AFTER QUALIFIED IMMUNITY

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Courts, scholars, and advocacy organizations across the political spectrum are calling on the Supreme Court to limit qualified immunity or do away with the defense altogether. They argue—and offer compelling evidence to show—the doctrine bears little resemblance to defenses available when Section 1983 became law, undermines government accountability, and is both unnecessary and ill-suited to shield government defendants from the burdens and distractions of litigation. Some Supreme Court justices appear to share critics' concerns. Indeed, Justice Thomas recently wrote that, "[i]n an appropriate case we should reconsider qualified immunity jurisprudence." If the Court does reconsider qualified immunity, it will find compelling reasons to abolish or greatly limit the defense. Yet the Court may be reluctant to take this type of dramatic action for fear that doing so would harm government and society as a whole.

In this Article, I offer five predictions about how constitutional litigation would function in a world without qualified immunity that should assuage these concerns. First, there would be clarification of the law, but modest if any adjustment to the scope of constitutional rights. Second, plaintiffs' and defendants' litigation success rates would remain relatively constant. Third, the cost, time, and complexity associated with litigating constitutional claims would decrease. Fourth, more civil rights lawsuits would likely be filed, but other doctrines and financial considerations would mean that attorneys would continue to have strong incentives to decline insubstantial cases. Fifth, indemnification and budgeting practices would continue to shield most government agencies and officials from the financial consequences of damages awards.

If my predictions are correct, abolishing qualified immunity would clarify the law, reduce the costs of litigation, and shift the focus of Section 1983 litigation to what should be the critical question at issue in these cases—whether government officials have exceeded their constitutional authority. But eliminating qualified immunity would not significantly alter the scope of constitutional protections, dramatically increase plaintiffs' success rates, or alter government practices that dampen the effects of lawsuits on officers' and officials' decisionmaking. Doomsday scenarios imagined by some commentators—of courthouses flooded with frivolous claims—would not come to pass. And constitutional litigation would often still fail to hold government officials accountable when they exercise power irresponsibly. The Supreme Court should not avoid reconsidering qualified immunity for fear that doing so would dramatically magnify the effects of lawsuits against government officials. And government accountability advocates should recognize that eliminating qualified immunity would not fundamentally shift dynamics that make it difficult for plaintiffs to redress constitutional violations and deter government wrongdoing.

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INTRODUCTION

In this Article, I imagine a world without qualified immunity. This may seem like a purely academic exercise. After all, the Supreme Court has been downright bullish about qualified immunity doctrine in recent years.[1] Since 2005, when John Roberts became Chief Justice, the Court has granted certiorari to consider twenty qualified immunity denials, and ruled in the government's favor every time.[2] The Court has repeatedly chastised lower courts for failing to use qualified immunity to shield government officials from damages liability.[3] And the Court's recent decisions have further expanded qualified immunity's reach.[4]

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[1] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1798, 1798 (2018) (describing the Supreme Court's recent qualified immunity decisions). For other descriptions and assessments of the Court's recent qualified immunity jurisprudence, see Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013).

[2] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018) (listing Supreme Court's qualified immunity decisions since 1982). Note that Baude "omits some additional cases concerning qualified immunity that were decided only on procedural grounds and without application of the clearly established standard." *Id.* at 82 n.219. By Karen Blum's count, the Court has "confronted the issue of qualified immunity in over thirty cases" since *Harlow*. Blum, *supra* note 1, at 1887 n.2. For the three most recent Supreme Court decisions post-dating Baude's analysis that reversed local court denials of qualified immunity, see City of Escondido v. Emmons, 586 U.S. __ (2019); District of Columbia v. Wesby, 138 S. Ct. 577 (2018); Kisela v. Hughes, 138 S. Ct. 1148 (2018).

[3] *See, e.g.*, *Emmons*, 586 U.S. at __ ("The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established."); White v. Pauly, 137 S. Ct. 548, 551-52 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.' Today it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'"); City & City. Of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability.").

[4] *See, e.g.*, Baude, *supra* note 2, at 48 (explaining that the Court has recently given qualified immunity "pride of place on the Court's docket"); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64 (2016) (observing that the Court, in recent decisions, "has engaged in a pattern

But there are growing calls by courts,[5] commentators,[6] and advocacy organizations across the political spectrum[7] to reconsider qualified immunity or do away with the defense altogether. The Supreme Court originally described qualified immunity as an extension of common law defenses in existence when Section 1983 became law, and later justified the doctrine on policy grounds—as a means of balancing interests in government accountability against an interest in shielding government officials from burdens of suit in insubstantial cases.[8] Yet critics contend that the doctrine bears little resemblance to the common law immunities in existence when Section 1983 was enacted, undermines government accountability, and is both unnecessary and ill-suited to shield government officials from the burdens and distractions of being sued.[9]

Some Supreme Court justices appear sympathetic to these critiques. Justice Sotomayor, sometimes joined by Justice Ginsburg, has criticized the Court's qualified immunity decisions for undermining government accountability by "sanctioning a 'shoot first, think later' approach to policing."[10] Justice Breyer concluded that qualified immunity was unnecessary for private defendants because they were likely to be indemnified by their employers[11]—a rationale that would apply to government defendants virtually assured indemnification.[12] And Justice Thomas has criticized the doctrine for straying from its common law foundations and

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of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.").

[5] *See, e.g.*, Zadeh v. Robinson, No. 17-50515 (5th Cir. 2018) (Willett, concurring) (observing that he and "a growing, cross-ideological chorus of jurists and scholars" are calling for reconsideration of qualified immunity). For other decisions critical of qualified immunity see, for example, Wheatt v. City of East Cleveland, 2017 WL 6031816 (N.D. Ohio Dec. 6, 2017); Thompson v. Clark, 2018 WL 3128975 (E.D.N.Y. June 26, 2018); Sarin v. Magee, 284 F. Supp. 3d 736 (E.D. Pa. 2018); Manzanares v. Roosevelt County Adult Detention Center, 2018 U.S. Dist. Lexis 147840 (D.N.M. Aug. 30, 2018).

[6] *See, e.g.*, *David* French, *End Qualified Immunity*, NAT'L REV. (Sept. 13, 2018); Matt Ford, *Should Cops Be Immune from Lawsuits?* THE NEW REPUBLIC (Sept. 12, 2018). *See also* Blum, *supra* note 1; Schwartz, *supra* note 1.

[7] *See, e.g.*, Emma Andersson, *The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later'*, ACLU (Apr. 9, 2018, 5:00 PM) (explaining that a recent Supreme Court qualified immunity decision "contributes to the deep deficit in police accountability throughout our country"); Jay Schweikert, *Openings in the Front in the Campaign Against Qualified Immunity*, CATO AT LIBERTY (June 12, 2018) (describing "Cato's ongoing campaign to challenge the doctrine of qualified immunity"), at https://www.cato.org/blog/openings-front-campaign-against-qualified-immunity.

[8] *See* Anderson v. Creighton, 483 U.S. 635 (1987) (explaining that the Court's immunity decisions "are made in light of the 'common-law tradition'" but that the doctrine was "completely reformulated" in *Harlow* "along principles not at all embodied in the common law"); Wyatt v. Cole, 504 U.S. 158, 170-71 (1992) (Kennedy, J., concurring) ("Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choice[s].'…[H]owever, we have diverged to a substantial degree from the historical standards…The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits."). *See also* Schwartz, *supra* note 1, at 1801, 1803 (describing these various justifications for the doctrine).

[9] *See* sources cited *supra* notes 5-7 (making these arguments); Schwartz, *supra* note 1 (same).

[10] Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (expressing concern that the Court's decision "sends an alarming signal to law enforcement officers…that they can shoot first and think later.").

[11] Richardson v. McKnight, 521 U.S. 399, 411 (1997) (explaining that private employment "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face.").

[12] *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (finding that law enforcement officers virtually never contribute to settlements and judgments entered against them).

recommended to his colleagues that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."[13]

The Court has yet to accept Justice Thomas's invitation to reconsider qualified immunity, but it seems like only a matter of time until it does. Petitions for certiorari in qualified immunity cases are now regularly invoking Justice Thomas's language in *Ziglar*.[14] In July 2018, an ideologically diverse collection of organizations—including the ACLU, the Cato Institute, and the Law Enforcement Action Partnership—submitted an amicus brief to the Supreme Court, describing "a cross-ideological consensus that this Court's qualified immunity doctrine under 42 U.S.C. 1983 misunderstands that statute and its common-law backdrop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing."[15] The case settled before the petition was ruled upon, but there is every reason to believe this coalition of critics will find another opportunity to bring their arguments to the Court.[16]

If the Court decides to take a closer look at qualified immunity, it will find compelling reasons to greatly restrict or abolish the defense. Yet the Court may be reluctant to take the type of dramatic action compelled by the record. As others have observed, one cause for hesitation may be *stare decisis*.[17] In this Article I focus on another possible concern which has received far less attention but may be giving the Court even more pause: how constitutional litigation would function in a world without qualified immunity.

The Court has repeatedly described qualified immunity as critically important to government officials and "society as a whole," suggesting a fear that restricting or eliminating the

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[13] Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

[14] *See, e.g.,* Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Spencer v. Abbott, No. 17-1397, 2018 WL 3778553 (Aug. 8, 2018); Reply Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Pauly v. White, No. 17-1078, 2018 WL 2684548 (May 31, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Shafer v. Padilla, No. 17-1396, 2018 WL 1705603 (Apr. 3, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit, Apodaca v. Raemisch, 2018 WL 1315085 (Mar. 9, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, Melton v. Phillips, No. 17-1095, 2018 WL 722531 (Feb. 2, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit, Noonan v. Cty. of Oakland, No. 17-473, 2017 WL 4386875 (Sept. 27, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit, Doe v. Olson, No. 17-296, 2017 WL 3701814 (Aug. 23, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, Walker v. Farnan, No. 17-53, 2017 WL 2954392 (July 10, 2017); *see also* Brief in Opposition to Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, S.C. Dep't of Corr. v. Booker, No. 17-307, 2017 WL 5714616, at 34 (Nov. 21, 2017) (arguing in opposition to a grant of certiorari but stating that "if the Court decides to grant certiorari it should add a question presented permitting it to revisit the doctrine of qualified immunity as a potential alternate ground for affirmance").

[15] 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 (July 11, 2018) [hereinafter *Cross-Ideological Amicus Brief*]. *See also* Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Almighty Supreme Born Allah v. Milling, 2018 WL 3388318 (July 11, 2018).

[16] *See* Will Baude, *Noteworthy Qualified Immunity Settlement*, REASON (Sept. 7, 2018, 9:03 AM), https://reason.com/volokh/2018/09/07/noteworthy-qualified-immunity-settlement.)

[17] For arguments that *stare decisis* should not impede reconsideration of qualified immunity, see Baude, *supra* note 2, at 80-82; Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999 (2018). For arguments that the Supreme Court's decisions reflect a deep commitment to the doctrine that cannot easily be disturbed, see, for example, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

doctrine will do significant harm.[18] To date, the strongest defenses of qualified immunity have been various predictions that the world would be worse off without it: Plaintiffs would file many more frivolous suits, plaintiffs would recover much more money against government defendants, and these suits and costs would imperil individual defendants' pocketbooks and the government fisc, chill officer behavior on the street, and discourage people from accepting government jobs.[19] Faced with these bleak prognoses, the Court may be reluctant to reconsider qualified immunity doctrine, despite its many flaws.

I do not share these predictions. Of course, it is impossible to know for certain what impact eliminating or restricting qualified immunity might have. We cannot know for certain whether or how eliminating qualified immunity tomorrow would change the litigation and disposition of cases filed today. We also cannot know for certain whether or how eliminating qualified immunity tomorrow might change plaintiffs' decisions about whether to file cases next week. Eliminating qualified immunity might also cause judges and legislators to tinker in unforeseen ways with rights and remedial design. But uncertainty should not be a barrier to prediction. Courts and commentators have made strong claims about the anticipated effects of eliminating qualified immunity fleetingly and without empirical support. In contrast, my views about a post-qualified immunity world are informed by the most comprehensive examination to date of the role qualified immunity plays in Section 1983 litigation—combining the results of a study examining the dockets in almost 1200 federal civil rights cases filed in five federal districts over a two-year period[20] with surveys of almost 100 attorneys who entered appearances in these cases and in-depth interviews of thirty-five of these attorneys[21]—in conjunction with my studies of police indemnification practices and government budgeting for settlement and judgment costs,[22] and other studies of district and circuit court qualified immunity decisions.[23] These data offer valuable insights about the role qualified immunity currently plays, and also can be used credibly to imagine constitutional litigation in a world without qualified immunity.

Based upon this evidence, I offer five predictions about constitutional litigation after qualified immunity. First, there would be additional clarification of constitutional rights, but the

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[18] *White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3; Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[19] *See, e.g.*, Andrew King, *Keep Qualified Immunity . . . For Now*, MIMESIS (July 1, 2016), http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 ("Mostly, but for qualified immunity, it's a bonanza for plaintiff's lawyers."); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, CAL. L. REV. (forthcoming) (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation" and impose "unanticipated financial drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs."); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, CAL. L. REV. ONLINE (forthcoming) (eliminating qualified immunity would "subject [police officers and other officials] to a great deal more liability than they currently are when they deprive citizens of their constitutional rights"); Nielson & Walker, *supra* note 17, at 1881 ("[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…."); Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case For A Categorical Approach*, 68 AM. U. L. REV. 379, 391 (2018) ("If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability.").

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

[21] *See* Joanna C. Schwartz, *Qualified Immunity Selection Effects* (draft on file with author).

[22] *See* Schwartz, *supra* note 12 (describing police indemnification practices); Joanna C. Schwartz, *How Government Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (describing police budgeting practices).

[23] *See* Aaron Nielson & Christopher Walker, *Strategic Immunity*, 66 EMORY L.J. (2016); Aaron Nielson & Christopher Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015).

scope of those rights would not dramatically change. Second, plaintiffs' and defendants' litigation success rates would remain relatively constant. Third, the overall cost and time associated with litigating constitutional claims would decrease. Fourth, more civil rights lawsuits would be filed, but other considerations would continue to discourage attorneys from filing insubstantial cases. Fifth, settlements and judgments would continue to have a limited impact on officers' and municipalities' dollars and decisionmaking.

If my predictions are correct, abolishing qualified immunity would clarify the law, make litigation more efficient, increase the number of suits filed, and shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority. But eliminating qualified immunity would not significantly change the scope of constitutional protections, dramatically increase the frequency with which plaintiffs prevail, or alter government indemnification, budgeting, and risk management practices that dampen the effects of lawsuits on officers' and officials' decisionmaking. Doomsday scenarios imagined by some commentators—of courthouses flooded with meritless claims—would not come to pass. And constitutional litigation would still be subject to criticisms that it fails to hold government officials accountable when they exercise power irresponsibly. These predictions should offer some comfort to justices on the Court who fear that doing away with qualified immunity could somehow jeopardize policing or "society as a whole."[24] But these predictions should also temper the optimism of government accountability advocates. Those who argue that qualified immunity allows government officials to act with impunity may believe that doing away with the doctrine will usher in a new age of government accountability.[25] Although eliminating qualified immunity would increase access to the courts, clarity about the law, and transparency about the conduct of government officials, it would not fundamentally shift dynamics that make it difficult for plaintiffs to redress constitutional violations and deter official misconduct.

