the cases in my docket dataset, the majority of surveyed attorneys from each of the five districts spend 25% or less of their time on police misconduct cases. Twenty-five (27.7%) of the ninety-four attorneys I surveyed reported that the percentage of time they spent on police misconduct cases was greater than the percentage of fees they received from police misconduct litigation; only two of the ninety-four attorneys I surveyed reported the converse.[157]

Attorney appearances in the 1183 cases in my five-district docket dataset offer additional circumstantial evidence to suggest that many lawyers may bring few civil rights cases—or stop bringing civil rights cases altogether—because of qualified immunity and other barriers to relief. More than three-quarters of the 1007 attorneys who entered appearances in the cases in my docket dataset entered just one appearance in a Section 1983 case involving law enforcement in federal court over the two-year period of my study.[158] Just 3.1% of the attorneys entered six or more appearances in Section 1983 cases involving law enforcement during the study period. There is significant regional variation in attorneys' filing practices—just one attorney in the Southern District of Texas entered six or more appearances during the two-year study period, whereas fifteen attorneys in the Eastern District of Pennsylvania entered six or more appearances during the study period. This regional variation tracks variation in the challenges associated with qualified immunity: In the Southern District of Texas, qualified immunity is far more often raised and granted than in the Eastern District of Pennsylvania.

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[155] *See*, *e.g.*, E. D. Pa. Attorney E (explaining that he spends one-quarter or less of his time on police misconduct cases because "I…transitioned into…easier work that pays a lot more money, which is personal injury and medical malpractice….") M.D. Fla. Attorney C (reporting that he used to litigate only police misconduct cases but now litigates dental malpractice cases as well because "the dental stuff perhaps will pay some bills."); M.D. Fla. Attorney E ("I'd say that I probably went from 50%, maybe 60% [civil rights cases] to 20 to 25% over the years after I've—as I commonly say if you like to have your teeth in your hand after a fight, then do civil rights litigation. You'll enjoy going to the dentist after most of the battles. And so, you know, I've decreased the number that I pick.").

[156] *See supra* note 136.

[157] *See* Appendix Tables 4-5. Appendix Table 4 sets out the percentage of time surveyed attorneys report spending on police misconduct cases, and Appendix Table 5 sets out the percentage of their fees surveyed attorneys report collecting from police misconduct cases.

[158] *See* Appendix Table 1. Some of these attorneys may have filed civil rights cases in federal districts that are not the focus of my study, or in state courts.

It is difficult to parse out the extent to which qualified immunity—as opposed to other challenges associated with Section 1983 litigation—might be discouraging lawyers from bringing civil rights cases. As I explore in other work, multiple aspects of civil rights litigation—including jury bias, procedural hurdles, and limitations on state law claims—may make it more difficult to practice civil rights law in Texas than in Pennsylvania.[159] But, assuming others share the views of the attorney from the Southern District of Texas I interviewed, qualified immunity not only screens out some cases, but also screens out some lawyers.

V. IMPLICATIONS

In this Part, I consider the implications of my study for our understanding of the role qualified immunity plays in constitutional litigation and the extent to which qualified immunity fulfills its intended policy goals. I then explore how doctrinal adjustments would better align qualified immunity and Section 1983 doctrine more generally with the realities of constitutional litigation.

A. Understanding the Role of Qualified Immunity in Constitutional Litigation

In a prior study I found that courts dismiss only a small percentage of police misconduct cases on qualified immunity grounds.[160] This study makes clear that formal dismissals only tell part of the story of qualified immunity's role in constitutional litigation. Qualified immunity motions had to be researched, briefed, and decided in almost one-third of Section 1983 cases in my dataset. Stays while motions in the district court and on interlocutory appeal were pending increased delay. Although the absolute risk of dismissal on qualified immunity grounds is low, my surveys and interviews made clear that the risk of dismissal weighs heavily on the minds of attorneys who file these cases—particularly because qualified immunity is most often raised and successful at summary judgment, after counsel has invested in discovery. Apart from the costs and challenges associated with litigating qualified immunity in individual cases, qualified immunity doctrine increases the difficulty of bringing civil rights cases. Attorneys I surveyed and interviewed echoed what judges and scholars have long said—qualified immunity doctrine is exceedingly complex to understand, and it takes time to understand and stay abreast of changes in the doctrine. In addition, the pervasive threat of interlocutory appeals means attorneys must be comfortable litigating in both trial and appellate court. The costs and risks associated with qualified immunity are greater in some districts than in others. But lawyers around the country agree that the doctrine makes it more costly to bring these cases and more difficult to recover.

