

## 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, in 2017, Justice Thomas wrote that “[i]n an appropriate case, we should reconsider our 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.*

*This Article offers 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 average 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 these 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 transform government practices that currently dampen the effects of lawsuits on officers’ and officials’ decisionmaking. Doomsday scenarios imagined by some commentators—of courthouses flooded with*

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*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.<sup>1</sup> This may seem like a purely academic exercise. After all, the Supreme Court has been downright bullish about qualified immunity doctrine in recent years.<sup>2</sup> 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.<sup>3</sup> The Court has repeatedly

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1. Qualified immunity shields law enforcement officers and other executive officials from damages liability so long as they have not violated “clearly established law.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For an overview of qualified immunity, what constitutes clearly established law, and the ways in which the doctrine has developed, see generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *Notre Dame L. Rev.* 1797 (2018) [hereinafter Schwartz, *Case Against*].

2. See Schwartz, *Case Against*, *supra* note 1, at 1798 (describing the Supreme Court’s recent qualified immunity decisions). For other descriptions and assessments of the Court’s recent qualified immunity jurisprudence, see generally Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *Touro L. Rev.* 633 (2013) [hereinafter Blum et al., *Qualified Immunity Developments*]; Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 *Notre Dame L. Rev.* 1887 (2018) [hereinafter Blum, *Time to Change*].

3. See William Baude, *Is Qualified Immunity Unlawful?*, 106 *Calif. L. Rev.* 45, 88–90 (2018) (listing the 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

chastised lower courts for failing to use qualified immunity to shield government officials from damages liability.<sup>4</sup> And the Court's recent decisions have further expanded qualified immunity's reach.<sup>5</sup>

But there have been growing calls by courts,<sup>6</sup> as well as by a number of

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in over thirty cases" since *Harlow*. Blum, Time to Change, *supra* note 2, at 1887 & n.2. For the three most recent Supreme Court decisions postdating Baude's analysis that reversed local court denials of qualified immunity, see *City of Escondido v. Emmons*, 139 S. Ct. 500, 503–04 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152–55 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589–93 (2018).

4. See, e.g., *Emmons*, 139 S. Ct. at 503 ("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, . . . [it] defined the clearly established right at a high level of generality . . . saying . . . the 'right to be free of excessive force' was clearly established."); *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017) (noting the Supreme Court has "revers[ed] federal courts in qualified immunity cases . . . 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'" (citations omitted) (internal quotation marks omitted) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009))); *Sheehan*, 135 S. Ct. at 1774 n.3 ("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." (quoting *Harlow*, 457 U.S. at 814)).

5. See, e.g., Baude, *supra* note 3, at 48 (explaining that the Supreme 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 in recent qualified immunity decisions, the Court "has engaged in a pattern 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").

6. See, e.g., *Zadeh v. Robinson*, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (observing that "a growing, cross-ideological chorus of jurists and scholars" are calling for reconsideration of qualified immunity). For other decisions critical of qualified immunity see, e.g., *Horvath v. City of Leander*, No. 18-51011, 2020 WL 104345, at \*10–13 (5th Cir. Jan. 9, 2020) (Ho., J., concurring in the judgment in part and dissenting in part) (explaining that he would "welcome a principled re-evaluation of our precedents" related to qualified immunity); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) ("The Court disagrees with the Supreme Court's approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, \*18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at \*6–7 (E.D.N.Y. June 26, 2018) ("The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope. The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); *Wheatt v. City of East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at \*4–5 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court for allowing interlocutory appeals of qualified immunity denials).

commentators<sup>7</sup> and advocacy organizations across the political spectrum,<sup>8</sup> 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 an interest in government accountability against an interest in shielding government officials from the burdens of suit in insubstantial cases.<sup>9</sup> Yet critics contend that the doctrine bears little resemblance to the common law immunities in existence when Congress enacted Section 1983, undermines government accountability, and is both unnecessary and ill-suited to shield government officials from the burdens and distractions of being sued.<sup>10</sup>