The remainder of this Article proceeds as follows. In the first three Parts, I explore how the universe of cases that are currently being filed might proceed differently in the absence of qualified immunity: Part I predicts how courts' interpretations of the scope of constitutional rights might change; Part II predicts how the dispositions of claims might change; and Part III predicts how the litigation of constitutional claims might change. Then, in Part IV, I consider how eliminating qualified immunity might change the types and number of cases that are filed. Finally, in Part V, I consider how eliminating qualified immunity might alter the deterrent effect of civil rights suits. In conclusion, I offer thoughts about how these predictions should influence the Supreme Court's approach to qualified immunity, and how these predictions relate to ongoing debates about the role of qualified immunity in constitutional litigation and the optimal structure of rights and remedies.

I. RIGHTS

Qualified immunity doctrine has been defended on the ground that it encourages courts to engage in constitutional innovation. Were qualified immunity eliminated, some scholars fear, courts will restrict the scope of constitutional rights.[26] But this view overstates the extent to which courts are currently innovating, and incorrectly assumes that courts would

[24] *White*, 137 S. Ct. at 551; *see also Sheehan*, 135 S. Ct. at 1774 n.3.

[25] *See, e.g.*, sources cited *supra* notes 6-7.

[26] *See infra* notes 37-42, 51-53 and accompanying text (describing these concerns).

respond in lockstep to qualified immunity's elimination. Absent qualified immunity, I predict that courts would almost certainly clarify the contours of constitutional law, but the scope of constitutional rights would not dramatically shift.

Qualified immunity doctrine, in its current formulation, obscures the contours of constitutional law. Qualified immunity protects government defendants from damages liability, even if they have violated the Constitution, so long as they have not violated "clearly established law."[27] Courts considering qualified immunity motions are faced with two questions—whether a defendant has violated the Constitution, and whether the constitutional right was clearly established. In 2001, in *Saucier v. Katz*, the Supreme Court instructed lower courts deciding qualified immunity motions to answer both questions as a means of "allow[ing] the law's elaboration from case to case."[28] But, in 2009, in *Pearson v. Callahan*, the Court reversed itself and held that lower courts could grant qualified immunity without first ruling on the constitutionality of a defendant's behavior.[29]

The Court's decision in *Pearson v. Callahan* has been widely criticized for creating confusion about the scope of constitutional rights. Commentators fear that when courts grant qualified immunity without first ruling on the scope of the underlying constitutional right, their decisions "often leave[] important, recurring, and non-fact bound constitutional questions needlessly floundering in the lower courts."[30] This concern is particularly acute for constitutional claims regarding novel practices and technologies, like Tasers and drones, where there are few pre-*Pearson* decisions and it can take many cases over many years for circuits to issue clarifying rulings.[31] Studies of district and circuit court decisionmaking after *Pearson* support fears of constitutional obscurity—approximately one-quarter of district and circuit court decisions grant defendants qualified immunity without first ruling on the constitutionality of defendants' behavior.[32]

In a world without qualified immunity, it would be more difficult for district and appellate courts to avoid ruling on the merits of plaintiffs' constitutional claims. Instead of limiting

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

[28] 553 U.S. 194, 201 (2001).

[29] 555 U.S. 223 (2009).

[30] Blum, *supra* note 1, at 1897. For one powerful example, see BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 74-75 (2017) (describing several decisions finding the strip searches of students to be unconstitutional, but granting qualified immunity). For similar concerns about the exclusionary rule, see Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies,* 65 DUKE L.J. 1 (2015).

[31] *See* Schwartz, *supra* note 1, at 1817; *see also* Blum, *supra* note 1 (describing the development of law regarding the First Amendment right to record the police, which has been developed over several years in circuit courts). *Accord* 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.").

[32] *See* Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 489 (2011) (finding that 22.6% of district and circuit court decisions issued after *Pearson* granted qualified immunity without ruling on the merits); Nielson & Walker, *The New Qualified Immunity*, *supra* note 23 (finding that 26.7% of the time circuit courts declared a right not clearly established without resolving the constitutional question). Studies examining appellate rulings before and after *Saucier* similarly found that *Saucier* decreased the frequency with which courts declined to reach constitutional questions in their qualified immunity decisions. *See, e.g.*, Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 423 (2009) (finding appellate courts declined to reach constitutional questions in 25.8% of cases in 1995 and 1.2% of cases in 2005); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 689-90 (2009) (finding that appellate courts declined to reach constitutional questions in 48.1% of cases pre-*Saucier* and just 6.2% of cases post-*Saucier*).

their analysis to whether the facts of a prior case were similar enough to "clearly establish" the unconstitutionality of defendants' conduct,[33] courts would more regularly explore and explicate the boundaries of constitutional protections. Such rulings could provide guidance to governments as they create policies and trainings for government officials,[34] and begin dialogue with other branches of government and the body politic about shared constitutional principles.[35]

Although courts' decisions would almost certainly offer more clarity about constitutional rights, there is more uncertainty about how eliminating qualified immunity would affect their scope.[36] The prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity. Qualified immunity doctrine allows courts to announce a new constitutional right while shielding the government official who is a defendant in the case from damages liability.[37] So, "[j]udges contemplating an affirmation of constitutional rights need not worry about the financial fallout."[38] Without qualified immunity, John Jeffries has observed, "[e]very extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages."[39] This prospect might cause judges to rule against plaintiffs as a way of protecting defendants from financial liability.[40] As one example, Jeffries and Richard Fallon have both observed that if plaintiffs in *Brown v. Board* and *Miranda v. Arizona* had sought monetary damages, and qualified immunity was not available to shield individual defendants from damages liability, the Supreme Court might not have issued either landmark ruling.[41] Accordingly, they suggest, those arguing to eliminate qualified immunity should be prepared to sacrifice decisions like *Brown* and *Miranda*.[42]

This is a powerful thought experiment, but it creates a false choice. Eliminating qualified immunity would not have imperiled *Brown* and *Miranda* because qualified immunity is a defense available only to individual officers in damages cases; neither *Brown* nor *Miranda* was brought against individual officers or sought damages. Indeed, it is hard to imagine a lawsuit that would seek constitutional innovation of the scope requested by *Brown* and *Miranda* that would not also include a claim for injunctive relief or a claim against a municipality (for which qualified immunity would be unavailable); Fallon and Jeffries have not offered examples of such cases and I know of none.

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[33] *See infra* note 112 and accompanying text (describing the qualified immunity standard).

[34] For further discussion of the relationship between court rulings and government policies and trainings see *infra* note 200 and accompanying text.

[35] *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 654 (2003).

[36] There is similar disagreement about whether *Saucier* caused courts to constrict the scope of constitutional rights. Compare Leong, *supra* note 32, at 670 (arguing that *Saucier*'s mandatory sequencing "leads to the articulation of more constitutional law," but may contract rights because courts do not want to issue decisions finding constitutional violations but granting qualified immunity) with John C. Jeffires, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 121-22 (2009) (rejecting the notion that *Pearson* would make courts "*more* likely to rule against constitutional claims in damages actions than those same courts would be to rule against those same claims if raised in other contexts.").

[37] John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

[38] John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 247 (2013).

[39] *Id.* at 248.

[40] *Id.*

[41] Fallon, Jr., *supra* note 19; Jeffries, *supra* note 37, at 98-102; Jeffries, *supra* note 38, at 248.

[42] *See* Fallon, *supra* note 19 ("[W]e are better off with a package that couples decisions such as *Brown* and *Miranda* with immunity doctrines than with a package that omits immunity doctrines but would have made the Supreme Court's *Brown* and *Miranda* rulings pragmatic impossibilities."); Jeffries, *supra* note 37, at 98-102.

Perhaps I am reading Jeffries and Fallon too narrowly. Both may believe that the Court would not issue landmark rulings like *Brown* and *Miranda*—even if such cases sought only injunctive relief—for fear that plaintiffs would subsequently bring damages actions for violations of those newly articulated rights that would impose significant financial liability on individual defendants. But this iteration of the argument creates a false choice for a different reason. Individual defendants almost never contribute to settlements and judgments entered against them, and lawsuit payouts represent a miniscule percentage of most municipal and state budgets.[43] Moreover, today's Court is highly unlikely—even with the protections of qualified immunity—to issue expansive constitutional decisions like *Brown* and *Miranda*.[44] Perhaps the Court could issue such decisions again in the future—anything is possible.[45] But eliminating qualified immunity has little risk of imperiling these types of decisions any time soon.

Qualified immunity also does not appear to encourage expansive rulings by lower courts. Jeffries observes that qualified immunity allows courts to extend constitutional rights (by finding constitutional violations) while shielding defendants from financial liability (by granting qualified immunity). But courts infrequently rule on qualified immunity motions in this manner.[46] Far more often, courts rule on the constitutional right and whether it was clearly established and reach the same conclusion on both, or grant qualified immunity without deciding the constitutional question.[47] Even when courts do find a constitutional violation but grant qualified immunity, most decisions do not appear dramatically to expand the law. When I reviewed all of the circuit court decisions issued over a three-year period that ruled on qualified immunity in this manner, I found that almost ten percent had not developed the law at all.[48] Instead, they merely recognized that the constitutional right had been clearly established in another opinion issued after the conduct at issue in the case. The remainder appeared to "apply[] well-established constitutional principles to slightly different factual scenarios."[49] There is no reason to conclude that the protections of qualified immunity are

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[43] *See* Schwartz, *supra* note 12. For a discussion of the financial burdens lawsuits place on the government fisc, *see infra* notes 179-182 and accompanying text.

[44] *See generally* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014) (describing the progressive jurisprudence of the Warren Court and the Court's more constrained view of constitutional rights under Justices Burger, Rehnquist, and Roberts).

[45] Fallon, *supra* note 19 ("One might counter that the era of revolutionary constitutional holdings such as those in *Brown* and *Miranda* has concluded. But the mid- and long-term future are unknowable.").

[46] *See* Nielson & Walker, *The New Qualified Immunity*, *supra* note 23, at 37 (finding that, post-*Pearson*, 3.6% of circuit court qualified immunity decisions found constitutional violations but granted qualified immunity); Rolfs, *supra* note 32 (finding that, post-*Pearson*, 2.5% of qualified immunity decisions found constitutional violations but granted qualified immunity); Ted Sampsell-Jones & Jenna Yauch, Note, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623 (2011) (finding that, post-*Pearson*, 7.9% of published circuit court decisions found constitutional violations but granted qualified immunity). The Hughes and Leong studies, *supra* note 32, did not include findings relevant to this question because they did not study cases post-*Pearson.*

[47] *See* Nielson & Walker, *The New Qualified Immunity, supra* note 23, at 37 (canvassing the findings from the Rolfs, Jones-Yauch, and Nielson & Walker studies regarding the frequency with which courts post-*Pearson* find no qualified immunity (22.6%-37.9% of cases); find no constitutional violation and that the law was not clearly established (34.7-55.3% of cases); or grant qualified immunity without reaching the constitutional question (18.9%-26.7% of cases)).

[48] *See* Schwartz, *supra* note 1, at 1827 (describing review of forty-three cases, four of which concluded that other decisions had clearly established the law).

[49] *Id.* at 1827.

what motivated judges to find constitutional violations in these cases.[50] But, to the extent that qualified immunity did encourage courts to announce new constitutional rights in these cases, the doctrine exerted a modest pressure in this direction.

Qualified immunity could conceivably encourage constitutional innovation in a broader sense. Richard Fallon and Daryl Levinson both imagine that courts use qualified immunity, substantive laws, and other doctrines and rules to create "the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system."[51] When one component of the bundle is restricted or expanded, courts may adjust the other components to maintain the same bundle of rights and remedies.[52] Accordingly, both predict, were qualified immunity eliminated, courts would respond by restricting the scope of constitutional rights to maintain equilibrium.[53] There are isolated examples of this type of equilibration. In a 2009 case, limiting the circumstances in which an officer could conduct a warrantless vehicle search, the Supreme Court appeared to take comfort in the fact that "qualified immunity will shield officers from liability for searches conducted in reasonable reliance" on prior law.[54] Perhaps the Court would not have reached this decision absent qualified immunity. But, overall, the Court does not appear to be adjusting qualified immunity and other doctrines to create equilibrium. Instead, over the past fifty years, the Supreme Court has progressively strengthened qualified immunity's protections for defendants on the one hand,[55] and weakened plaintiffs' substantive constitutional protections on the other.[56] The Court's interpretations of related doctrines and rules have similarly favored government defendants.[57] Far from creating equilibrium, the Supreme Court's qualified immunity, justiciability, procedural, and substantive constitutional jurisprudence has acted as a one-way ratchet.

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[50] *See infra* notes 58-59 and accompanying text (describing a range of beliefs, interests, and affiliations that are believed to guide judicial decisionmaking).

[51] Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999); Wells, *supra* note 19, at 406 ("[E]liminating qualified immunity could result in dilution of the content of substantive constitutional rights.").

[52] Fallon, *supra* note 51, at 480 (describing his "equilibration thesis"); Levinson, *supra* note note 51, at 857-60 (describing his theory of "remedial equilibration").

[53] Fallon, *supra* note 51, at 480 ("In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them would likely *shrink*, and sometimes appropriately so."); Levinson, *supra* note 51, at 915 (imagining that, if qualified immunity were eliminated, "who could doubt that the effect would be a wholesale rewriting of constitutional rights? While it is impossible to predict just how various rights would be transfigured, drastically increasing the cost of rights would surely result in some curtailment.").

[54] Arizona v. Gant, 556 U.S. 332, 349 n.11 (2009).

[55] *See supra* notes 1-4 and accompanying text.

[56] *See generally* CHEMERINSKY, *supra* note 44. For exploration of the Court's restrictive Fourth Amendment rulings, see Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 129 (2017) (describing how "the Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling"); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1508 (2017) (describing how "a particular area of Fourth Amendment law—stop-and-frisk jurisprudence—facilitates police violence against African Americans); FRIEDMAN, *supra* note 30 (describing the Court's ineffectual regulation of law enforcement).

[57] *See generally, e.g.*, CHEMERINSKY, *supra* note 44 (describing the Court's restrictive standing requirements for injunctive relief, heightened pleading and summary judgment standards, limitations on civil rights plaintiffs' entitlement to attorneys' fees, and limitations on the availability of *Bivens* remedies).

Although qualified immunity has encouraged little in the way of constitutional innovation, it may still be true that eliminating qualified immunity will cause some courts to weaken constitutional protections further, as Jeffries, Fallon, and Levinson predict. But I believe that courts are unlikely to respond uniformly to this type of doctrinal shift. Studies have shown that judges' decisions are guided by a variety of beliefs, interests, and affiliations.[58] In the study of judicial decisionmaking perhaps most relevant to this question, Aaron Nielson and Christopher Walker found that circuit judges approach qualified immunity decisions in ways that appear guided by their circuit, their political affiliation, and the political affiliation of other members on their panel. Nielson and Walker found that the Fifth Circuit is more likely than the national average to rule on the merits of constitutional claims in its qualified immunity decisions, and less likely than the national average to recognize new constitutional rights. The Ninth Circuit is equally unusual but in the opposite way—less likely than the national average to rule on the merits of constitutional claims in its qualified immunity decisions, and more likely to recognize new constitutional rights. Nielson and Walker have also found circuit court differences in the application of qualified immunity that correlate with the political affiliation of the president who appointed the panel members and the political affiliations of other members on the panel. Among their findings is that circuit panels with three Democratic appointees "are more likely…to exercise their *Pearson* discretion to recognize new constitutional rights" than other panel compositions, and panels with three Republican appointees "are more likely…to exercise their *Pearson* discretion to find no constitutional violation."[59]

Just as circuit and political differences may influence the frequency with which courts exercise their *Pearson* discretion and the frequency with which they announce new constitutional rights, circuit and political differences would likely influence whether or not courts would contract the scope of constitutional protections in response to the elimination of qualified immunity. Some judges may restrict constitutional rights—as Jeffries, Fallon, and Levinson have predicted—in order to shield defendants from assumed financial liability for novel constitutional claims or to maintain what they consider to be equilibrium between rights and remedies. Other judges may not change the substance of their rulings—either because they recognize government officials are virtually certain not to be held personally responsible for settlements and judgments in cases against them,[60] or because they do not believe it is their job to constrict the scope of constitutional rights in order to equilibrate.