Models of attorney decisionmaking behavior would suggest that attorneys would not accept cases vulnerable to motion practice and dismissal on qualified

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[159] *See* Joanna C. Schwartz, *Civil Rights Ecosystems* (draft on file with author).

[160] Schwartz, *supra* note 4.

immunity grounds because of these costs and risks. But my study makes clear that the relationship between these costs and risks and attorneys' case selection decisions are not as clear as models would suggest. More than two-thirds of the attorneys I interviewed reported that qualified immunity rarely or never causes them to decline cases; almost one-third of attorneys reported that the doctrine plays a more significant role in their decisionmaking process; and one attorney reported having stopped bringing Section 1983 cases altogether because of the doctrine.

Attorneys' wide-ranging views on this subject prevent me from offering a single or definitive answer about the role qualified immunity plays in decisions not to file police misconduct suits.[161] I do not know how many attorneys in the five districts I studied share the views of the attorneys I have surveyed and interviewed, or the extent to which these data reflect attorney perceptions and practices around the country. Although the majority of attorneys I interviewed report not taking qualified immunity into account at case selection, I do not believe that the majority of attorneys who file police misconduct cases in these five districts—or around the country—take this approach. Indeed, the vast majority of attorneys in my docket dataset filed only one police misconduct case in federal court during the two-year study period.[162] And my interviews and survey data suggest that at least some of these attorneys choose to stop filing police misconduct cases because they are discouraged by the challenges associated with qualified immunity. So, although only one attorney I interviewed reported he stopped filing police misconduct cases because of qualified immunity, my survey and docket data offer reason to believe that this category of attorneys may predominate over the other two.

Although I cannot pinpoint the frequency with which attorneys decline cases because of qualified immunity, or the number of cases declined because of these concerns, my findings make clear that qualified immunity's power as a pre-filing filter is highly dependent on which attorney is considering the case. All lawyers agree that qualified immunity increases the costs and risks of bringing these cases. Returning to the language of standard models of case selection, qualified immunity increases the cost of litigation (C), decreases the probability of success

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[161] Although my top-line conclusion appears to contrast with that of Alex Reinert, *supra* note 30 at 494 ("Most attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation"), our observations from our interviews are largely consistent. Reinert and I both find that attorneys believe qualified immunity doctrine increases the costs and risks of constitutional tort litigation. *See id.* We also both find that some attorneys report qualified immunity plays a limited role in case selection because "they only accept[] the most egregious cases for representation, which ma[kes] it unlikely that qualified immunity would play a role," that some attorneys limit the impact of qualified immunity by filing in state court, that some attorneys do not consider qualified immunity because cases vulnerable to dismissal advance other interests, and that attorneys who do consider qualified immunity when selecting cases may decline cases alleging novel or ill-defined constitutional violations. *See id.*

[162] *See* Appendix Table 1.

(*p*), and can reduce the size of possible judgments (J). But lawyers have different views about the extent to which these costs and risks duplicate other considerations at case selection, the magnitude of these costs and risks, the predictability of these costs and risks, attorneys' ability to mitigate these costs and risks through creative litigation strategy, and their willingness to accept cases despite these costs and risks.[163]

To some lawyers, the challenges associated with qualified immunity appear insurmountable—others view qualified immunity as one of many challenges lawyers are trained to get around. Some lawyers shy away from false arrest cases because they must show an officer knowingly arrested their client without probable cause in order to defeat a qualified immunity motion. Others willingly accept these same types of false arrest cases, bringing state law claims in state court where qualified immunity cannot be raised as a defense. Some lawyers file cases they consider likely to be dismissed on qualified immunity grounds because they advance important interests—cases may clearly establish a constitutional right for future cases, develop evidence of unconstitutional conduct by the officer or department that can be used in future cases, or reveal information important to the plaintiff or her loved ones. Other lawyers view civil rights cases as sensible to bring only if they are likely to be financially remunerative. Many lawyers, new to civil rights litigation, may lose their first few cases on qualified immunity grounds. Following these defeats, some lawyers may decide to dedicate the time necessary to learn how to avoid or defeat future motions raising the defense; others may decide never to bring another civil rights case again.