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7. See, e.g., Matt Ford, *Should Cops Be Immune from Lawsuits?*, *New Republic* (Sept. 12, 2018), <https://newrepublic.com/article/151168/legal-revolt-qualified-immunity> [<https://perma.cc/TSJ9-B9HX>] (highlighting examples of the “broad, cross-ideological push against qualified immunity” and the need for the Supreme Court to reform the doctrine); David French, *End Qualified Immunity*, *Nat’l Rev.* (Sept. 13, 2018), <https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/> [<https://perma.cc/5ZWC-93HD>] (“Judges created qualified immunity, and they can end it. It’s past time to impose true accountability on public servants who violate citizens’ constitutional rights.”); George Leef, *Qualified Immunity—A Rootless Doctrine the Court Should Jettison*, *Forbes* (Mar. 21, 2018), <https://www.forbes.com/sites/georgeleef/2018/03/21/qualified-immunity-a-rootless-doctrine-the-court-should-jettison> [<https://perma.cc/NC7K-8WT9>] (arguing that “[t]he [Supreme] Court should go back to its original understanding of Section 1983—that it imposes strict liability on government officials for violations of citizens’ constitutional rights”); see also Blum, *Time to Change*, *supra* note 2, at 1892 (concluding that “the doctrine of qualified immunity is beyond repair” and urging “the [Supreme] Court to make the reformation of its qualified immunity doctrine unnecessary by revisiting and revamping another of its confusing creations, the doctrine of municipal liability under Section 1983”); Schwartz, *Case Against*, *supra* note 1, at 1800 (arguing that “[t]he Justices can end qualified immunity in a single decision, and they should end it now”).

8. See, e.g., Emma Andersson, *The Supreme Court Gives Police a Green Light to ‘Shoot First and Think Later,’* *ACLU* (Apr. 9, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-gives-police-green-light-shoot-first-and> [<https://perma.cc/TJ9B-VV3M>] (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 Inst.* (June 12, 2018), <https://www.cato.org/blog/openings-front-campaign-against-qualified-immunity> [<https://perma.cc/GQ66-XA75>] (describing “Cato’s ongoing campaign to challenge the doctrine of qualified immunity”); see also *infra* note 16 and accompanying text.

9. See *Wyatt v. Cole*, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (“Our immunity doctrine is . . . 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.” (first alteration in original) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986))); *Anderson v. Creighton*, 483 U.S. 635, 644–45 (1987) (explaining that the Court’s immunity decisions were “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” (quoting *Malley*, 475 U.S. at 342)); see also Schwartz, *Case Against*, *supra* note 1, at 1801–03 (describing these various justifications for the doctrine).

10. See *supra* notes 6–8.

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."<sup>11</sup> Justice Breyer concluded that qualified immunity was unnecessary for private defendants because they were likely to be indemnified by their employers<sup>12</sup>—a rationale that would apply to government defendants who almost never satisfy settlements and judgments entered against them.<sup>13</sup> And Justice Thomas has criticized the doctrine for straying from its common law foundations and recommended to his colleagues that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."<sup>14</sup>

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 v. Abbasi*.<sup>15</sup> An ideologically

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11. *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").

12. *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").

13. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, apps. A–B at 962–66 (2014) [hereinafter Schwartz, *Police Indemnification*] (finding that law enforcement officers almost never contribute to settlements and judgments entered against them).

14. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and in the judgment).

15. See, e.g., Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit at 27, *Echols v. Lawton*, No. 18-1358 (Apr. 24, 2019), 2019 WL 1916157; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 34, *Baxter v. Bracey*, No. 18-1287 (Apr. 8, 2019), 2019 WL 1569711; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 25, *I.B. v. Woodard*, No. 18-1173 (Mar. 8, 2019), 2019 WL 1126159; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 2, *Brennan v. Dawson*, No. 18-913 (Jan. 11, 2019), 2019 WL 193913; Reply Supporting Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 6–7, *Spencer v. Abbott*, No. 17-1397 (Aug. 8, 2018), 2018 WL 3778553; Reply Brief on Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 1, *Pauly v. White*, No. 17-1078 (May 31, 2018), 2018 WL 2684548; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit at 17–18, *Shafer v. Padilla*, No. 17-1396 (Apr. 3, 2018), 2018 WL 1705603; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 23, *Apodaca v. Raemisch*, No. 17-1284 (Mar. 9, 2018), 2018 WL 1315085; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit at 34, *Melton v. Phillips*, No. 17-1095 (Feb. 2, 2018), 2018 WL 722531; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 17–18, *Noonan v. County of Oakland*, No. 17-473 (Sept. 27, 2017), 2017 WL 4386875; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit at 19, *Doe v. Olson*, No. 17-296 (Aug. 23, 2017), 2017 WL 3701814; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit at 33–34, *Walker v. Farnan*, No. 17-53 (July 10, 2017), 2017 WL 2954392; see also Brief in Opposition to Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit at 34, *S.C. Dep't of Corr. v. Booker*, No. 17-307 (Nov. 21, 2017), 2017 WL 5714616 (arguing in opposition to a grant of

diverse collection of organizations—including the ACLU, the Cato Institute, and the Law Enforcement Action Partnership—have submitted multiple amicus briefs 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.”<sup>16</sup> The Court has yet to grant certiorari in any of these cases, but there is every reason to believe this coalition of critics will continue to find opportunities to bring their arguments to the Court.