For judges disinclined to change the substance of their constitutional rulings, eliminating qualified immunity might actually hasten the expression of new constitutional rights. Studies have found that when courts were required to answer both the constitutional question

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[58] *See, e.g.*, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (arguing that ideology plays a role in all judicial decisionmaking); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (identifying differences in the ways that judges appointed by Democrats and Republicans interpret the law); Harry T. Edwards & Michael Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. REV. 1895 (2009) (arguing that law, precedent, and deliberation primarily influence judicial decisionmaking). *C.f.* Jeffrey J. Rachlinski et al., *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051 (2017) (finding that "the aggregate effect of political ideology is either non-existent or amounts to roughly one-quarter of a standard deviation.").

[59] Nielson & Walker, *Strategic Immunity*, *supra* note 23, at 109-110.

[60] Schwartz, *supra* note 12 (finding officers rarely contribute to settlements and judgments).

and whether the law was clearly established—during the *Saucier* regime—they were more likely to find constitutional violations that were not clearly established than they are now, post-*Pearson*, when they can jump straight to the second question.[61] Nielson and Walker surmise that courts may prefer not to answer "difficult constitutional questions," but that, when *Saucier* forced them to do so, they were somewhat more likely to find constitutional violations.[62] Following this logic, one could imagine that, absent qualified immunity, some courts would be quicker to announce new constitutional rights. For example, every circuit that has considered the question has concluded that there exists a First Amendment right to record the police.[63] But, in some circuits, it took many cases litigated over many years to establish that principle because courts repeatedly granted qualified immunity without reaching the constitutional question.[64] In a world without qualified immunity, courts could not have avoided this difficult constitutional question and might more quickly have announced the right exists.

Eliminating qualified immunity might hasten the articulation of new rights for another reason—plaintiffs may be more willing to file cases alleging novel constitutional claims. As I will soon explain, some plaintiffs' attorneys decline cases alleging novel claims for fear that courts will award defendants qualified immunity.[65] If attorneys are reluctant to bring cases alleging novel claims—for example, cases alleging violations of a First Amendment right to record the police in jurisdictions where the right has not been clearly established—fewer such cases will be brought and it will take even longer to get rulings delineating the scope of those rights.[66] Eliminating qualified immunity would make it more likely for plaintiffs' attorneys to accept cases with novel claims, and would make it more likely that courts would issue rulings clarifying the scope of these rights. As I have acknowledged, some courts may construe the scope of the First Amendment more narrowly than they would have were qualified immunity available. But other judges would find a constitutional right to record with or without qualified immunity and would do so more quickly absent qualified immunity than they would have had qualified immunity remained in existence.

Taken together, available evidence suggests that eliminating qualified immunity would almost certainly clarify constitutional rights, but would not dramatically curtail their scope—and might sometimes hasten the articulation of new rights. Few cases present courts with a painful choice between imposing significant damages on officers and extending important constitutional rights. When such cases arise in a post-qualified immunity world, judges are unlikely to have a uniform response. Some judges might view constitutional rights more restrictively and others might announce new constitutional rights more quickly than they would have otherwise. Given Nielson and Walker's research, it appears that Democrat-appointee judges and panels would be more likely to announce new constitutional rights and

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[61] Nielson & Walker, *The New Qualified Immunity*, *supra* note 23, at 37-38 (reporting that circuit courts post-*Pearson* announced constitutional violations that were not clearly established in 2.5%-7.9% of cases, while circuit courts during the *Saucier* regime announced constitutional violations that were not clearly established in 6.5%-13.9% of cases). *But see* Leong, *supra* note 32 (arguing that *Saucier* may have caused courts to restrict the scope of rights).

[62] Nielson & Walker, *The New Qualified Immunity*, *supra* note 23, at 38.

[63] Blum, *supra* note 1, at 1897.

[64] *See id.*

[65] *See infra* Part IV; *see also* Schwartz, *supra* note 21.

[66] For similar arguments about attorney incentives in the context of the exclusionary rule, see Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011).

Republican-appointee judges and panels would be more likely to narrow constitutional rulings. It also may be that the courts' responses to the elimination of qualified immunity would vary by circuit, with the Fifth Circuit further restricting constitutional rights and the Ninth Circuit further expanding them. Such regional variation may be concerning, but could not be blamed on the elimination of qualified immunity—there is already regional variation in the interpretation of qualified immunity doctrine and other substantive and procedural laws relevant to civil rights litigation.[67] Those concerned about the constriction of constitutional rights absent qualified immunity overstate the extent to which qualified immunity currently spurs constitutional innovation and the harms that would befall constitutional innovation absent qualified immunity, and additionally overlook the benefits of greater constitutional clarity that eliminating qualified immunity would provide.

II. DISPOSITIONS

Commentators and courts appear to believe that most civil rights cases are dismissed on qualified immunity grounds, and that eliminating qualified immunity would dramatically increase the frequency with which civil rights plaintiffs win.[68] Some view this prospective expansion of liability in a positive light, imagining it would create greater incentives for government officials to comply with the law.[69] Others take a more negative view. As one commentator has written: "but for qualified immunity, it's a bonanza for plaintiff's lawyers."[70] Regardless of whether they welcome or decry the prospect of expanded liability, those who believe eliminating qualified immunity would dramatically increase plaintiffs' rate of success

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[67] *See, e.g.*, Blum, *supra* note 1, at 1918-20 (describing the Fifth Circuit's summary judgment decisions in police misconduct cases, in which the circuit has overlooked material factual disputes and granted defendants qualified immunity); Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2063, 2069-70 (2018) (describing variation across circuits regarding the burdens of establishing qualified immunity); Charles R. Wilson, *"Location, Location, Location": Recent Developments of the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000) (describing regional variation in the interpretation and application of qualified immunity doctrine). For further discussion of regional variation in courts' interpretation of relevant procedural and substantive rules, see Joanna C. Schwartz, *Civil Rights Ecosystems* (draft on file with author).

[68] *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal."); *see also, e.g.*, John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from *trial* as well as from *liability*—has been largely successful."); Levin & Wells, *supra* note 19 (predicting that eliminating qualified immunity would "subject [police officers and other officials] to a great deal more liability than they currently are when they deprive citizens of their constitutional rights."); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (arguing that the Supreme Court's qualified immunity decisions have "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."); Martin A. Schwartz, *Section 1983 Litigation*, FED. JUD. CTR. 143 (2014) (reporting that "courts decide a high percentage of Section 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity.").

[69] *See, e.g.*, Levin & Wells, *supra* note 19 (predicting that doing away with qualified immunity would "incentivize officials acting under the color of law to better respect and protect individuals' rights than the Court's § 1983 doctrine currently encourages.").

[70] King, *supra* note 19.

overlook the fact that most civil rights cases fail for reasons other than qualified immunity, and those other barriers to relief would continue to exist in qualified immunity's absence. There are, unquestionably, plaintiffs whose cases are dismissed on qualified immunity grounds and would have prevailed in a world without qualified immunity. But their numbers are far smaller than commentators and courts assume. I predict that there would likely be more plaintiff successes in absolute terms, because more suits would be filed,[71] but that civil rights plaintiffs' rates of success would not significantly change in a world without qualified immunity.

In making this and other predictions I take, as a starting point, my study of Section 1983 litigation against law enforcement agencies and officers in five federal districts across the country.[72] In that study, I examined the dockets, briefs, and decisions in 1183 cases filed in these five districts over a two-year period, and tracked the frequency with which qualified immunity was raised, successful, and dispositive.[73] I then surveyed almost 100 plaintiffs' attorneys who entered appearances in these cases, and interviewed thirty-five of these attorneys, about the role of qualified immunity in their case selection and litigation practice, among other areas of inquiry.[74] Although this research has limitations that I describe in detail elsewhere,[75] it presents the most comprehensive picture to date of the role qualified immunity plays in constitutional litigation and therefore offers the best starting place to begin imagining constitutional litigation in a world without qualified immunity.

Qualified immunity was rarely the reason that the cases in my docket dataset were dismissed. If one adopts the standard measure of success—as split or full jury verdicts, settlements, and voluntary or stipulated dismissals[76]—plaintiffs succeeded in 682 (57.7%) of the 1183 cases, and failed in 467 (39.5%) cases.[77] Of the 467 cases in which plaintiffs "failed"—meaning plaintiffs' cases were dismissed without payment—just thirty-six were dismissed on qualified immunity grounds; seven at the motion to dismiss stage, twenty-six at summary judgment, and three on appeal.[78] The remaining 431 cases failed for various other reasons. Approximately 37% of the cases that failed (173) were dismissed *sua sponte* before defendants answered, dismissed as a sanction, or dismissed for failure to prosecute. Approximately 40% of the cases that failed (191) were dismissed on motions to dismiss or for judgment on the

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[71] For further discussion of the effects of eliminating qualified immunity on case filing decisions, *see infra* Part IV.

[72] *See generally* Schwartz, *supra* note 20.

[73] For further discussion of my methodology, *see id.* at 19-25.

[74] *See* Schwartz, *supra* note 21 (describing the survey and interviews).

[75] *See id.* (describing the methodological limitations of my study); Schwartz, *supra* note 20, at 23-25 (same).

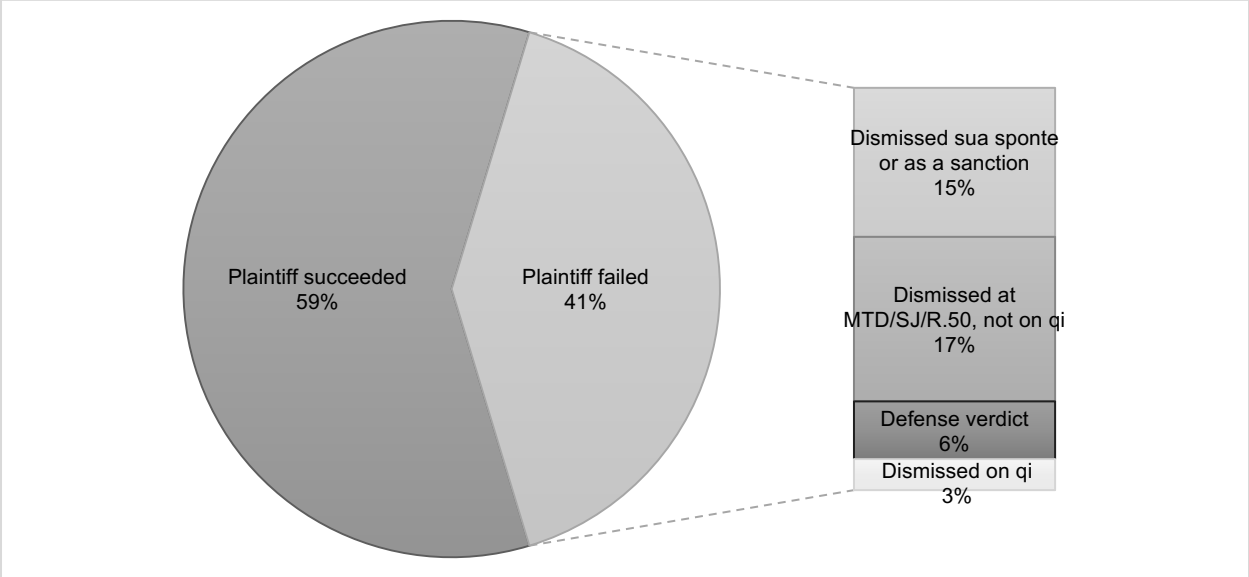
[76] *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 812-13 n.13 (2010) (describing the common definition of plaintiff "success" in similar studies).

[77] *See* Schwartz, *supra* note 20, at 46 tbl. 12. Note that there were twenty-eight cases in my dataset that were remanded to state court (and I do not have information about what happened to the cases in state court); remained open, stayed, or on appeal; or fell into a miscellaneous category and so are counted neither as successes nor failures for the purposes of this discussion.

[78] I previously reported thirty-eight cases that were dismissed on qualified immunity grounds, *see id.*, but when reviewing these thirty-eight opinions for inclusion in this Article's Appendix realized I had mischaracterized the dispositions of two cases from the Eastern District of Pennsylvania. Alex Reinert reached similar findings regarding the frequency with which *Bivens* claims are dismissed on qualified immunity grounds. *See* Reinert, *supra* note 76, at 843 (finding qualified immunity to be "the basis for dismissal in only 5 out of the 244 complaints studied.").

pleadings, at summary judgment, or at directed verdict on grounds other than qualified immunity.[79] Another 14% of cases (67) resulted in defense verdicts after trial.[80] For every one case dismissed by a court on qualified immunity grounds, another twelve failed for other reasons.

FIGURE 1: DISTRIBUTION OF CASE DISPOSITIONS



Although there is regional variation in the frequency with which qualified immunity was raised, granted, and dispositive, qualified immunity was not the primary basis for dismissal even in the districts most sympathetic to the defense. Among the districts in my dataset, courts dismissed the highest percentage of cases on qualified immunity grounds in the Southern District of Texas. There, twelve (9.2%) cases were dismissed at the motion to dismiss and summary judgment stages on qualified immunity grounds. But twenty-seven (20.6%) were dismissed at the motion to dismiss and summary judgment stages on other grounds, and thirteen (9.9%) were dismissed *sua sponte* by the court, as a sanction, or for failure to prosecute. The same was true in each of the four other districts—no matter how many cases district courts dismissed on qualified immunity grounds, many more failed for other reasons.[81]

To be sure, qualified immunity can cause a plaintiff to fail even if it is not the formal reason for dismissal. A plaintiff's strongest claims could be dismissed on qualified immunity grounds, leading to failure at a later stage of litigation. Or the cost of defending against a qualified immunity motion might expend all of a plaintiff's resources, causing her to abandon

[79] I did not track the causes for dismissal of these cases, but at the motion to dismiss stage, many claims were dismissed because the plaintiff had not pled her claims plausibly or because a criminal conviction barred the claim, and at summary judgment and directed verdict courts often found that the plaintiffs had not presented sufficient evidence to create a material factual dispute about the existence of a constitutional violation.