How an attorney views and weighs the costs and risks associated with qualified immunity at case selection may be a product of that attorney's experience bringing civil rights cases, the percentage of their legal practice dedicated to these cases, or their motivations for entering into this line of work. Attorneys' approach to qualified immunity at case selection may also be influenced by the jurisdiction in which they practice. My research makes clear that qualified immunity imposes more risks and costs in some parts of the country than in others. As I will show in a related project, other challenges associated with Section 1983 litigation—including unsympathetic juries and judges, and other substantive and procedural barriers—may be particularly difficult to overcome in those same jurisdictions. In future work I will explore how these various factors combine to create what I call civil rights ecosystems around the country.[164] For now, it is worth noting that the costs and risks of litigating Section 1983 cases—including the costs and risks of qualified immunity—do not fall evenly across the country, and that that variation may well lead to region-specific case selection decisions.

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[163] Variation in attorneys' weights and measurements of these factors complicates standard models of case selection decisions described *supra* note 17 and accompanying text.

[164] *See* Schwartz, *supra* note 159.

B. Evaluating the Purposes Served by Qualified Immunity

My study additionally offers critically important evidence to an ongoing debate about whether qualified immunity doctrine achieves its intended policy goals. Although the Supreme Court initially described qualified immunity doctrine as drawn from common law defenses in existence when Section 1983 became law, it acknowledged over thirty years ago that it had "completely reformulated qualified immunity along principles not at all embodied in the common law."[165] The Court restructured qualified immunity doctrine 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."[166] Scholars, advocates, and courts have criticized qualified immunity doctrine for failing to balance these interests. These critics contend that qualified immunity is both unnecessary and ill-suited to shield officers from the costs and burdens of being sued, and undermines interests in government accountability. My observations about qualified immunity's selection effects support both of these contentions.

1. Qualified Immunity Does Not Effectively Shield Government Officials from "Insubstantial Cases"

The Supreme Court imagines that qualified immunity is important to "society as a whole"[167] because it shields government officials who have acted reasonably from the "harassment, distraction, and liability" associated with litigation.[168] Specifically, the Court expects that qualified immunity shields government officials from financial liability and from the burdens of participating in discovery and trial, and thereby encourages government officials vigorously to enforce the law and members of the public to accept public office. For decades, the Court's assumptions about qualified immunity's role in constitutional litigation and the deterrent effect of litigation went unchallenged.[169] But, in recent years, mounting evidence has shown that qualified immunity is neither necessary nor well-suited to perform its intended role. Police officers virtually never contribute to settlements and judgments entered against them, and there is no reason to believe that other types of government officials contribute more

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[165] Anderson v. Creighton, 483 U.S. 635, 645 (1987).

[166] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[167] White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting *Sheehan*, 135 S. Ct. at 1774 n.3).

[168] *Pearson*, 555 U.S. at 231.

[169] *See* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094-95 (2018).

often.[170] Cases are rarely dismissed on qualified immunity grounds before discovery and trial.[171] And many other doctrines and procedural rules—including courts' power to dismiss *pro se* cases *sua sponte* at the outset of a case, pleading rules that require plaintiffs to allege "plausible" claims, summary judgment requirements, and substantive constitutional requirements—are available to weed out cases before discovery and trial.[172] One of the only remaining possible ways qualified immunity can serve its intended goal is by screening out insubstantial cases before filing and thereby sparing government officials the burdens and distractions of litigation. But this study offers three important reasons to conclude that qualified immunity cannot be justified on this ground.

First, contrary to the view that qualified immunity is the only protection against a flood of meritless suits against government officials,[173] all the attorneys I interviewed made clear that qualified immunity is one of many barriers to relief in these cases. Attorneys are motivated not to file insubstantial cases for reasons that have nothing to do with qualified immunity—including the need to overcome other substantive and procedural barriers to relief in these cases, and to convince factfinders often sympathetic to law enforcement defendants of the merits of plaintiffs' claims. Moreover, most plaintiffs' attorneys bear the financial risk in these cases, and will only be paid if they secure a substantial settlement or jury verdict. Accordingly, attorneys have financial interests in filing only the strongest cases.[174] To be sure, some lawyers are not primarily motivated by financial considerations. But because these lawyers are interested in developing the law and vindicating the rights of people whose rights have been violated, they also have little interest in filing insubstantial claims.[175] Qualified immunity

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[170] *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

[171] *See generally* Schwartz, *supra* note 4.