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*.<sup>17</sup> This Article focuses on another possible concern that has received far less attention but may be giving the Court even more pause:

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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”).

16. 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 at 6, *Almighty Supreme Born Allah v. Milling*, No. 17-8654 (U.S. July 11, 2018), 2018 WL 3388317 [hereinafter *Allah* Cross-Ideological Amicus Brief]; see also 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 at 4–5, *Baxter v. Bracey*, No. 18-1287 (U.S. May 31, 2019), 2019 WL 2370285; 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 at 6, *I.B. v. Woodard*, No. 18-1173 (U.S. Apr. 10, 2019), 2019 WL 1596323. The Cato Institute has been filing separate amicus briefs arguing in favor of reconsidering qualified immunity. See, e.g., Brief of the Cato Institute as Amicus Curiae Supporting Petitioner at 2–3, *Baxter v. Bracey*, No. 18-1287 (U.S. May 30, 2019), 2019 WL 2354727; Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 2–3, *I.B. v. Woodard*, No. 18-1173, (U.S. Apr. 10, 2019), 2019 WL 1596319. Scholars, myself included, have also submitted amicus briefs to the Court, urging reconsideration of qualified immunity doctrine. See, e.g., Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner at 4–5, *Almighty Supreme Born Allah v. Milling*, No. 17-8564 (U.S. July 11, 2018), 2018 WL 3388318; Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 3–5, *Baxter v. Bracey*, No. 18-1287 (U.S. May 31, 2019), 2019 WL 2354728; Brief of Scholars for the Law of Qualified Immunity as Amici Curiae Supporting Petitioners at 2–4, *I.B. v. Woodard*, No. 18-1173 (U.S. Apr. 10, 2019), 2019 WL 1596321.

17. For arguments that *stare decisis* should not impede reconsideration of qualified immunity, see Baude, *supra* note 3, at 80–82; Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 *Notre Dame L. Rev.* 1999, 2006–18 (2018). For arguments that the Supreme Court’s decisions reflect a deep commitment to the doctrine that cannot easily be disturbed, see generally Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 *Notre Dame L. Rev.* 1853 (2018) [hereinafter Nielson & Walker, *Qualified Defense*].

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 doctrine will do significant harm.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> In contrast, my views about a post-qualified immunity world are informed by the most comprehensive examination to date of the role

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18. *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

19. See, e.g., Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 *Calif. L. Rev.* 933, 975 (2019) [hereinafter Fallon, *Bidding Farewell*] (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*, 9 *Calif. L. Rev. Online* 41, 41 (2018) (eliminating qualified immunity would subject “police officers and other officials who deprive citizens of their constitutional rights . . . to much more liability than the current law permits”); Nielson & Walker, *Qualified Defense*, *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.”); Andrew King, *Keep Qualified Immunity . . . For Now*, *Mimesis* (July 1, 2016), <http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010> [<https://perma.cc/8LCT-GZCX>] (“Mostly, but for qualified immunity, it’s a bonanza for plaintiff’s lawyers.”).

20. See *supra* notes 18–19 and accompanying text.

qualified immunity plays in Section 1983 litigation—combining the results of a study examining the dockets in almost 1,200 federal civil rights cases filed in five federal districts over a two-year period<sup>21</sup> with surveys of almost 100 attorneys who entered appearances in these cases and in-depth interviews of thirty-five of these attorneys<sup>22</sup>—in conjunction with my studies of police indemnification practices and government budgeting for settlement and judgment costs,<sup>23</sup> and other studies of district and circuit court qualified immunity decisions.<sup>24</sup> 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, this Article offers five predictions about constitutional litigation after qualified immunity that differ markedly from conventional wisdom. First, there would be additional clarification of constitutional rights, but the 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 these 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,

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21. See generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *Yale L.J.* 2 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] (examining “the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, the courts’ assessments of defendants’ qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases’ dispositions”).