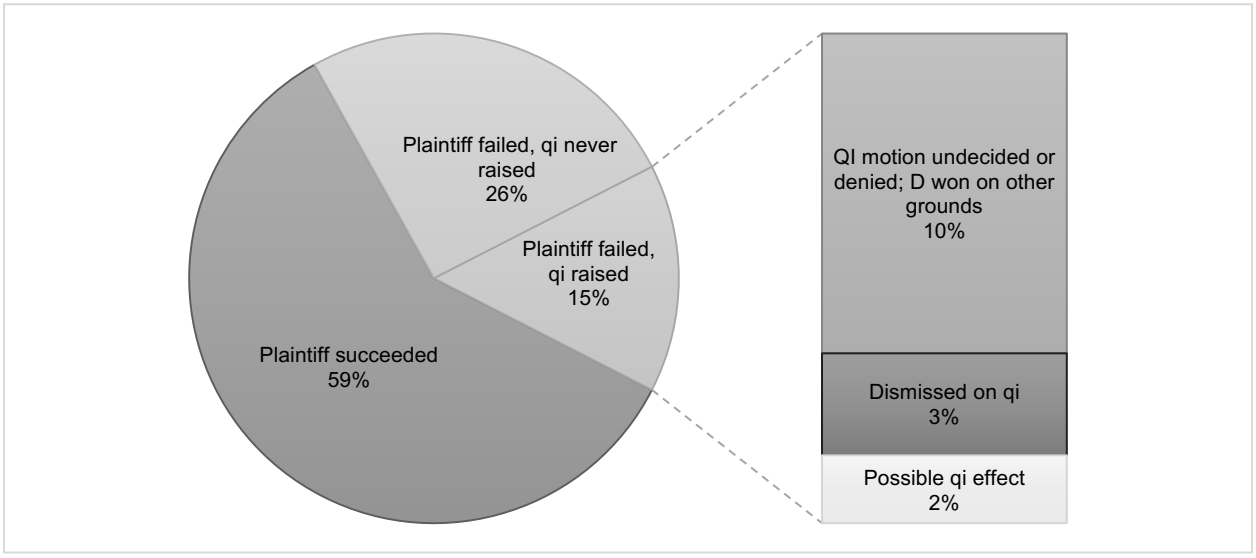
[80] I did not assess whether qualified immunity played some role in these defense verdicts, but Alex Reinert has examined the role of qualified immunity at trial and found that "qualified immunity rarely plays a significant role in jury trials." Reinert, *supra* note 67, at 2088.

[81] *See* Schwartz, *supra* note 20 (describing the bases for dispositions in all five districts).

her case.[82] I have previously recognized that qualified immunity could play an indirect role in case dispositions,[83] and Aaron Nielson and Chris Walker have suggested that qualified immunity's "core effectiveness" may lie in these types of informal effects.[84]

But my data does not bear out this theory. A closer look at my docket dataset makes clear that there are only a few cases in which qualified immunity could have caused plaintiffs to fail. Defendants never raised qualified immunity in 294 of the 431 cases that were not formally dismissed on qualified immunity grounds. In another ninety-four cases, defendants raised qualified immunity as one of several arguments at the motion to dismiss or summary judgment stage, and courts dismissed plaintiffs' claims on other grounds. In nineteen cases, defendants raised qualified immunity at some point during litigation, lost those motions in their entirety, and then prevailed at trial. So, in 407 (94.4%) of the 431 cases dismissed on grounds other than qualified immunity, it appears that qualified immunity did not play even an informal role in the plaintiffs' failures.

FIGURE 2: INFLUENCE OF QUALIFIED IMMUNITY ON CASE DISPOSITIONS



The remaining twenty-four cases were not dismissed on qualified immunity grounds, but it is conceivable that the doctrine played some role. Eleven resulted in defense verdicts after defendants' qualified immunity motions were granted in whole or part. Perhaps the claims with more sympathetic facts were dismissed on qualified immunity grounds, leaving the remaining claims to fail at trial. Thirteen cases were dismissed as a sanction or dismissed for failure to prosecute. Perhaps responding to defendants' qualified immunity motions depleted plaintiffs' resources, or concern that the motions might be granted caused plaintiffs to abandon their claims. If the eleven defense verdicts and the thirteen other dismissals were attributable to the informal effects of qualified immunity, then qualified immunity would have

[82] For further discussion of the costs associated with defending against qualified immunity motions, *see infra* Part III; *see also* Schwartz, *supra* note 21.

[83] *See* Schwartz, *supra* note 20, at 51.

[84] Nielson & Walker, *supra* note 17, at 1881.

contributed to the failure of a total of sixty cases (including the thirty-six cases formally dismissed on qualified immunity grounds). That is a pretty small number of cases, in the scheme of things. Assuming, for the purposes of argument, that all sixty cases failed because of qualified immunity and plaintiffs would have "succeeded" in all sixty cases in a world without qualified immunity, plaintiffs' success rate would only increase about five percentage points, to 62.8% across the five districts in my study.

But I believe that many if not most of the plaintiffs in these sixty cases would have failed even absent qualified immunity. A closer examination of these cases suggest that eliminating qualified immunity would not have changed the results in most. First, consider the thirty-six cases dismissed on qualified immunity grounds. In only one of these thirty-six cases did the court find a jury could reasonably conclude the defendants violated the Constitution.[85] In twenty-five of the thirty-six cases, courts held that plaintiffs had not met their burdens of pleading plausible claims (at the motion to dismiss stage) or creating a factual dispute about the existence of a constitutional violation (at the summary judgment stage).[86] In another ten cases, the courts did not clearly rule one way or the other on plaintiffs' constitutional claims, but expressed skepticism about the cases' underlying merits. Absent qualified immunity, courts likely would have denied one of these motions and dismissed most or all of the remaining thirty-five cases because plaintiffs failed to satisfy their burdens of pleading and proof.

Also, consider the eleven cases that resulted in defense verdicts after trial. I cannot know how the juries seated in these cases would have evaluated the evidence had qualified immunity not resulted in the dismissal of some claims. But plaintiffs in my docket dataset usually lost at trial—regardless of whether qualified immunity was raised in the case—and there is every reason to believe that plaintiffs would continue to lose regularly at trial in a world without qualified immunity.[87] When I surveyed attorneys about the biggest obstacle to bringing police misconduct cases, attorneys' most common answer was juries.[88] Attorneys I interviewed and surveyed agree that juries are more sympathetic to government defendants, more likely to believe officers at trial, and hostile to plaintiffs' claims. Several attorneys I inter-

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[85] Dunklin v. Mallinger, 11-cv-1275 (N.D. Cal. 2011).

[86] *See* Appendix (setting out the courts' rationale in the thirty-six cases dismissed on qualified immunity grounds).

[87] *See* Schwartz, *supra* note 20, at 46 tbl. 12. Across the five districts in my study, seventy-seven trials ended in jury verdicts, and sixty-seven (87%) were defense verdicts.

[88] One question in my online survey asked: "What is the biggest obstacle to bringing police misconduct cases in the jurisdiction you sue most frequently?" Attorneys had a blank space that they could fill in. Eighty-five of the ninety-four attorneys who took the survey answered this question, and offered a total of 114 responses. Twenty-seven (31.8%) of these attorneys described juries as one of the biggest obstacles to success. *See, e.g.*, E.D. Pa. Survey 1 ("Judges and juries still tend to believe police officers over citizens"); E.D. Pa. Survey 2 (describing "more rural/suburban juries" in federal court); E.D. Pa. Survey 4 ("[J]ury bias"); E.D. Pa. Survey 6 ("[C]itizens, judges and jurors believe a police officer's word over that of anybody else"); E.D. Pa. Survey 7 ("[J]uries believing cops"); N.D. Cal. Survey 4 ("[J]uries like police"); N.D. Cal. Survey 10 ("[J]uror bias against minorities"); N.D. Ohio Survey 1 ("[P]ublic perception that police are acting in good faith"); N.D. Ohio Survey 5 ("[R]acism by public and juries"); M.D. Fla. Survey 3 ("[J]ury sympathy with police"); M.D. Fla. Survey 5 ("[V]ery conservative juries who lack empathy towards minorities and love the police"); M.D. Fla. Survey 6 ("[H]aving a sympathetic finder of fact"); S.D. Tx. Survey 1 ("[I]nherent racism"); S.D. Tex. Survey 2 ("[P]ublic attitude is very supportive of law enforcement"); S.D. Tex. Survey 3 ("[C]ommunity perceptions about law enforcement"); S.D. Tex. Survey 4 ("[J]urors and judges trust cops more than citizens"); S.D. Tex. Survey 5 ("[R]acial prejudice. If the cop doesn't bloody the arrestee juries are more likely to let the cop off."); S.D. Tex. Survey 7 ("[J]uries will give police '2 strikes' before holding them accountable").

viewed reported losing cases at trial despite egregious facts, and blamed those losses on juries' predisposition against their clients.[89] Several attorneys predicted that more cases would go to trial in a world without qualified immunity, but that jurors' skepticism about plaintiffs' claims meant that they would not prevail more often.[90]

Finally, consider the thirteen cases dismissed as a sanction or for failure to prosecute. In one case, the dismissal of the individual damages claim on qualified immunity grounds may have caused the plaintiff to abandon the case. In that case, the district court dismissed plaintiff's Section 1983 claims against defendant police officers on qualified immunity grounds, leaving only his *Monell* claim against the city.[91] Plaintiff's counsel stopped responding to defendant's communications after the court ruled, and the case was dismissed for failure to prosecute. It is possible that plaintiff's counsel abandoned the case because he concluded that he could not succeed on the *Monell* claim, and would have remained in the case had the individual damages claims not been dismissed. But it is more difficult to see how the results of the other twelve cases would have changed absent qualified immunity. Three of the cases were dismissed because counsel failed to comply with court orders. In each case, defendants' qualified immunity motions were denied or granted in part on other grounds before the attorney's failure to comply.[92] Nine of the cases dismissed for failure to prosecute were brought by *pro se* plaintiffs who failed to respond to motions or comply with court orders.[93] Cases

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[89] *See, e.g.*, Interview with E.D. Pa. Attorney A (explaining that federal juries are often conservative and "when we win…they give us very little."); Interview with M.D. Fla. Attorney A (describing a case in which a jury awarded $1 to a man who, while in handcuffs, was kneed in the abdomen so hard that he lost his spleen).

[90] *See* Interview with N.D. Cal. Attorney E ("[I]f they eliminated – if they eliminated qualified immunity, I would – I would have more cases given to trial. And I would have – I would be in front of a jury. In terms of my overall success rate, in all honestly, I don't think it would make much – it wouldn't make that much difference."); Interview with N.D. Ohio Attorney G (predicting more trials, but "I don't think I'd win any more cases."); Interview with N.D. Ohio Attorney D at 8; Interview with N.D. Ohio Attorney F ("I don't know because you still have to deal with the complexities of police-citizen encounters, and there is a built-in inclination to give the police the benefit of" the doubt); Interview with M.D. Fla. Attorney D ("although cases would "actually get to go to juries more often and let them decide…[i]t's still a hard road to hoe").

[91] *Porter v. City of Santa Rosa*, 11-cv-4886 (N.D. Cal. Oct. 3, 2011).

[92] *See* Lathan v. City of Cleveland, 12-cv-0037 (N.D. Ohio 2012) (motion to dismiss granted in part on grounds other than qualified immunity with leave to file amended complaint, but attorney never served an amended complaint on defendants); Whitaker v. Alameda County, 12-cv-5923 (N.D. Cal. 2012) (defendants moved to dismiss on qualified immunity, which was denied; plaintiff's attorney missed first pretrial conference, then wrote to the court saying he had been on medical leave, then did not appear for second scheduled pretrial conference, and the court dismissed for failure to prosecute); Powell v. County of Delaware, 12-cv-6285 (E.D. Pa. 2012) (dismissed as sanction; before dismissal, detectives' judgment on pleadings granted in part in an unwritten order, then rest of claims dismissed because plaintiff never wrote a requested letter).

[93] *See* Grogg v. Gee, 11-cv-2646 (M.D. Fa. 2011) (plaintiff's counsel withdrew, defendants filed motion to dismiss raising qualified immunity, *pro se* plaintiff never responded to motion, and the court dismissed for failure to prosecute); Murphy v. Northwestern School District, 12-cv-2429 (N.D. Ohio 2012) (*pro se* plaintiff, dismissed for failure to prosecute); Cannon v. City of Petaluma, 11-cv-0651 (N.D. Cal. 2011) (*pro se* plaintiff, dismissed for failure to prosecute after one motion to dismiss denied and second motion to dismiss granted in part); Barberi v. Freitas, 12-cv-6311 (N.D. Cal. 2012) (*pro se* plaintiff, dismissed for failure to prosecute while a motion to dismiss on qualified immunity grounds was pending); Johnson v. Ahern, 12-cv-2385 (N.D. Cal. 2012) (*pro se* plaintiff, dismissed for failure to prosecute while a motion to dismiss on qualified immunity grounds was pending); Hickman v. City of Berkeley, 11-cv-4395 (N.D. Cal. 2011) (plaintiff's counsel withdrew from the case for irreconcilable differences while the qualified immunity summary judgment motion was pending; the motion was granted on qualified immunity in the alternative, and then the case was dismissed for failure to prosecute by the *pro se* plaintiff); Silverman v. City and County of San Francisco, 11-cv-1615 (N.D. Cal. 2011) (plaintiffs' lawyers withdrew because the plaintiff did not cooperate with counsel, then defendants filed a motion for summary judgment

brought by *pro se* plaintiffs often fail, regardless of whether defendants raise qualified immunity.[94] It is possible that attorneys would agree to represent some of these *pro se* plaintiffs absent qualified immunity—but only if the plaintiffs had a decent chance of success.[95] And although representation would make success more likely, represented plaintiffs still have to overcome many other challenges at the motion to dismiss and summary judgment stages, and at trial.[96]

Thus far, I have focused only on cases in my docket dataset in which plaintiffs failed. But eliminating qualified immunity could also influence the outcomes of some cases where plaintiffs succeeded. Presumably, most plaintiffs who are today able to negotiate a settlement or win a verdict after trial would be able to succeed in these same ways in a world without qualified immunity. Some of these plaintiffs might recover a larger verdict or settlement absent qualified immunity. The predicted costs of litigating qualified immunity and the threat of dismissal on qualified immunity grounds may cause defendants to offer—and plaintiffs to accept—lower settlement amounts than they would absent the defense. In addition, qualified immunity sometimes results in a partial dismissal of the plaintiff's most valuable claims, and the plaintiff subsequently succeeds on the claims that remain; absent qualified immunity, that plaintiff would likely recover additional money for the claims that were dismissed on qualified immunity grounds.[97]

But eliminating qualified immunity might in some instances cause plaintiffs to decline settlements in favor of trial. For example, approximately 17% of qualified immunity motions and 34% of interlocutory and final appeals in my dataset were never decided, presumably because the cases settled while the motions were pending.[98] These settlements may have been motivated by uncertainty about how the qualified immunity motions and appeals might be decided. In a world without qualified immunity, litigants might still settle while motions to dismiss and for summary judgment are pending, for fear that they will be granted on other grounds. Some cases might in fact be dismissed on other grounds. And plaintiffs might decide to take some cases to trial.[99] As I have explained, defendants win the vast majority of cases that go to trial and attorneys view jurors as hostile to these cases. So, if cases that would have otherwise settled would go to trial absent qualified immunity, at least some of those plaintiff "successes"—settlements—might turn into failures after trial.

Although I believe plaintiffs' success rate would not markedly change absent qualified immunity, there are, indisputably, some cases dismissed on qualified immunity grounds that would have succeeded in a world without the defense. District and circuit courts around the

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and the court entered judgment for failure to prosecute because *pro se* plaintiff did not respond to the motion); Durham v. City of Palo Alto, 12-cv-0666 (N.D. Cal. 2012) (dismissed for failure to prosecute after *pro se* plaintiff failed to respond to motion for summary judgment); Collura v. City of Philadelphia, 12-cv-4398 (E.D. Pa. 2012) (dismissed as sanction because *pro se* plaintiff did not comply with several court orders).

[94] *See* Schwartz, *supra* note 21 (describing failure rates in *pro se* cases).

[95] For further discussion of attorneys' case selection decisions, see *infra* Part IV.

[96] *See supra* note 79 and accompanying text (describing frequency of and bases for dismissal at the motion to dismiss and summary judgment stages), *supra* notes 87-90 and accompanying text (describing likelihood of failure after trial).

[97] For further discussion of the ways qualified immunity can reduce the value of plaintiffs' claims, *see* Schwartz, *supra* note 21.

[98] *See* Schwartz, *supra* note 20, at 51.