[172] *See id.*; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018) (describing the many barriers to relief in prison litigation that amount to "practical immunity" that "insulates prison defendants from liability at least as much as qualified immunity."). *Accord* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Almighty Supreme Born Allah v. Milling, 2018 WL 3388317 at *20 (July 11, 2018) ("Generally applicable rules governing pleading and proof are more than up to the task of weeding out frivolous Section 1983 litigation – just as they do in all others.").

[173] *See*, *e.g.*, *supra* note 6 and accompanying text.

[174] *See* Hubbard, *supra* note 19, at 712-13; Patton, *supra* note 18 at 756-57 ("Since few plaintiffs can afford counsel and most suits are taken on a contingency basis, an attorney undertakes an enormous financial risk when filing a Section 1983 suit. An attorney will therefore be hesitant to accept a weak case or a case without significant damages.").

[175] *See* Hubbard, *supra* note 19, at 713 ("Whether an attorney's motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both), the incentive will be to select those cases with higher merit.").

is an unnecessary pre-filing filter because other barriers to relief and financial challenges associated with bringing these cases mean that attorneys have powerful incentives only to file cases they might be able to win or that might advance other interests.

Second, qualified immunity does not reliably cause lawyers to screen out cases vulnerable to the defense. Two-thirds of the attorneys I interviewed rarely or never decline cases because of concerns about qualified immunity. Some attorneys report that qualified immunity plays little role in their case selection decisions because other considerations—particularly juror sympathies for government defendants—cause them to select only the most egregious cases, which are not vulnerable to dismissal on qualified immunity grounds. Other attorneys' explanations for their inattention to qualified immunity make clear that the doctrine is in many ways ill-suited to screen out cases before filing. Because the application of qualified immunity is judge-dependent, some attorneys conclude that it makes no sense not to file a case because of the doctrine; instead, they file the case, see which judge is assigned, and then decide how to proceed. Because qualified immunity applies to Section 1983 damages actions against individual officers—but not municipal liability claims, claims for injunctive relief, or state law claims—attorneys report including these claims in their cases to minimize the effects of the doctrine. And some attorneys are willing to accept the risk of dismissal on qualified immunity grounds as a means of developing the law, gathering evidence for future claims, or uncovering information valuable to the plaintiff about the case.

Third, to the extent that concerns about qualified immunity cause attorneys to screen out some cases, the attorneys I interviewed suggest the doctrine is not doing a good job of screening out "insubstantial" cases. Although the Court has not clarified what cases are "insubstantial," it has repeatedly suggested that "insubstantial" claims are "baseless" and "frivolous," brought against "innocent" government officials who acted "reasonably."[176] But the cases attorneys report declining because of qualified immunity are not necessarily "baseless" or "meritless." Attorneys do report declining false arrest cases because they believe they must show intentional wrongdoing in order to defeat qualified immunity. But such cases are not necessarily baseless or frivolous—a plaintiff may be able to show a Fourth Amendment violation, which requires a showing of unreasonable behavior, without being able to establish a knowing violation. Other attorneys report declining cases with factual scenarios that a court has not previously held unconstitutional. But, as the Court has recognized, novelty is not a good proxy for merit.[177] Attorneys also report declining cases that do not make economic sense to bring given the costs and delays associated with qualified immunity. And some attorneys decline all civil rights cases because of the costs and risks

[176] *See supra* notes 23-26 and accompanying text.

[177] *See*, *e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002).

of qualified immunity. None of these responses suggest that concerns about qualified immunity cause attorneys to decline cases that are "baseless" or "frivolous."