22. See generally Joanna C. Schwartz, *Qualified Immunity’s Selection Effects*, 114 *Nw. U. L. Rev.* (forthcoming 2020) (on file with the *Columbia Law Review*) [hereinafter Schwartz, *Selection Effects*] (describing an anonymous twenty-question survey asking about various aspects of respondents’ civil rights practice, as well as follow-up interviews with participating attorneys probing their views about qualified immunity and its effect on their case-selection decisions).

23. See generally Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 *UCLA L. Rev.* 1144 (2016) [hereinafter Schwartz, *How Governments Pay*] (examining the impact of lawsuit payouts on law enforcement agencies’ budgets); Schwartz, *Police Indemnification*, *supra* note 13 (examining the frequency with which law enforcement officers personally satisfy settlements and judgments entered against them).

24. See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 *S. Cal. L. Rev.* 1, 27–51 (2015); Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 *Emory L.J.* 55, 95–117 (2016) [hereinafter, Nielson & Walker, *Strategic Immunity*].

dramatically increase the rate at which plaintiffs prevail, or alter government indemnification, budgeting, and risk-management practices that dampen the effects of lawsuits on officers' and officials' behavior. 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 the criticism that it fails to hold government officials accountable when they exercise power irresponsibly.

These predictions should offer some comfort to the Justices on the Court who fear that doing away with qualified immunity could somehow jeopardize policing or “society as a whole.”<sup>25</sup> But these predictions should also temper the optimism of the doctrine's critics. 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.<sup>26</sup> 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. The first three Parts explore how the universe of civil rights 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 cases might change; and Part III predicts how the litigation of constitutional claims might change. Part IV considers how eliminating qualified immunity might impact the types and number of cases that are filed. Part V explores how eliminating qualified immunity might alter the deterrent effect of civil rights suits. Finally, the Conclusion summarizes these predictions and offers preliminary thoughts about how they might influence Supreme Court doctrine, scholarly commentary, and efforts to strengthen government accountability.

## 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 would restrict the scope of constitutional rights.<sup>27</sup> But this view overstates the extent to which courts are currently innovating and incorrectly assumes that courts would respond in lockstep to qualified immunity's elimination. Absent qualified immunity,

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25. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015)).

26. See, e.g., *supra* notes 7–8.

27. See *infra* notes 38–45, 58–60 and accompanying text (describing these concerns).

courts would almost certainly clarify constitutional law, but the scope of constitutional rights would not dramatically shift.

Qualified immunity doctrine, in its current form, obscures the contours of constitutional rights. 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.”<sup>28</sup> 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 its 2001 *Saucier v. Katz* decision, the Supreme Court instructed lower courts deciding qualified immunity motions to answer both questions as a means of allowing “the law’s elaboration from case to case.”<sup>29</sup> 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.<sup>30</sup>

The Court’s decision in *Pearson* has been widely criticized for creating confusion about the scope of constitutional rights. Commentators observe 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.”<sup>31</sup> This concern is particularly acute for constitutional claims regarding novel practices and technologies, like Tasers and drones, for which there are few pre-*Pearson* decisions, and it can take many cases over many years for circuits to issue clarifying rulings.<sup>32</sup> Studies of circuit court decisionmaking after *Pearson* support fears of constitutional obscurity: Approximately one-quarter of circuit court decisions grant defendants qualified immunity without first ruling on the constitutionality of defendants’ behavior.<sup>33</sup>

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28. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

29. 533 U.S. 194, 201 (2001).

30. 555 U.S. 223, 227 (2009).

31. Blum, *Time to Change*, supra note 2, at 1897. For one powerful example, see Barry Friedman, *Unwarranted: Policing Without Permission* 74–75 (2017) [hereinafter Friedman, *Unwarranted*] (describing several decisions finding 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, 51–52, 78–79 (2015).

32. See Schwartz, *Case Against*, supra note 1, at 1817; see also Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, 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.”); Blum, *Time to Change*, supra note 2, at 1897–98 (describing the law regarding the First Amendment right to record the police, which has developed over several years in circuit courts).