[99] *See supra* note 90 (describing attorneys' predictions that more cases would go to trial without qualified immunity).

country, as well as the United States Supreme Court, issue a slow but steady stream of decisions finding that plaintiffs' constitutional rights were violated but granting qualified immunity because there was not a prior case holding factually similar conduct to be unconstitutional. Many of these decisions describe tragic facts and clear misconduct; defendants who have searched homes without probable cause, conducted pretextual arrests, and used unreasonable force are shielded from liability.[100] These decisions deny relief to deserving plaintiffs and send a troubling message to government officials that they can violate the law with impunity.[101] But commentators have reasonably, but incorrectly, taken these decisions as proof that qualified immunity regularly shields defendants from liability and that plaintiffs would succeed far more often in qualified immunity's absence. Courts only rarely find constitutional violations but grant qualified immunity. Far more often, courts granting qualified immunity also find that plaintiff failed on their constitutional claim, or express great skepticism about the merits of that claim. And civil rights suits usually fail for reasons unrelated to qualified immunity—they are dismissed *sua sponte* by the court before defendants even have an opportunity to respond, dismissed as a sanction or for failure to prosecute, dismissed at the motion to dismiss stage for failing to allege plausible claims, dismissed at summary judgment for failing to put forth sufficient evidence to support the plaintiff's claim, or dismissed following defense verdicts at trial.

For reasons I will soon explain, eliminating qualified immunity would likely result in more civil rights cases filed.[102] I predict that more attorneys might be inclined to take civil rights cases, and that attorneys who already take some civil rights cases might devote a greater percentage of their docket to these cases.[103] My interviews additionally suggest that plaintiffs' attorneys who currently bring civil rights cases would be more inclined, absent qualified immunity, to file cases alleging novel constitutional violations, false arrest cases, and cases with limited damages.[104] I do not know how many more cases would be filed in a world without qualified immunity. But I believe these additional cases would likely have a similar success rate as cases filed today.[105] Plaintiffs in these cases would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary bases for

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[100] For descriptions of some of these cases, see *infra* note 213. *See also Cross-Ideological Amicus Brief*, *supra* note 15, at * 15 (describing a "sample of recent cases in which Section 1983 claimants prevailed on the merits, only to have a court deny recovery because the adjudicated constitutional violation was nevertheless insufficiently 'clearly established.'"); Schwartz, *supra* note 1 at 1840-51 (describing additional decisions finding constitutional violations but granting qualified immunity).

[101] *See supra* note 10.

[102] *See infra* Part IV.

[103] *See id.*

[104] *See id.*

[105] George Priest and Benjamin Klein famously hypothesized that plaintiff success rates are impervious to changes in the applicable legal standard. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1, 31 (1984) (positing "that litigants will take varying attitudes of jurors or differing legal standards into account in their settlement negotiations so that the proportion of observed plaintiff recoveries will tend to remain constant over time regardless of changes in the underlying standards applied."). Others have examined and disputed the Priest-Klein hypothesis. *See, e.g.*, Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEG. STUD. 209, 210-11 (2014) (finding that "trial win rates vary with judicial characteristics, legal standards, and other factors that affect case strength."); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEG. STUD. 427 (finding that settlement and win rates are influenced by the strength of the economy). Although I predict limited change in plaintiffs' success rates absent qualified immunity, I do not

dismissal.[106] And there is no reason to believe that the additional cases filed absent qualified immunity would be more likely to overcome those obstacles than the pool of cases filed today.[107] Eliminating qualified immunity would likely increase the absolute number of plaintiff successes, but all available evidence suggests it would not result in a "bonanza for plaintiffs' attorneys."[108]

III. LITIGATION

The Supreme Court has repeatedly described qualified immunity as a means of shielding government defendants from the costs and burdens associated with litigation.[109] Presumably, then, the Court believes that eliminating qualified immunity would increase the litigation burdens on defendants. In contrast, my research suggests that qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised. I predict that eliminating qualified immunity would decrease the overall cost and time spent litigating and adjudicating civil rights cases.

Litigants and courts spend money and time on qualified immunity in four different ways. First, they spend time and money researching, briefing, writing, arguing, and deciding motions raising qualified immunity. Defendants raised qualified immunity as a defense in 368 (31.1%) of the 1183 cases in my docket dataset.[110] In sixty of these cases, defendants raised qualified immunity two or more times during the course of litigation.[111] Defendants are entitled to qualified immunity unless a plaintiff can prove the constitutional violation was obvious, or can point to 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.[112] So, for a plaintiff effectively to respond to a qualified immunity motion, she

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believe that plaintiff success rates are impervious to changes in legal standards. Instead, I believe that a combination of factors—including state and federal liability rules, procedural rules, jury pools, judges, and the plaintiffs' bar—influence plaintiffs' success rates. *See* Joanna C. Schwartz, *Civil Rights Ecosystems* (draft on file with author). My prediction that success rates would not change absent qualified immunity is based on my view that eliminating qualified immunity without adjusting these other legal rules and characteristics of civil rights litigation is unlikely dramatically to affect the distribution of dispositions.

[106] *See supra* notes 78-81 and accompanying text (describing the bases for dismissal of cases in my dataset).

[107] For further discussion of attorneys' case selection decisions absent qualified immunity, *see infra* Part IV.

[108] King, *supra* note 19.

[109] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (explaining that qualified immunity is necessary to protect against "the diversion of official energy from pressing public issues"); Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); Pearson v. Callahan, 555 U.S. 223, 231 (2009) (describing protecting government officials from burdens associated with discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine.").

[110] The time and costs associated with litigating qualified immunity are not evenly distributed across jurisdictions. While defendants in the Southern District of Texas and the Middle District of Florida brought qualified immunity motions in more than half of the cases in which the defense could be raised, defendants in the Eastern District of Pennsylvania brought qualified immunity motions in less than one-fourth of possible cases. *See* Schwartz, *supra* note 20, at 29.

[111] Defendants in the Southern District of Texas and Middle District of Florida were more likely to raise qualified immunity in multiple motions. See *id.* at 33, tbl.5.

[112] *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

must research factually similar cases holding defendants' conduct unconstitutional, and then must brief and argue the motion. To be sure, qualified immunity is generally one of many arguments raised in motions to dismiss, summary judgment motions, and motions for judgment as a matter of law.[113] But qualified immunity, criticized by both commentators and courts for its complexity, is considered a particularly difficult issue to brief and decide.[114] As one attorney explained, eliminating qualified immunity would make litigation "less burdensome definitely" because it is "the biggest [defense] that you have to confront."[115]

Second, litigants spend money and time on interlocutory appeals of qualified immunity denials. Unlike other arguments raised in motions to dismiss and summary judgment motions, defendants are entitled to immediate appeals of qualified immunity denials that turn on questions of law.[116] Defendants 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.[117] Attorneys must take the time to research, brief, and argue oppositions to interlocutory appeals, and the court of appeals will need to take the time to consider and decide the appeal.

Third, cases can be suspended while qualified immunity motions and appeals are pending. District courts have broad discretion to grant stays,[118] but have understood this power to be particularly important when faced with qualified immunity motions. Qualified immunity is understood as "an immunity from suit rather than a mere defense to liability,"[119] and so granting discovery stays while qualified immunity motions are pending furthers the goals of the defense. Defendants sought and received formal stays of 152 days, on average, while eight motions to dismiss on qualified immunity grounds were pending.[120] Cases are also suspended while interlocutory appeals are pending; among the cases I studied, interlocutory appeals were pending for 441 days on average before being decided.[121] Several attorneys I interviewed predicted that eliminating qualified immunity would reduce the amount of time spent litigating civil rights cases because there would be fewer discovery stays and no interlocutory appeals.[122]

[are] sufficiently 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)).

[113] *See* Schwartz, *supra* note 20, at 35 (reporting the frequency with which motions to dismiss and summary judgment motions included a qualified immunity argument).

[114] *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 915 (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); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1937 (2018) ("[T]he doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges, and litigators for half a century."); Jeffries, *supra* note 68, at 852 (calling qualified immunity "a mare's nest of complexity and confusion").

[115] Interview with N.D. Ca. Attorney B.

[116] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

[117] There is regional variation in the frequency of interlocutory appeals. In the Eastern District of Pennsylvania, there was an interlocutory appeal in just one of the 407 qualified immunity cases in my dataset. In contrast, in the Northern District of Ohio, defendants filed interlocutory appeals in almost ten percent of filed cases. *See* Schwartz, *supra* note 20, at 40.

[118] *See* Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.").

[119] *Mitchell*, 472 U.S. at 526.

[120] *See* Schwartz, *supra* note 21.

[121] *See id.*

[122] *See* Interview with M.D. Fla. Attorney E (predicting that, absent qualified immunity, "we wouldn't spend so much time flailing around with these huge motions waiting for the judge to rule."); Interview with N.D. Ohio

Fourth, apart from the costs and time associated with researching and responding to individual qualified immunity motions, litigants and courts must learn about and stay abreast of the law. Qualified immunity is considered a particularly complex area of civil rights doctrine.[123] The Supreme Court has offered unclear and shifting guidance about which courts' decisions can clearly establish the law, and how factually similar prior precedent must be to clearly establish the law.[124] Litigants and courts report dedicating significant time and resources to understanding the intricacies of the doctrine.[125]

Qualified immunity increases the cost, complexity, and time associated with civil rights litigation in each of these ways. But qualified immunity might still be serving its core function if it effectively shields government defendants from the burdens of discovery and trial. Government defendants would almost certainly prefer that their attorneys spend their time researching and arguing qualified immunity motions rather than be forced to respond to questions under oath at deposition and trial. And government attorneys reportedly prefer motion practice to trial—perhaps because arguing that defendants are entitled to qualified immunity is likely less time consuming than defending against or deciding such motions.[126] But my research suggests that qualified immunity motion practice does not usually obviate the need for discovery and trial.

Qualified immunity motions would only shield government officials from the burdens of discovery and trial if, as the Supreme Court appears to assume, the motions were raised early—before defendants engaged in discovery—and were usually granted, dispensing with further litigation of the case. My research demonstrates that both assumptions are incorrect. Among the cases in my dataset, defendants most often raised qualified immunity at summary judgment, after litigants had already participated in discovery.[127] And qualified immunity motions were rarely dispositive. Across the five districts in my dataset, just 8.6% of defendants' qualified immunity motions resulted in the dismissal of plaintiffs' cases.[128] Seven of these qualified immunity motions were granted at the motion to dismiss stage, and twenty-nine were granted at summary judgment or on appeal. In the remaining 91.4% of motions, the parties and courts took the time and money to research, brief, argue and decide the qualified immunity defense without disposing of the cases.

Qualified immunity motions and appeals might not even save litigants time in the rare event that they are dispositive. Thirty-six cases in my dataset were dismissed on qualified immunity grounds. As I have explained, courts in twenty-five of those cases held that plaintiffs also had failed to meet their burden of pleading or proof, and expressed skepticism about the merits of plaintiffs' claims in another ten.[129] Absent qualified immunity, it appears that

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Attorney D (predicting that, without qualified immunity, cases "would be completed sooner" because an interlocutory appeal "adds another year, year and a half to a case in our circuit.").

[123] *See supra* note 114 and accompanying text.

[124] *See* Blum, *supra* note 1, at 925 (reporting that courts are "hopelessly conflicted both within and among themselves" about qualified immunity standards).

[125] *See, e.g.*, Interview with M.D. Fla. Attorney C ("[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."); Wilson, *supra* note 67, at 447 ("Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.").

[126] *See* Blum, *supra* note 1, at 1890 n.23 (describing defense attorneys' views about qualified immunity).

[127] *See* Schwartz, *supra* note 20, at 33, tbl. 4 (reporting that 64.3% of qualified immunity motions were filed at summary judgment, 35% were filed at the motion to dismiss stage, and .7% were filed at or after trial).

[128] *See id.* at 60.

[129] *See supra* note 86 and accompanying text.

most or all of those thirty-five cases would have been dismissed on other grounds. If so, the time taken to research and brief qualified immunity in these thirty-five cases was unnecessary.

In one of the thirty-six cases dismissed on qualified immunity grounds, the court held that a jury could have found the plaintiff's constitutional rights were violated, but granted qualified immunity because those rights were not clearly established. Absent qualified immunity, the case might have gone to trial. Did qualified immunity save the parties time in this case? Not likely. Civil rights trials—which, in my dataset, were almost always completed within a few days—take far less time than qualified immunity motions and appeals take to resolve.[130] For this reason, Alan Chen has observed that "the pretrial litigant costs caused by the invoking of the immunity defense may cancel out the trial costs saved by the defense."[131] Northern District of Ohio Judge Gwin has criticized interlocutory appeals of qualified immunity denials on similar grounds. As he has explained, most denials of qualified immunity are affirmed on appeal—so, the time spent on the appeal increases the time spent on the case without changing the result.[132] Even when a defendant is awarded qualified immunity on interlocutory appeal, the decision might not save time. As Gwin writes:

> [A]n interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that…could have finished in less than a week….[133]

Even when qualified immunity motion practice eliminates the need for trial, the defense may not actually reduce the cost, time, and complexity of litigation.

Some have suggested that qualified immunity might streamline litigation in another way—by encouraging plaintiffs' attorneys to settle early, while a qualified immunity motion is pending or threatened.[134] But plaintiffs' attorneys I interviewed held the opposite view—they believe that qualified immunity delays settlement because defendants do not engage in meaningful settlement negotiations until after summary judgment motions raising qualified immunity have been decided.[135] My docket dataset suggests that both views may sometimes be correct. Among the 386 cases in which qualified immunity was raised at some point during the course of litigation, 186 were settled or voluntarily dismissed. Seventy-seven (41.4%) of those 186 cases were settled while qualified immunity motions or interlocutory appeals were

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[130] *See* Interview with N.D. Cal. Attorney B (describing the time it takes to prepare oppositions to summary judgment motions).

[131] Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 100 (1997).

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

[133] *Id.*

[134] Nielson & Walker, *supra* note 17, at 1881 (suggesting that qualified immunity might "encourag[e] plaintiffs to settle before discovery or trial and/or for far less than they would in a world without qualified immunity.")

[135] *See, e.g.*, Interview with N.D. Ohio Attorney G (predicting that, absent qualified immunity, "[t]here'd be a lot more honest discussion about what's really going on much earlier in every case. We wouldn't wait for summary judgment to start talking to each other. It would be a dramatic change."); Interview with M.D. Fla. Attorney B (predicting that, without qualified immunity "there would be more and earlier settlements…."). *See also* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 50 GEO. WASH. L. REV. 1165, 1179 (1990) (reporting that "the district judges with whom I have spoken…all believed that defendants used the *Mitchell* appeal as a delaying tactic that hampered litigation that would otherwise be tried or settled relatively quickly.").

pending. Perhaps plaintiffs would have been less inclined to settle these cases absent qualified immunity. But we do not know for certain—defendants made other arguments in most or all of these motions, and we know that motions to dismiss and for summary judgment raising qualified immunity are far more likely to be granted on other grounds.[136] Another eighty (43%) of the 186 settlements were entered into after plaintiffs had defeated defendants' summary judgment motions (raising qualified immunity), after an unsuccessful interlocutory appeal, or during or after trial.[137] Settlements in these eighty cases appear to have been prompted not by plaintiffs' concerns about qualified immunity, but by defendants' failure to win their motions. If so, defense attorneys in these cases were doing what plaintiffs' counsel described—waiting to pursue settlement until after they lost their summary judgment motions. Although we cannot know for sure what motivated settlements in these cases, it appears that qualified immunity may hasten settlement in some cases, and delay settlement in others.