Perhaps, though, the Supreme Court intends qualified immunity to have a broader reach. The Court has repeatedly stated that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law,"[178] and may intend for qualified immunity to discourage lawyers from filing any case that does not meet that exacting standard. To the extent that qualified immunity discourages some lawyers from filing false arrest cases in which an officer has not knowingly arrested someone without probable cause, the doctrine arguably furthers this goal.[179] Some attorneys report declining cases without factually similar precedent on point unless the case is so egregious that it could amount to an obvious constitutional violation. To the extent that attorneys decline cases without factually similar precedent for this reason, qualified immunity may also, arguably, further this goal. But because a qualified immunity motion can be defeated by pointing to a prior decision holding factually similar conduct unconstitutional, the egregiousness of an officer's behavior is less relevant to the qualified immunity analysis than the existence of prior precedent. Indeed, as one attorney explained, he will file a case involving a "de minimis" constitutional violation if there was a prior case on point.[180] Moreover, to the extent that concerns about qualified immunity discourage some attorneys from taking any constitutional claims, the doctrine may be screening out cases where defendants were plainly incompetent or knowingly violated the law.

Qualified immunity has already been shown to be unnecessary and ill-suited to shield government officials from the burdens of litigation because of the prevalence of indemnification and the infrequency with which cases are dismissed on qualified immunity grounds before discovery and trial. This study offers persuasive anecdotal evidence to suggest that qualified immunity also does not serve its intended goal by discouraging attorneys from filing insubstantial cases. Qualified immunity does not reliably cause lawyers to decline cases, and the cases that attorneys report declining because of concerns about qualified immunity are not reliably "insubstantial" under any plausible meaning of the term.

2. Qualified Immunity Inhibits Government Accountability

Qualified immunity not only fails to advance interests in protecting government; it also harms interests in government accountability. Although the Supreme Court has stated that qualified immunity doctrine is intended to allow plaintiffs to "hold public officials accountable when they exercise power irre-

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[178] *See id.*

[179] *See supra* notes 144-146 and accompanying text.

[180] *See* N.D. Cal. Attorney D.

sponsibly," commentators have observed that qualified immunity doctrine undermines government accountability in several ways—by fostering uncertainty about the contours of constitutional law,[181] shielding from liability officers who intentionally engage in misconduct,[182] and "send[ing] an alarming signal to law enforcement officers . . . that they can shoot first and think later."[183] This study suggests that qualified immunity may compromise government accountability in two additional ways.

First, qualified immunity makes it more difficult and less reliably remunerative to bring civil rights cases. Researching, briefing, and arguing qualified immunity motions and appeals take time and money. Stays while motions and appeals are pending can delay litigation and weaken plaintiffs' evidence. Qualified immunity can reduce the amount of available recovery, either by dismissing higher value claims or limiting recovery to state law claims that may have damages caps and attorneys' fees limitations. Qualified immunity carries with it the risk that cases will be dismissed—often after contingency fee attorneys have dedicated significant resources to discovery. And, in order effectively to challenge qualified immunity motions, attorneys need to understand and keep up to date with changes in a very complex and uncertain doctrinal terrain and be prepared to litigate in both trial and appellate courts.

Some lawyers accept these costs, burdens, and risks as among the many challenges associated with bringing civil rights cases. But it should come as no surprise that other attorneys, faced with these challenges, limit the number of civil rights cases they bring or get out of the business of civil rights litigation altogether. As Congress recognized when it passed the Civil Rights Attorneys' Fees Awards Act of 1976, "civil rights laws depend heavily upon private enforcement."[184] And, as Pamela Karlan has noted, "[a]ttorney's fees are the fuel that drives the private attorney general engine."[185] Commentators have criticized the Supreme Court for limiting the circumstances in which plaintiffs' attorneys can recover fees under Section 1988 because these decisions reduce the number of

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[181] *See*, *e.g.*, Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willet, J., concurring dubitante) ("If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive.").

[182] *See* John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1974-75 (2018) (describing *Mullenix v. Luna*, in which the defendant was shielded from liability on qualified immunity grounds despite acting in violation of an order, and *Robles v. Prince George's County*, in which defendants were shielded from liability despite acting in violation of police regulations and state law).

[183] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). *See also* Schwartz, *supra* note 14 at 1814-20 (describing these and other arguments that qualified immunity impairs government accountability).

[184] S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976).

[185] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (2003).

attorneys willing to take civil rights cases and skew the types of cases they select.[186] To the extent that qualified immunity doctrine makes it more difficult for lawyers to make a living bringing civil rights cases, and discourages lawyers from entering into this line of work, the doctrine similarly undermines longstanding interests in creating a market for private attorneys general.