33. See Nielson & Walker, *The New Qualified Immunity*, supra note 24, at 33–34 (finding that 26.7% of post-*Pearson* circuit court decisions declared a right not clearly established without resolving the constitutional question); cf. Colin Rolfs, Comment, *Qualified Immunity After Pearson v. Callahan*, 59 *UCLA L. Rev.* 468, 491–93 (2011) (finding that 22.6% of district and circuit court decisions issued after *Pearson* granted qualified immunity

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 their analysis to whether the facts of a prior case were similar enough to "clearly establish" the unconstitutionality of defendants' conduct,<sup>34</sup> 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,<sup>35</sup> and begin dialogue with other branches of government and the body politic about shared constitutional principles.<sup>36</sup>

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.<sup>37</sup> The prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity.<sup>38</sup> Because qualified immunity doctrine allows courts

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without ruling on the merits). Studies examining appellate rulings before and after *Saucier* 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 tbl.1 (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, 711 tbl.4 (2009) (finding that appellate courts declined to reach constitutional questions in 22.2% of cases pre-*Saucier* and just 4.5% of cases post-*Saucier*).

34. See *infra* note 146 and accompanying text (describing the qualified immunity standard).

35. For further discussion of the relationship between court rulings and government policies and trainings, see *infra* note 262 and accompanying text.

36. See Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 654 (1993).

37. There is similar disagreement about whether *Saucier* caused courts to constrict the scope of constitutional rights. Compare Leong, *supra* note 33, at 670 (arguing that *Saucier*'s mandatory sequencing "leads to the articulation of more constitutional law, but not the expansion of constitutional rights" because courts do not want to issue decisions finding constitutional violations but granting qualified immunity), with John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 121–22 (rejecting the assumption that *Saucier* makes 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").

38. See, e.g., Richard H. Fallon, Jr., Asking the Right Questions About Officer Immunity, 80 Fordham L. Rev. 479, 480 (2011) [hereinafter Fallon, Right Questions] ("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."); John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 248 (2013) [hereinafter Jeffries, Liability Rule] ("[Without qualified immunity,] every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 914–15 (1999) (imagining that, if Congress expanded Section 1983 liability and eliminated qualified immunity, there "would be a wholesale rewriting of constitutional rights" and "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"

to announce a new constitutional right while shielding the government official who is a defendant in the case from damages, “Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout.”<sup>39</sup> Without qualified immunity, John Jeffries has observed, “[E]very extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages.”<sup>40</sup> This prospect might cause judges to rule against plaintiffs as a way of protecting defendants from financial liability.<sup>41</sup> To hit the point home, both John Jeffries and Richard Fallon have argued that if plaintiffs in *Brown v. Board of Education*<sup>42</sup> and *Miranda v. Arizona*<sup>43</sup> 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.<sup>44</sup> Accordingly, they suggest, those arguing to eliminate qualified immunity should be prepared to sacrifice decisions like *Brown* and *Miranda*.<sup>45</sup>

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;<sup>46</sup> neither *Brown* nor *Miranda* was brought against individual officers or sought damages.<sup>47</sup> 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.

Perhaps this reading of Fallon and Jeffries is too constrained. 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

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(citation omitted)); Wells, *supra* note 19, at 406 (“[E]liminating qualified immunity could result in dilution of the content of substantive constitutional rights.”).

39. Jeffries, *Liability Rule*, *supra* note 38, at 247.

40. *Id.* at 248.

41. *See id.*

42. 347 U.S. 483 (1954).

43. 384 U.S. 436 (1966).

44. Fallon, *Bidding Farewell*, *supra* note 19, at 968; John C. Jeffries, Jr., *The Right–Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 98–102 (1999) [hereinafter *Jeffries, Right–Remedy Gap*]; *see also* Jeffries, *Liability Rule*, *supra* note 38, at 248.

45. *See* Fallon, *Bidding Farewell*, *supra* note 19, at 968 (“[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, *Right–Remedy Gap*, *supra* note 44, at 101–02 (“Might *Brown* have come out differently if the decision had come with a huge pricetag? . . . Might the prospect of crippling judgments and school district bankruptcies have altered the terms of the debate? Or delayed the decision even further? Or stiffened the resolve of the initial dissenters . . . ?”).

46. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 13.

47. *See* *Miranda*, 384 U.S. at 477–79; *Brown*, 349 U.S. at 299–301.

plaintiffs would subsequently bring damages actions for violations of those newly articulated rights that would impose significant financial liability on individual defendants.<sup>48</sup> 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 modest percentage of most municipal and state budgets.<sup>49</sup> Moreover, today's Court is highly unlikely—even with the protections of qualified immunity—to issue expansive constitutional decisions like *Brown* and *Miranda*.<sup>50</sup> Perhaps the Court could issue such decisions again in the future—anything is possible.<sup>51</sup> But eliminating qualified immunity has little risk of imperiling these types of decisions any time soon.