Doing away with qualified immunity would eliminate the need to spend time and money bringing, defending against, and deciding qualified immunity motions and interlocutory appeals; eliminate lengthy delays while motions and appeals are pending; and make irrelevant a complex and quickly-changing area of the law. Most qualified immunity motions are denied, only adding to the cost of litigation. Even if some cases would go to trial that would have settled or been dismissed because of qualified immunity, eliminating the defense may still be the most efficient course because trials are often quicker and less complex than qualified immunity motion practice and appeals. Although qualified immunity is intended to reduce litigation burdens, doing away with qualified immunity may actually decrease the time, complexity, and cost of civil rights cases.

IV. FILINGS

The Supreme Court intends for qualified immunity doctrine to shield government officials from the costs and burdens associated with insubstantial litigation. Although the Court appears to believe that qualified immunity achieves this goal by causing insubstantial cases to be dismissed before discovery and trial, defenders of qualified immunity have suggested that the doctrine may achieve this goal by discouraging plaintiffs from filing insubstantial cases.[138] If so, eliminating qualified immunity might result in a massive influx of frivolous suits.[139] But those holding this view overlook two critically important features of civil rights litigation: plaintiffs' attorneys' strong incentives to decline weak cases, and the many barriers to relief in these cases. I predict that attorneys would file more civil rights cases absent qualified immunity, but there would be no massive influx of frivolous cases.

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[136] *See* Schwartz, *supra* note 20, at 39.

[137] The remaining twenty settlements were entered into after a motion to dismiss but before summary judgment. It is difficult to tell, based on the timing, what encouraged these settlements.

[138] *See, e.g.*, Nielson & Walker, *supra* note 17, at 1881 ("[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….").

[139] *See, e.g.*, Fallon, *supra* note 19 (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation").

Plaintiffs' attorneys generally accept civil rights cases on contingency,[140] with an agreement that they can seek reasonable attorneys' fees under Section 1988 if the plaintiff prevails.[141] Congress intended that the availability of attorneys' fees would create financial incentives for plaintiffs' attorneys to bring civil rights cases, including those with limited potential damages.[142] But the Supreme Court's narrow construction of what it means to prevail in civil rights cases means that plaintiffs are generally entitled to fees only if they win at trial.[143] If a case is settled, the lawyer's fee will usually be a percentage of the settlement award.[144] If the plaintiff loses, the attorney bears the entire costs of litigation. Given this arrangement, plaintiffs' attorneys have strong incentives to select cases that are likely to win (so that the attorney is not shouldered with the costs of litigation), and likely to result in large damages awards (so that the attorney can be assured adequate compensation if the case resolves in plaintiff's favor).[145]

For a recent study, I interviewed thirty-five plaintiffs' attorneys around the country about their case selection decisions.[146] Some attorneys reported sometimes accepting riskier cases, and cases with lower potential damages. Some attorneys report bringing smaller damages cases if they expect to bring them to trial and win—after which they can seek fees over and above the plaintiff's award.[147] Some attorneys report they are willing to bring cases they expect to lose because there are other associated benefits—establishing a constitutional right, or uncovering evidence that can be useful to the plaintiff or to future cases.[148] Many attorneys

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[140] Although there are some attorneys who represent civil rights plaintiffs *pro bono* and others who work for non-profits like the ACLU, they "are the exceptions rather than the rule…most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity." 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, 768 (1988). *See also* Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. COLLOQUY 182, 184 (2007) (explaining that most civil rights litigation is brought "by individual lawyers who are trying to make a living.").

[141] *See generally* 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 Section 1988); Paul D. Reingold, *Requiem for Section 1983,* 3 DUKE J. CONST. L. & PUB. POL'Y 1 (2008) (describing typical fee arrangements in Section 1983 cases).

[142] *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) (explaining that the availability of attorneys' fees for civil rights cases were necessary because "civil rights laws depend heavily upon private enforcement.")

[143] *See* Reingold, *supra* note 141, at 13-18. *See also* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 192 (2013) (describing research exploring the impact of the Court's attorney fee decisions on civil rights filings).

[144] *See* Reingold, *supra* note 141, at 13-18.

[145] *See id. Accord* HERBERT M. KRITZER, RISKS, REPUTATIONS AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 84 (2004) (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.").

[146] *See generally* Schwartz, *supra* note 21.

[147] *See, e.g.*, Interview with N.D. Cal. Attorney E ("I've never thought about the damages….Somebody who's been beaten up, bruises, no broken bones, maybe bruises and things like that but no serious injuries. Those cases aren't worth the time on the damages side. But you can play them up on the attorney's fees side. So, I don't really – I don't think about the damages when I take the case. I'm thinking more about the indignity.").

[148] *See, e.g.*, Interview with N.D. Ohio Attorney F (reporting that his firm has sometimes taken "a political case that we felt very committed to for the principle as opposed to whether it was financially valuable to us"); Interview with E.D. Pa. Attorney A ("[W]e look for cases that have the potential for actually resulting in changes in police procedures, practices, directives….So we're looking for, you know,…institutional reform."); Interview with N.D. Ohio Attorney D ("[T]he main factor [in case selection] is my point of view on the world which is equality and there is such a thing as justice…I just like to level the playing field."); Interview with N.D. Ohio Attorney E

view risk and reward holistically—expecting that some cases they take will be money losers, some will be cost-neutral, and some will result in fee awards greater than the amount of money put into the cases.[149] And for most attorneys I interviewed, civil rights is one in a portfolio of practice areas that may also include criminal defense, personal injury, employment discrimination, and medical malpractice.[150] Although attorneys make different choices within these parameters, the broader point stands: plaintiffs' attorneys have strong incentives to ensure that their clients will usually win, and that their expected recoveries will exceed their expenses.[151]

This calculation means that plaintiffs' attorneys are extremely selective in the cases they accept.[152] The thirty-five attorneys I interviewed reported declining the vast majority of cases they consider.[153] Twenty-two attorneys reported that vulnerability to motion practice and dismissal on qualified immunity is one consideration they take into account. But all of the attorneys reported considering a wide range of factors related to a case's costs, risks, and potential rewards—including whether judge and jury will be sympathetic to the plaintiff, the strength of the evidence supporting the plaintiff's claims, the legal merits of the claim, the cost of litigating the case, and the amount of recoverable damages.[154] Because attorneys believe juries are skeptical of plaintiffs' claims in police misconduct cases,[155] many report selecting only cases with egregious misconduct, a plaintiff whose story will be compelling, and video or eyewitness evidence that a jury will believe.[156] Because attorneys are often paid a

("Well, fundamentally, it's very simple, whether someone suffered an injustice and I think maybe more so than other firms in other practice areas, we don't necessarily only consider whether there's going to be big damages…").

[149] *See, e.g.*, Interview with M.D. Fla. Attorney F (reporting that he files low-damages cases when the evidence is strong, but will file high damages cases that are harder to prove).

[150] *See* Schwartz, *supra* note 21, Appendix Table 6 (describing the practice areas of interviewed attorneys, and the amount of time spent on civil rights work).

[151] To the extent that *pro bono* attorneys and non-profits accept these cases, they may not have the same financial incentives as contingency fee attorneys but are, nevertheless, likely to select only the strongest cases. *See* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 713 (2016) (acknowledging that *pro bono* and non-profit attorneys do not have the same financial incentives as contingency fee attorneys, but observing that, "[t]o the extent that attorneys working on a pro bono basis and legal aid providers are oversubscribed—and they usually are—one should again expect these attorneys to screen cases on plausible merit before filing. 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.").

[152] For discussion of the contingency fee lawyer's role as gatekeeper, see Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 22 (July-Aug. 1997) ("Lawyers, particularly contingency fee lawyers, are gatekeepers who control the flow of civil cases into the courts.").

[153] *See, e.g.*, Interview with E.D. Pa. Attorney A (estimating that he declines 90-95% of cases); Interview with E.D. Pa. Attorney F (estimating that he declines 96-98% of cases); Interview with N.D. Ca. Attorney B (estimating that she declines 75% of cases); Interview with N.D. Ca. Attorney F (estimating that he declines 85-85% of cases); Interview with N.D. Ohio Attorney A (estimating that he declines 94-99% of cases); Interview with N.D. Ohio Attorney G (estimating that he declines 90% of cases); Interview with M.D. Fla. Attorney B (estimating that she declines 99% of cases); Interview with M.D. Fla. Attorney C (estimating that he declines more than 90% of cases); Interview with S.D. Tex. Attorney A (estimating that he declines 80-85% of cases); Interview with S.D. Tex. Attorney D (estimating that he declines 99% of cases). *See also* Schwartz, *supra* note 21, Appendix Table 6 (listing the estimated percentage of cases declined by all thirty-five interviewed attorneys).

[154] For further discussion of these considerations, see Schwartz, *supra* note 21.

[155] *See supra* notes 88-90 and accompanying text.

[156] *See, e.g.*, Interview with 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."); Interview with E.D. Pa. Attorney G ("[T]he excessive force cases was bring, we've got—we almost always have something more than our client's version whether it's on video or a photograph or very strong medical documentation or a witness."); Interview with N.D.

portion of their client's settlement award (if they are paid at all), lawyers often are willing to accept only cases with significant potential awards, and are less inclined to accept cases with large anticipated costs.[157] Eliminating qualified immunity would do away with one challenge that increases the cost, risks, and complexity of these cases. But these other barriers to relief would remain, and lawyers would continue to be very selective in the cases that they accept.[158]

With that said, I do predict that eliminating qualified immunity would result in more lawsuits being filed. One attorney I interviewed reported that the challenges associated with qualified immunity had caused him to stop filing any civil rights cases.[159] And there is circumstantial evidence to suggest that many attorneys file few civil rights cases or stop bringing such cases altogether because of qualified immunity and other barriers to relief.[160] I also predict that eliminating qualified immunity would encourage attorneys to file certain types of claims more frequently. One-third of the attorneys I interviewed reported declining certain types of cases because of qualified immunity, including cases alleging novel constitutional violations, cases concerning certain types of claims—like false arrest claims—where the qualified immunity standard is particularly difficult to overcome, and cases where low potential damages do not offset the potential costs of litigating qualified immunity motions and appeals.[161]

In a world without qualified immunity, plaintiffs' attorneys would no longer be dissuaded from bringing false arrest cases by a legal standard that immunizes officers from liability so long as they have "arguable probable cause" to arrest.[162] Attorneys would not be dissuaded from bringing novel constitutional claims simply because a court had not previously held the conduct at issue unconstitutional.[163] When attorneys estimated the cost of litigating a case, they would not have to factor in the cost and time necessary to litigate qualified immunity

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Ca. Attorney C ("[P]art of [case selection] is the overall circumstances, the client, who is the client, do I think the client is likeable, 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."). *See also* Schwartz, *supra* note 21 (describing attorneys' case selection considerations).

[157] *See, e.g.*, Interview with N.D. Ohio Attorney G (reporting declining some cases because "[s]ometimes it's just the damages are really, really low."); S.D. Tex. Attorney C (explaining that the main factor in case selection "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….I'll let those go…"); Interview with M.D. Fla. Attorney B ("You know, distance might make a difference [in case selection], 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."). *See also* Schwartz, *supra* note 21 (describing attorneys' case selection considerations).

[158] I assume that plaintiffs proceeding *pro se* do not consider the challenges associated with qualified immunity when deciding whether to file a case, and so would not make different decisions absent qualified immunity. *See* Schwartz, *supra* note 21.

[159] *See* Interview with S.D. Tex. Attorney G.

[160] *See* Schwartz, *supra* note 21.

[161] *See id.*

[162] *See, e.g.*, Lawrence v. Gwinnett County, 557 Fed. Appx. 864 (11 Cir. 2014). *See also* Schwartz, *supra* note 21 (describing this concern).

[163] *See, e.g.*, Interview with 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…then you risk being dumped on summary judgment because of qualified immunity."); *see also* Schwartz, *supra* note 21.

denials through interlocutory appeal.[164] Eliminating qualified immunity might also encourage more attorneys to include Section 1983 cases in their portfolio of cases because Section 1983 doctrine would be less complicated to understand and these cases would be less costly, risky, and time-consuming to bring.[165]

But even if eliminating qualified immunity changed attorneys' calculation of risk and reward in certain types of cases, and increased attorneys' willingness to consider taking such cases, attorneys' case selection decisions would still be made against the backdrop of their contingency fee arrangements and the many other challenges associated with bringing these cases. An attorney considering whether to accept a false arrest case will no longer be discouraged by the qualified immunity standard applied in these cases, but she may nevertheless decline the case if the potential recoverable damages are low or the plaintiff has a lengthy arrest record. An attorney considering whether to accept a case with a novel constitutional claim will no longer be discouraged by the fact that she cannot point to another factually similar case on point, but may decline the case if the facts are not egregious or there is no video or witness to support the plaintiff's story. An attorney considering whether to accept a case with low recoverable damages will not have to litigate qualified immunity in the district court or on appeal, but must still recognize that, unless the case goes to trial and she can recover fees pursuant to Section 1988, her payment will be limited to a portion of the plaintiff's small settlement. And, even in the absence of qualified immunity, attorneys may continue to conclude it would be wiser to spend the majority of their time on personal injury or medical malpractice cases than on civil rights claims, given jurors' predisposition in favor of government officials.[166]

Eliminating qualified immunity would likely increase the number of civil rights cases filed to some degree. But there is no reason to fear that eliminating qualified immunity would result in a massive influx of frivolous cases. Absent qualified immunity, attorneys would still have strong incentives to file successful civil rights cases, and many barriers to relief would still remain in these cases that would inform attorneys' case selection decisions. For these reasons, a lawyer with whom I spoke predicted that there would be "a fairly small number" of cases he would decline today but accept in a world without qualified immunity.[167] Attorneys would still consider civil rights litigation to be less reliably remunerative than personal injury, medical malpractice, or work for paying clients. And those that do decide to bring civil rights cases will continue to reject the vast majority of cases that come their way.

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[164] *See, e.g.*, Interview with N.D. Ca. Attorney B (explaining that she considers the costs and delays associated with qualified immunity motions and interlocutory appeals when deciding whether to accept a case); *see also* Schwartz, *supra* note 21.

[165] *See, e.g.*, Interview with M.D. Fla. Attorney G (predicting that more attorneys might file civil rights cases if qualified immunity did not exist); *see also* Schwartz, *supra* note 21.

[166] *See, e.g.*, Interview with 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…"); Interview with M.D. Fla. Attorney C (explaining that he used to litigate only police misconduct cases but now brings dental malpractice cases as well because "the dental stuff will pay some bills.").

[167] Interview with E.D. Pa. Attorney G.

V. DETERRENCE

The Supreme Court and some commentators believe that being sued and the threat and imposition of damages liability overdeter officers, discourage people from entering government service, and imperil government budgets.[168] Qualified immunity is considered a critically important protection against these adverse effects. If so, doing away with the doctrine would harm government operations in each of these ways. But those holding this view overstate the deterrent effects of lawsuits, and overestimate the ability of qualified immunity to shield against these ill-effects.

The Supreme Court has written that the threat of liability puts government officers in an impossible position—an officer must "choose between being charged with dereliction of duty if he does not arrest when he has probable cause" or "be[] mulcted in damages if he does."[169] Fred Smith recently echoed this concern, arguing that, absent qualified immunity, "[w]e would sometimes be asking government officials to gamble: Follow state and local guidance, or follow your perception of what the law may one day be. If you guess wrong, then you may find yourself liable."[170] Michael Wells has offered a similar prediction: "If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability."[171]

But available evidence suggests that the threat of civil damages liability does not regularly force government officials into making this type of difficult decision. Several studies of law enforcement officers have shown that "the possibility of being sued does not play a role in the day to day thinking of the average police officer."[172] The majority of surveyed officers in two different studies reported that legal liability was not among their top ten thoughts when doing their work.[173] Contrary to the Supreme Court's suggestion that police fret overmuch about the possibility of being sued while making split-second decisions, available evidence suggests that the threat of legal liability rarely enters most officers' minds when they are doing their job.