Second, qualified immunity doctrine inhibits the development of constitutional law in previously unappreciated ways. Commentators have already observed that the Court's qualified immunity jurisprudence—which allows courts to grant qualified immunity without ruling on the underlying merits of plaintiffs' constitutional claims—leads to constitutional stagnation.[187] This study suggests that qualified immunity may also inhibit the development of constitutional law by discouraging lawyers from filing cases involving novel claims. Attorneys know that cases are more likely to be dismissed on qualified immunity grounds if they cannot point to factually similar precedent, and some report declining cases if they cannot find a prior case on point. The inclination not to file these types of cases creates a vicious cycle—if lack of precedent makes a certain type of case difficult to bring, then fewer lawyers will bring those types of cases, and then those rights are even less likely to become clearly established.[188]

Some have defended qualified immunity on the ground that it encourages the development of constitutional law by allowing a court to announce a new constitutional right while shielding the government officials sued in the case from financial liability.[189] I have previously expressed skepticism about this argument in favor of qualified immunity, both because courts infrequently decide cases in this manner and because those decisions infrequently do much to expand the contours of constitutional rights.[190] This study offers another reason to be skeptical of this defense of qualified immunity. When a court announces a new constitutional right but grants qualified immunity to the defendants in the case, the plaintiff does not recover and the plaintiff's attorney—who almost certainly will have brought the case on contingency—will not be paid. Lawyers willing to bear this risk of financial loss will continue to file cases vulnerable to dismissal

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[186] *See*, *e.g.*, Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. COLLOQUY 182, 185-86 (2007); Karlan, *supra* note 185, at 205-08; Reingold, *supra* note 18.

[187] *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34 (2015).

[188] Accord *Reinert*, *supra* note 30, at 494 (suggesting that attorneys' case selection decisions, geared to avoid qualified immunity dismissals, may mean that "the vast majority of *Bivens* cases never test the limits of existing law, because the attorneys who file them select cases that are within the 'clearly established' zone that will defeat a qualified immunity defense.").

[189] *See*, *e.g.*, John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99-100 (1999); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011).

[190] *See* Schwartz, *supra* note 183, at 1826-30.

on qualified immunity grounds as a means of expanding the law. But it is far from clear that we should expect plaintiffs' attorneys to bankroll efforts to expand constitutional rights. And my data suggest that few attorneys are willing or able to bear the risk of these financial losses with any regularity.

C. *Moving Forward*

The Supreme Court has said that evidence about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[191] In previous work, I have shown that government defendants rarely bear financial liability in civil rights cases, and that qualified immunity rarely leads to the dismissal of cases before discovery and trial.[192] Here, I show that qualified immunity imposes previously unappreciated costs and burdens on attorneys bringing these cases, and does not do a good job of screening out insubstantial cases. All of this evidence, taken together, make clear that the Court should adjust the balance it has struck with qualified immunity. My findings about attorney case selection decisions support several possible adjustments to qualified immunity doctrine currently under consideration.

For example, John Jeffries has proposed that qualified immunity focus not on whether the law is clearly established by prior decisions, but on whether the conduct was "clearly unconstitutional."[193] In Jeffries's view, defendants' liability should not be determined by whether a prior case has held their conduct unconstitutional—such a rule fails to punish behavior that is clearly unconstitutional, yet novel.[194] Moreover, as Judge Browning recently made clear, this standard makes unfounded assumptions about the ways in which government officials learn about the law.

> The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed

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[191] Anderson v. Creighton, 483 U.S. 635, 542 n.3 (1987).

[192] *See* Schwartz, *supra* note 4; Schwartz, *supra* note 170.

[193] Jeffries, *supra* note 52, at 867.