One might view these studies as evidence that qualified immunity is working—protecting officers from the threat of legal liability so that they can work without distraction—and that

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[168] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("[C]laims frequently run against the innocent, as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") (quoting Gregoire v. Biddle, 144 F.2d 579, 581 (2d Cir. 1949)). *See also infra* notes 169-171170, 177-178 and accompanying text (describing these concerns).

[169] Scheuer v. Rhodes, 416 U.S. 232, 245 (1974) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)). *See also* Owen v. City of Independence, 445 U.S. 622, 655 (1980) (fearing that lawsuits will "paralyz[e] [an] official's decisiveness and distort[] his judgment.").

[170] Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2109 (2018).

[171] Wells, *supra* note 19, at 391.

[172] Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT'L REV. POLICE DEV. 19, 26 (1995); *see also* Schwartz, *supra* note 1, at 1811-13 (describing other similar studies).

[173] *See* Garrison, *supra* note 172, at 26; *see also* Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 529, 542 (2003).

eliminating qualified immunity would force officials into making these types of difficult decisions more often. But there are three likely explanations for officers' indifference to the threat of legal liability unrelated to qualified immunity that would presumably continue to exist even if the defense was eliminated. First, law enforcement officials infrequently pay for their defense counsel and virtually never contribute to settlements and judgments entered against them—and there is no reason to conclude that other types of government officials have different arrangements with their government employers.[174] Second, available evidence suggests that most law enforcement officials do not gather and analyze information from lawsuits brought against their officers—and there is every reason to believe that other government agencies operate with similar indifference to the information in lawsuits brought against their employees.[175] Third, available evidence suggests that government officials have a number of other concerns on their minds beyond the threat of litigation. Recent reports attribute the challenges of recruiting and retaining law enforcement officers to "high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."[176] These factors—widespread indemnification, government inattention to information in lawsuits, and myriad other concerns about accepting government employment—likely explain officers' current disregard for the threat of being sued while on the job and would presumably continue to exist in a world without qualified immunity.

Commentators have also expressed concern that eliminating qualified immunity would overdeter local government officials who make policy decisions. As Nielson and Walker argue, the money currently spent on lawsuits already presents "a heavy financial burden on financially strapped municipalities."[177] Were qualified immunity eliminated, settlements and judgments might increase, municipal budgets might be further compromised, and government officials might encourage inaction to reduce payouts.[178] This bleak picture assumes that lawsuits currently impose significant economic burdens on local governments, that eliminating qualified immunity would dramatically increase these burdens, and that government officials would respond by discouraging valuable behavior that might lead to further suits.

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[174] *See generally* Schwartz, *supra* note 12. *See also* Wells, *supra* note 19, at 406 (observing that my studies of indemnification and litigation—Schwartz, *supra* note 12 and Schwartz, *supra* note 20—focus on law enforcement, but "suspect[ing]" that those "findings are valid across the whole field of constitutional tort litigation."). For research reaching similar conclusions regarding *Bivens* litigation against federal employees of the Bureau of Prisons, *see generally* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed* (draft on file with author).

[175] *See generally* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010). *See also* Pfander, Reinert & Schwartz, *supra* note 174 (describing a similar failure to collect lawsuit information by the Federal Bureau of Prisons).

[176] Schwartz, *supra* note 1, at 1813 (citing and describing these reports). *See also* Rich Morin et al., Pew Research Center, Behind the Badge 65 (2017) (reporting that nine in ten officers report increased concerns about their safety following high-profile police shootings and protests of those shootings).

[177] Nielson & Walker, *supra* note 17, at 1877. *See also* Fallon, *supra* note 19 (predicting that eliminating qualified immunity would impose "unanticipated financial drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs.")

[178] See Jeffries, *supra* note 38, at 245–46 ("Civil-rights judgments and the accompanying awards of attorneys' fees are on-budget costs. At least for states and localities . . . increased on-budget costs mean higher taxes or cuts in other expenditures. The political penalties for either choice can be severe. There is this additional reason to think, therefore, that while erroneous government action and erroneous government inaction may be equally costly to society as a whole, the former is more likely to trigger on-budget liability and thus to affect and distort government behavior.").

Setting aside for a moment what effect eliminating qualified immunity would have on payouts, this argument relies on an inaccurate view of lawsuit budgeting. Lawsuits do not threaten most governments' budgets. Although there are isolated stories of small towns and villages that have gone bankrupt or had to disband their police departments after large awards,[179] liability costs are a small part of most government budgets. One study found that liability costs amount to approximately one percent of the budgets for counties, cities, villages, and towns in New York State.[180] The executive director of a national association of more than 200 risk pools across the country has estimated that small jurisdictions pay no more than one or two percent of their budgets to liability insurers.[181] And in my study of one hundred law enforcement agencies across the country, I found that law enforcement liability—the most common and costly type of government litigation—amounts to significantly less than one percent of most governments' budgets.[182] Moreover, lawsuit payouts usually have little or no direct financial impact on the budget of the agency that employs the defendant officers.[183]

Fears of municipal overdeterrence also assume a closer connection than actually exists between lawsuit filings and payouts on the one hand, and personnel and policy decisions on the other. Highly-publicized cases and other incidents of misconduct can have political consequences for elected officials, and can cause officials to make personnel and policy changes.[184] But my research has shown that law enforcement agencies do not gather or analyze information about run-of-the mill lawsuits brought against them, and there is no reason

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[179] *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1588-89 n.282 (2017) (describing examples of municipalities that closed their police forces after losing liability insurance); Schwartz, *supra* note 22, at 1191-92 (describing towns and small cities that lost liability coverage following lawsuit payouts and were disbanded). In these cases, the damages award is usually the straw that broke the camel's back; the town or village is already underfunded, then foregoes liability insurance, and then is successfully sued and does not have funds to satisfy a judgment. *See, e.g.*, Andrew Cockburn, *Blood Money*, HARPER'S MAG. (Jan. 24, 2019) (describing this type of downward cycle in South Tucson). There are growing calls to consolidate small law enforcement agencies because larger agencies are more efficient and better able to train and supervise their officers. POLICE EXECUTIVE RESEARCH FORUM, OVERCOMING THE CHALLENGES AND CREATING A REGIONAL APPROACH TO POLICING IN ST. LOUIS CITY AND COUNTY 2 (Apr. 30, 2015) (finding that St. Louis County "contains a patchwork of police departments, many of which have jurisdiction over very small areas," which "has led to confusion and distrust among residents," and is "inefficient, undermines police operations, and makes it difficult to form effective law enforcement partnerships to combat crime locally and regionally."); THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 28 (May 2015) (recommending that the U.S. Department of Justice "provide technical assistance and incentive funding to jurisdictions with small police agencies that take steps towards shared services, regional training, and consolidation."). These anecdotes offer another reason to support growing calls to consolidate small law enforcement agencies. But these isolated examples do not, in my view, demonstrate that lawsuits payouts are too large for most jurisdictions to handle.

[180] *See* SYDNEY CRESSWELL & MICHAEL LANDON-MURRAY, TAKING MUNICIPALITIES TO COURT: AN EXAMINATION OF LIABILITY AND LAWSUITS IN NEW YORK STATE LOCAL GOVERNMENTS vii (2013) (reporting that liability costs total approximately 1 percent of the budget for counties, cities, villages, and towns in New York State).

[181] *See* Schwartz, *supra* note 22, at 1164-65 n.73 (reporting that the executive director of a national association of over 200 risk pools that insure small municipalities explained that "[c]ontributions to risk pools (or premium payments to insurers) are minimal in a local government's overall budget. We're talking just a percent or two of a city's budget going toward contributions—if that.")

[182] *See id.* at 1165 (reporting that lawsuit payouts in police misconduct cases are less than 1% of municipal budgets in my study).

[183] *See* Schwartz, *supra* note 22.

[184] *See, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 858–67 (2001) (describing the "informational" and "fault-fixing" functions of

to believe that other types of government agencies are more attentive to lawsuit filings and information.[185] As a result, many government officials do not have good information about the types of behaviors that lead to lawsuits and liability against their agencies, and so do not have an informed understanding about what personnel and policy changes might decrease liability. In fact, many law enforcement agencies do not even know the most basic information about lawsuits filed against their officers—how many suits were filed in any given year, how much was paid in settlements and judgments in these cases, or whether punitive damages were awarded against their own employees.[186] Furthermore, several of the largest cities and counties in the country reported to me that they kept no records in any government agency or office reflecting how much they paid in lawsuits brought against their employees.[187] Government officials may implement personnel and policy decisions based upon political pressures and a general sense of what might reduce liability. But the connection between lawsuits, payouts, and government decisionmaking is far more tenuous than has been assumed, and unless eliminating qualified immunity causes local governments to pay better attention to lawsuits brought against them, these information gaps will continue to exist in a world without qualified immunity.

Available evidence suggests that government employees rarely suffer financial or job-related costs of being sued, that local governments' and agencies' budgets are rarely imperiled by lawsuits, and that governments do not collect enough information about lawsuits brought against them and their officers to make informed decisions about what personnel and policy actions could reduce liability. All of these characteristics of local government employment, budgeting, and information systems disrupt the ways in which lawsuits are presumed to deter. And all of these barriers to deterrence would presumably continue to exist were qualified immunity eliminated. Against this backdrop, what impact could eliminating qualified immunity have on officer and official decisionmaking? Although I find no reason to believe eliminating qualified immunity would change government indemnification, budgeting, or risk management practices, I do think that eliminating qualified immunity could lead to changes in constitutional litigation that could influence government behavior in three important ways.

First, eliminating qualified immunity might encourage plaintiffs' attorneys to file more cases,[188] and might encourage plaintiffs to take their cases to trial more often.[189] As I have explained, I do not think plaintiffs' success rate would increase, and believe jurors' sympathies for government defendants means that plaintiffs would continue regularly to lose at trial.[190] But there would be more cases filed, more trials, and more plaintiff victories in absolute terms. It is unclear what effect additional suits and trials might have on the officers

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constitutional damages actions); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003) (describing how negative publicity regarding lawsuits "can trigger embarrassing political inquiry and even firings, resignations, or election losses"); Schwartz, *supra* note 22, at 1151 (explaining that "lawsuits can create nonfinancial pressures by generating publicity about allegations of misconduct and by revealing previously unknown information about the details of that misconduct").

[185] *See generally* Schwartz, *supra* note 175.

[186] *See* Schwartz, *supra* note 12, at 956.

[187] *See id.*

[188] *See supra* notes 159-165 and accompanying text.

[189] *See supra* notes 98-99 and accompanying text.

[190] *See supra* notes 88-90 and accompanying text.

directly involved in the cases. The Supreme Court has assumed that participating in discovery and trial is particularly taxing and time-consuming for government officials.[191] If so, more suits and more trials might cause officers to change their behavior to avoid being sued again.[192] On the other hand, a study of officers in Cincinnati found that those who had previously been sued were more aggressive than those who had not.[193] Moreover, officers would presumably continue to be indemnified for their conduct, and officers' decisions on the job would continue to be influenced by a number of different concerns and incentives apart from litigation.[194]

More lawsuits and trials could, alternatively, influence officer behavior in a more indirect way—by making public additional information about government behavior. This additional information and focus on government could heighten political pressures on policymakers to make personnel, policy, or training adjustments. And these personnel, policy, and training adjustments could, in turn, improve line officer behavior.[195] Influencing official and officer behavior in this manner is far less certain than theoretical models would presume[196]—it depends upon suits and trials that reveal damaging information, political pressure placed on officials who can take action, and well-designed policies and trainings that influence officers in intended ways. But, given what we know, I find it most plausible to imagine that additional lawsuits and trials could influence government officials' and officers' decisions in this manner.

Second, eliminating qualified immunity could make the scope of constitutional law clearer. As I have described, qualified immunity creates legal uncertainty because courts can grant qualified immunity without explaining whether the constitutional right in question was violated.[197] To return to an earlier example, the existence and scope of a First Amendment right to record the police has been "needlessly floundering in the lower courts" for years, and five circuits still have not ruled on whether such a right exists.[198] Absent qualified im-

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[191] *See supra* note 109 and accompanying text.

[192] For further exploration of the deterrent effect of the practical consequences of being sued, such as having to sit for a deposition, see Reinert, *supra* note 76, at 847-49; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 283 (1988).

[193] See Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003) (surveying and observing Cincinnati police officers, and finding that "[o]fficers who had previously been sued for on-the-job behavior were observed to use an impact weapon in a high proportion of encounters with citizens than their counterparts.").

[194] *See supra* note 172-176 and accompanying text.

[195] *See, e.g.*, Emily Owens et al., *Can You Build a Better Cop? Experimental Evidence on Supervision, Training, and Policing in the Community*, 17 CRIM. & PUB. POL'Y 41, 43 (2018) (finding that when officers participated in a training program focused on procedural justice, the "were as active in the community as untreated officers along multiple dimensions, but they were less likely to resolve incidents with an arrest and less likely to be involved in use-of-force incidents."); POLICE USE OF FORCE PROJECT, http://useofforceproject.org/#project [https://perma.cc/57AN-GAWE] (finding that "police departments with policies that place clear restrictions on when and how officers use force had significantly fewer killings than those that did not have these restrictions in place.").

[196] For foundational theories of the relationship between liability rules and behavior, see, for example, Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799 (1983); Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

[197] *See supra* Part I.

[198] Blum, *supra* note 1, at 1895.

munity, courts would more regularly announce the law. I do not think line officers will themselves study these circuit and Supreme Court decisions, much less compare the situation they are confronting on the job to the facts or holding of a prior case.[199] But these declarations of the law may in some instances inform policies and trainings. Government agencies are unlikely to adjust their policies and trainings every time a court finds a constitutional violation. But, in the past, when the Supreme Court or circuit courts have announced new legal requirements—or clarified what the law does not require—police departments have incorporated those legal rulings into their policies and trainings.[200] Presumably, by eliminating qualified immunity, courts could give governments better guidance about what the law prohibits, allows, and requires; governments could translate that guidance to their officers in the form of policies and trainings; and those policies and trainings could influence officer behavior.

Third, eliminating qualified immunity would do away with the slow but steady stream of district, circuit, and Supreme Court decisions finding that plaintiffs' constitutional rights have been violated, but nevertheless insulating defendants from liability because a prior decision did not clearly establish the law. Although cases are infrequently resolved in this manner, these types of decisions may send the message to government officials that they can violate the law with impunity, as Justice Sotomayor fears.[201] By eliminating qualified immunity, courts would no longer send this message in this way.

All available evidence suggests that civil rights cases do not deter constitutional violations in the manner expected by courts and commentators. Government employees are rarely financially liable for settlements and judgments in suits brought against them, and the threat of civil liability does not enter most law enforcement officers' minds when they are doing their jobs. The link between lawsuits and municipal behavior is similarly tenuous—settlements

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[199] *See* Manzanares v. Roosevelt County Adult Detention Center, 2018 WL 4150885, at *18 n.10 (D.N.M. Aug. 30, 2018) (criticizing the Supreme Court "assum[ption] that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time" and adding that "[i]t strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: 'Are the facts here anything like the facts in *York v. City of Las Cruces*?'").

[200] *See, e.g.*, David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008) (observing that California law enforcement agencies stopped training their officers not to conduct warrantless searches of trash—a requirement of California constitutional law—after the United States Supreme Court rejected this prohibition); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming Miranda); Patrick Healy, LAPD Commission Adds to Guidelines for Review of Police Use of Force, NBC L.A. (Feb. 19, 2014), https://www.nbclosangeles.com/news/local/LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html (reporting that a decision by the California Supreme Court that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability" caused the Los Angeles Police Commission to change the ways in which it evaluates whether force used by its officers was proper). For other examples, *see* Schwartz, *supra* note 1, at 1819 n.138.

[201] *See supra* note 10 and accompanying text. Although law enforcement has not endorsed Justice Sotomayor's concern that the Court's qualified immunity decisions promote a "shoot first and think later" approach to policing, one police publication did recently applaud the Court's qualified immunity decisions for "demonstrat[ing] the Court's continued determination to give police officers the benefit of the doubt when reviewing their split-second life changing decisions from the entirely safe contours of judicial chambers" and "demonstrat[ing] the extraordinary value of the qualified immunity defense to police officers who use deadly force in the performance of their duty, even in cases where the need for such force was not absolutely clear cut and obvious." Mike Callahan, *Protecting Cops from Frivolous Lawsuits: Qualified Immunity, Explained*, POLICEONE (Apr. 29, 2016), https://www.policeone.com/legal/articles/176707006-Protecting-cops-from-frivolous-lawsuits-Qualified-immunity-explained/.

and judgments make up less than one percent of most jurisdictions' budgets. Although high-profile lawsuits can have political consequences, governments may not gather or analyze information from run-of-the-mill lawsuits brought against them such that they could design personnel and policy changes that would reduce the likelihood of future suits. Eliminating qualified immunity is unlikely to change the fundamental characteristics of government indemnification and budgeting that shield line officers and policymakers from the financial consequences of lawsuits. Eliminating qualified immunity is also unlikely to change officers' and policymakers' inattention to the vast majority of lawsuits brought against them. But eliminating qualified immunity may nevertheless influence government behavior by increasing political pressure on officials to change their policies and trainings, providing clearer guidance about the legal standards these policies and trainings should contain, and dampening the message that government officials can violate constitutional rights without consequence. It is difficult to measure the impact these adjustments would have, but there is reason to believe they could, at least to some degree, reduce the frequency of constitutional violations and improve government behavior.

CONCLUSION

Critics and supporters of qualified immunity appear to agree that constitutional litigation is dominated by the doctrine. For critics, qualified immunity is a scourge that closes courthouse doors to people whose constitutional rights have been violated.[202] For supporters, qualified immunity is the only shield against an avalanche of frivolous suits,[203] thus its "importance to society as a whole."[204] Not surprisingly, commentators hold strongly opposing views about how the elimination of qualified immunity might influence constitutional litigation, government officials' conduct, and society as a whole. To some, doing away with qualified immunity would result in more suits and higher judgments that would "incentivize officials acting under the color of law to better respect and protect individuals' rights than the Court's § 1983 doctrine currently encourages."[205] To others, eliminating qualified immunity would result in a massive influx of frivolous suits and damages awards, causing officers to become overly cautious on the street, discouraging people from accepting government employment, and encouraging government officials to promote inaction as a means of reducing legal liabilities.[206]

My research offers a more nuanced portrait of qualified immunity's role in constitutional litigation, and suggests very different predictions about how civil rights litigation would function in a world without qualified immunity. My examination of almost 1200 dockets in federal civil rights cases around the country and surveys and interviews of lawyers who bring these cases makes clear that qualified immunity is one of many barriers to success in civil rights actions against government officials. Cases brought without counsel are likely to be dismissed *sua sponte* by the court before the defendant has an opportunity to respond. At the motion to

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[202] *See, e.g.*, Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012); Blum, Chemerinsky & Schwartz, *supra* note 1; Reinhardt, *supra* note 67, at 1245.

[203] *See, e.g.*, King, *supra* note 19.

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

[205] Levin & Wells, *supra* note 19.

[206] *See supra* notes 19, 168 (describing these concerns).

dismiss and summary judgment stages, cases can be dismissed for a variety of reasons, including failing to satisfy pleading requirements and failing to establish evidence of a constitutional violation. If a case gets to trial, the jury will likely be sympathetic to the government defendants and skeptical of the plaintiff's claim. Today, the vast majority of cases fail for reasons other than qualified immunity. In a world without qualified immunity, cases would continue to fail for these other reasons.

These many barriers to relief would also protect against the filing of a flood of meritless suits. Plaintiffs' attorneys, who usually take civil rights cases on contingency, bear all the financial risk of loss and therefore have strong incentives to take cases they can win. Plaintiffs' attorneys deciding whether to accept any given case consider all of the potential risks, and weigh them against potential rewards. Today, qualified immunity is one of many risks on attorneys' minds. In a world without qualified immunity, attorneys would consider the other risks and challenges associated with bringing these cases, and would continue to have strong financial incentives only to accept those cases they believe they can win.

Fears that eliminating qualified immunity would dramatically impact individual officers' and government officials' budgets and decisionmaking fail to recognize that eliminating qualified immunity doctrine would not result in a massive influx of claims and awards. These fears also fail to take account of the limited role that lawsuit payouts currently play in officers' and governments' finances, and in their decisionmaking. Officers are almost always indemnified, lawsuit payments are rarely a significant portion of local budgets, and both officers and government officials weigh many other considerations when making policy decisions or taking action on the street. Just as courts and commentators overestimate the power of qualified immunity on case selection and dispositions by overlooking the many other barriers to success in civil rights cases, courts and commentators who imagine government officials are weighing the possibility of being sued before stopping a car or making an arrest overlook the many other considerations on officers' minds when they are doing their jobs. Today, lawsuits play a limited role in officers' finances and decisions. In a world without qualified immunity, government indemnification, budgeting, and risk management practices that dampen lawsuits' deterrent effects would likely remain unchanged.

Given the many ways in which civil rights litigation would stay the same, I do not think that the Supreme Court or defenders of the doctrine should fear doing away with qualified immunity. And if the Court does do away with qualified immunity doctrine, I do not think that the Court or Congress need craft another protection for government officials to put in its place. Others who write and think in this area expect that something would need to substitute for qualified immunity were the defense eliminated.[207] If qualified immunity was eliminated, unions and other representatives of government interests would likely lobby courts and Congress for an alternative protection. But my research makes clear that many other barriers to relief already exist, and would continue to play a powerful role in civil rights litigation moving forward. Justice Kennedy observed in *Wyatt v. Cole* that strengthening summary judgment standards arguably made qualified immunity unnecessary as a shield from trial in insubstantial cases.[208] In addition to fortified summary judgment standards, there

[207] *See, e.g.*, Samuel L. Bray, *Forward: The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793, 1794 (2018) ("The moment is therefore right for reappraising qualified immunity, and also for careful thinking about what should replace it."). *See also* Fallon, *supra* note 19.

[208] 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

are stricter pleading requirements, stringent standards for substantive constitutional violations and causation, limitations on attorneys' fees awards in cases that do not go to trial, and unsympathetic juries.[209] In other words, there are already many barriers to shield government officials and local governments from the threat of discovery, trial, and damages liability in civil rights cases and these protections will continue to exist absent qualified immunity. We need nothing to replace qualified immunity; alternative protections are already in place and largely doing qualified immunity's intended work.

Although many aspects of constitutional litigation would remain the same, I believe that there would be five important improvements in a post-qualified immunity world. First, the cost, risk, and complexity of constitutional litigation would decrease. Lawyers would no longer have to brief qualified immunity motions, wait months or years while motions and interlocutory appeals are pending, and prepare for the possibility that their cases will be dismissed on qualified immunity grounds after lengthy discovery. Attorneys will not have to learn and stay abreast of an exceedingly convoluted and shifting doctrine, or be prepared to argue their case on interlocutory appeal.

Second, the decreased costs and risks of civil rights litigation might encourage more lawyers to include civil rights cases in their docket, and might encourage lawyers who already litigate civil rights cases to increase the number of cases they bring. Lawyers may be more willing to file certain types of cases, including cases involving novel constitutional claims, cases with lower damages, and cases alleging false arrest and other constitutional violations that lawyers consider particularly vulnerable to motion practice or dismissal on qualified immunity grounds. Lawyers will still have strong incentives only to select cases they believe they can win, but more plaintiffs would likely be able to secure representation for their civil rights cases.

Third, more cases might go to trial. These trials would not likely result in a dramatic increase in plaintiff victories, given juries' apparent predisposition against plaintiffs in these types of cases. But more trials would offer more transparency, more opportunity for plaintiffs to have their day in court, and more focus on what should be the critical question in these cases—whether government defendants violated plaintiffs' constitutional rights. These trials may also pressure government officials to craft polices and trainings that will reduce the likelihood of future harms.[210]

Fourth, courts would offer more clarity about the scope of constitutional rights. Courts could no longer grant qualified immunity because a prior case had not held sufficiently similar conduct unconstitutional. Instead, courts would more regularly rule on constitutional questions underlying these cases. As I have explained I do not think that constitutional rights would change dramatically in their scope, but clarity about constitutional rights would benefit the public and assist local governments as they guide and train their officers.[211]

Fifth, and finally, courts would no longer issue decisions shielding defendants from liability even as they have violated plaintiffs' constitutional rights. Although courts issue these

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[209] *Accord* Blum, *supra* note 114, at 964 (explaining that "the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success" if plaintiffs were allowed to sue municipalities directly for constitutional violations by their employees); *Cross-Ideological Amicus Brief*, *supra* note 15, at *20 ("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.").

[210] *See supra* note 195 and accompanying text.

[211] *See supra* note 34-35.

types of decisions in relatively few civil rights cases, they deny the best available relief[212] to plaintiffs who have been grievously wronged by government actors.[213] Decisions finding constitutional violations but granting qualified immunity may also send a message to government officials that they can violate plaintiffs' rights without consequence.[214] Eliminating qualified immunity would end these types of decisions and curtail this type of message from the courts.

Although eliminating qualified immunity would improve the current state of affairs in each of these ways, I do not believe that we would be left with an optimal system of rights and remedies. For decades, commentators have proposed various doctrinal interventions intended to encourage the filing of meritorious claims, and place liability on the entities best situated to bear the costs of constitutional violations and discourage future misconduct. Eliminating qualified immunity is but one of many doctrinal adjustments that have been proposed in this vein. Some have suggested that qualified immunity need not be eliminated but could simply be improved: The Court could reinstate *Saucier* so that courts would more regularly issue opinions clarifying the scope of constitutional rights, or relax the qualified immunity standard so that defendants engaged in clearly unconstitutional conduct would not be entitled to the defense.[215] Several scholars have argued that the best approach is to keep qualified immunity but do away with the requirements of *Monell* and allow entity liability when a plaintiff has established a constitutional violation.[216] Others have suggested keeping qualified immunity for cases seeking compensatory damages, but eliminating qualified immunity

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[212] Although there are other possible forms of oversight—including criminal prosecution and internal discipline—these approaches "often fail or are otherwise unavailable." *Cross-Ideological Amicus Brief*, *supra* note 15, at *13. *See also* Joanna C. Schwartz, *Who Can Police the Police*?, 2016 CHI. LEGAL F. 437 (describing various forms of government regulation and their strengths and limitations).

[213] *See, e.g.,* Bryan v. MacPherson, 608 F.3d 614 (9th Cir. 2010), *withdrawn and superceded by* 630 F.3d 805 (9th Cir. 2010) (finding that an officer violated the Fourth Amendment when he used a Taser against a plaintiff who "was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer," but granting qualified immunity); Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011) (finding plaintiff's constitutional rights were violated when a police officer "kicked him several times on both sides of his body, although he was restrained on the ground and offering no resistance," another officer "repeatedly choked and kicked him during the trip to the hospital," and a third officer "extended the journey by taking a roundabout route and intentionally driving so erratically that [plaintiff] was jerked roughly back and forth in his car seat while his head was positioned adjacent to the dashboard," but granting qualified immunity); Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009) (finding decedent's constitutional rights were violated when officer shot him in the back of his head as he was driving away, but granting qualified immunity); Coates v. Powell, 639 F.3d 471 (8th Cir. 2011) (finding plaintiff's constitutional rights were violated when officer remained in house after consent was revoked, but granting qualified immunity); Constanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101 (9th Cir. 2010) (finding plaintiff "had a Fourteenth Amendment due process right to be free from deliberately fabricated evidence in a civil child abuse proceeding" but granting qualified immunity). For additional decisions see *Cross-Ideological Amicus Brief*, *supra* note 15, at *15; Schwartz, *supra* note 1, at 1840-51.

[214] *See supra* note 10 and accompanying text.

[215] *See, e.g.*, Jeffries, *supra* note 38.

[216] *See, e.g.*, PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 104 (1983) (arguing that police departments are better suited than individual officers to bear the costs of liability because departments "can better identify and evaluate different strategies for deterring illegal arrests and can also better predict the likely effects of alternative deployments of police officers, training methods, or arrest guidelines upon both deterrence and vigorous decisionmaking."); *see also* Blum, *supra* note 1, at 1935 ("Correcting the Court's error in *Monell* and recognizing that respondeat superior was part of the original scheme would be a good first step towards cleaning up the mess of qualified immunity and clarifying the message that Section 1983 was intended to restore, rather than restrict, civil rights."); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies:*

in cases seeking nominal damages.[217] Others have proposed adjusting the Supreme Court's interpretation of Section 1988 to more readily authorize the award of attorneys' fees and, thereby, encourage the filing of more claims.[218] I think that each of these ideas have merit, and would result in a better system that we have today.

But this Article makes clear that none of these doctrinal adjustments would address dynamics undergirding our current system of rights and remedies that extend beyond doctrine, including judges' and juries' perceived predisposition against civil rights plaintiffs, the limited financial effects of payouts on individual officers and local governments, the limited information governments collect about the lawsuits brought against them, and regional variation in the ways in which these cases are filed and decided. Adopting the most ambitious doctrinal proposals—eliminating qualified immunity, allowing vicarious liability, and increasing the availability of attorneys' fees—would almost certainly increase the number of cases filed, reduce the costs of litigating these cases, and increase the total number of settlements and jury awards. But even in this very different doctrinal landscape there would remain other substantive and procedural barriers to relief, judges and juries who give government defendants the benefit of the doubt, and structural barriers dampening the deterrent effect of these suits. Taking the more modest step of eliminating qualified immunity would leave more barriers in place. For the same reasons that eliminating qualified immunity will not result in a massive influx of cases and awards, eliminating qualified immunity will not address these fundamental barriers to relief and reform.

Courts and commentators may well disagree about whether and to what extent lifting these fundamental barriers to relief and reform is a good thing. Without resolving those disagreements, it is enough to recognize that these barriers would continue to exist absent qualified immunity. The Supreme Court, when contemplating whether to reconsider qualified immunity, as Justice Thomas has recommended,[219] need not fear that eliminating qualified immunity will harm government or society as a whole. And advocates should keep in mind that doing away with qualified immunity would be an important but preliminary step toward greater accountability and deterrence.

Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (arguing respondeat superior liability for municipalities would simplify the law, impose costs on deeper-pocketed municipalities, and create incentives for municipalities to prevent future harms); Bd. Of Cnty. Comm'rs v. Brown, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (observing that, to the extent indemnification "provide[s] for payments from the government that are similar to those that would take place in the absence of *Monell*'s limitations…municipal reliance upon the continuation of *Monell*'s 'policy' limitation loses much of its significance.").

[217] *See, e.g.*, James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601-1639 (2011).

[218] *See, e.g.*, Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829 (2016); Reingold, *supra* note 141.

[219] *See supra* note 13 and accompanying text.