[194] *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013).

comparison of their situation with a previous Supreme Court or published Tenth Circuit case.[195]

If qualified immunity turned on whether the defendant's conduct was clearly unconstitutional, the standard would also be better aligned with common law principles that are the ostensible basis for the doctrine.[196]

This study offers an additional reason to prefer the "clearly unconstitutional" standard. Determining whether a constitutional right is "clearly established" is complicated and confusing, with perpetually changing rules about how similar the facts of the prior case must be and which courts can clearly establish the law—and this complication and confusion makes it more difficult for lawyers to stay abreast of the rules. Plaintiffs' counsel must search for cases finding factually similar conduct unconstitutional in order to defeat qualified immunity, increasing the burdens on plaintiffs' counsel when briefing their motions in opposition. Moreover, the "clearly established" standard does not appear to do a good job of weeding out insubstantial cases. As Jeffries has observed, a case is not without merit simply because a prior decision has not held similar conduct to be unconstitutional. This mismatch can lead to the dismissal of cases concerning novel but unconstitutional conduct. It can also cause attorneys to decline meritorious but novel cases, and accept cases alleging de minimis harms if prior cases have held that conduct unconstitutional.

My findings also support calls to eliminate interlocutory appeals of qualified immunity denials. The Supreme Court allows defendants immediately to appeal denials of qualified immunity motions because it believes interlocutory appeals further the doctrine's goal of shielding government officials from the costs and burdens of litigation.[197] Yet, as Judge Gwin of the Northern District of Ohio has observed, interlocutory appeals often "increase the burden and expense of litigation both for government officers and for plaintiffs" because they take time and money to brief and decide, and the lower court decisions are usually affirmed.[198] This study shows that plaintiffs' attorneys consider interlocutory appeals to be unnecessarily costly and time consuming. In addition, attorneys report that the threat of interlocutory appeal makes it more challenging to bring these cases and may discourage some lawyers from going into this line of work.

Finally, my study offers further evidence to support calls to eliminate qualified immunity or return the defense to the scope of common law defenses in existence at the time Section 1983 became law. The original justification for qualified immunity—that it serves as an extension of common law principles in

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[195] Manzanares v. Roosevelt County Adult Detention Center, 2018 WL 4150885, at *18 n.10 (D.N.M. Aug. 30, 2018).

[196] *See* Smith, *supra* note 169, at 2110 (arguing that Jeffries's approach would allow unreasonable and unconstitutional actions to be punished, and would be consistent with common law principles).

[197] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[198] Wheatt v. City of East Cleveland, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017).

effect when Section 1983 became law—has been called into serious doubt.[199] For more than thirty years, the Supreme Court has defended qualified immunity doctrine as a means of balancing interests in government accountability with interests in shielding government officials from the costs and burdens of insubstantial litigation.[200] But this study, and my research more generally, makes clear that qualified immunity fails to achieve this balance. The doctrine undermines government accountability in multiple ways, and has proven ill-suited and unnecessary to weed out insubstantial cases both before and after cases are filed. If qualified immunity is not serving its intended policy goals, we should do away with qualified immunity or, at the very least, reverse the expansions to the doctrine made with the intent of achieving these goals.[201]

CONCLUSION

In recent years, the Court has issued several decisions reversing lower court denials of qualified immunity—often in cases involving fatal force by law enforcement—with opinions that make clear its belief that the protections of qualified immunity are exceedingly important to encourage vigorous enforcement of the law by government officials and to benefit "society as a whole."[202] But a growing body of research makes clear that qualified immunity doctrine is not achieving its intended policy goals. This Article explores two critically important but understudied questions—the impact of qualified immunity on litigation and case selection. My findings offer further reason to conclude that qualified immunity harms interests in government accountability and fails to shield government officials from litigation in insubstantial cases.

The Supreme Court will undoubtedly have multiple opportunities to reconsider qualified immunity in the near future. When the Court does grant certiorari in a qualified immunity case, advocates across the political spectrum will likely make the case that qualified immunity should be abolished or greatly limited because the doctrine bears little resemblance to common defenses in 1871, and because the doctrine fails to achieve its intended policy goals. This study offers more reason to "reconsider the balance struck" by the Court in its qualified immunity decisions.[203]

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[199] *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); *see also* sources cited *supra* note 13.

[200] *See* Schwartz, *supra* note 14.

[201] One possible objection is that eliminating qualified immunity would harm government and society as a whole in a variety of ways—including more frivolous lawsuits filed and more damages awarded, overdeterrence of government officials, and difficulties hiring people to fill government jobs. For a response to these concerns, *see* Schwartz, *supra* note 86.

[202] *See* Schwartz, *supra* note 14.

[203] Anderson v. Creighton, 483 U.S. 635, 642 n.3 (1987).