Qualified immunity does not appear to encourage expansive rulings by lower courts, either. 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).<sup>52</sup> But courts infrequently rule on qualified immunity motions in this manner.<sup>53</sup> 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

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48. See, e.g., Fallon, Bidding Farewell, *supra* note 19, at 968 (“[I]f . . . *Brown* . . . and *Miranda* . . . had included damages remedies against school officials who had maintained racially segregated classrooms or against judges who had allowed the admission of confessions obtained without *Miranda* warnings, the Court might have felt unable to decide *Brown* and *Miranda* as it did.” (footnotes omitted)); Jeffries, Right–Remedy Gap, *supra* note 44, at 103 (asking if the Supreme Court might have decided *Green v. County School Board* differently “if announcing an ‘affirmative duty’ to eliminate racially identifiable schools had meant huge damages judgments against Southern school districts”).

49. See Schwartz, Police Indemnification, *supra* note 13, at 913 (reporting that officers rarely contribute to settlements and judgments); see also *infra* notes 240–243 and accompanying text (describing the financial burdens lawsuits place on the government fisc).

50. 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 Chief Justices Burger, Rehnquist, and Roberts).

51. E.g., Fallon, Bidding Farewell, *supra* note 19, at 975 (“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.”).

52. See generally Jeffries, Right–Remedy Gap, *supra* note 44 (“[Qualified immunity] allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice.”).

53. See Nielson & Walker, *The New Qualified Immunity*, *supra* note 24, at 37 (finding that, post-*Pearson*, 3.6% of circuit court qualified immunity decisions found constitutional violations but granted qualified immunity); Rolfs, *supra* note 33, at 493 & fig.2 (finding that, post-*Pearson*, approximately 2.5% of qualified immunity decisions found constitutional violations but granted qualified immunity); Ted Sampson-Jones & Jenna Yauch, Note, *Measuring Pearson in the Circuits*, 80 *Fordham L. Rev.* 623, 628 (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 33, did not include findings relevant to this question because they did not study cases post-*Pearson*.

question.<sup>54</sup> Even when courts do find a constitutional violation but grant qualified immunity, most decisions do not appear to dramatically 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.<sup>55</sup> 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.”<sup>56</sup> There is no reason to conclude that the protections of qualified immunity are what motivated judges to find constitutional violations in these cases.<sup>57</sup> 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. Both Richard Fallon and Daryl Levinson 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.”<sup>58</sup> When one component of the bundle is restricted or expanded, courts may adjust other components to maintain equilibrium in the relationship between rights and remedies.<sup>59</sup> Accordingly, both predict, were qualified immunity eliminated, courts would respond by restricting the scope of constitutional rights.<sup>60</sup> 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.<sup>61</sup> 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

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54. See Nielson & Walker, *The New Qualified Immunity*, *supra* note 24, at 37 (canvassing several 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)).

55. See Schwartz, *Case Against*, *supra* note 1, at 1827 (reviewing forty-three cases, four of which concluded that other decisions had clearly established the law).

56. *Id.*

57. See *infra* notes 65–70 and accompanying text (describing a range of beliefs, interests, and affiliations that are believed to guide judicial decisionmaking).

58. Fallon, *Right Questions*, *supra* note 38, at 480; see also Levinson, *supra* note 38, at 858 (describing the ways in which constitutional “rights and remedies are inextricably intertwined”).

59. See Fallon, *Right Questions*, *supra* note 38, at 480 (describing his “Equilibration Thesis”); Levinson, *supra* note 38, at 857–60 (describing his theory of “remedial equilibration”).

60. See *supra* note 38 (describing this concern).

61. *Arizona v. Gant*, 556 U.S. 332, 349 n.11 (2009).

protections for defendants on the one hand,<sup>62</sup> and weakened plaintiffs' substantive constitutional protections on the other.<sup>63</sup> The Court's interpretations of related doctrines and rules have similarly favored government defendants.<sup>64</sup> Far from creating equilibrium, the Supreme Court's qualified immunity, justiciability, procedural, and substantive constitutional decisions have acted as a one-way ratchet.

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. Even if so, 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.<sup>65</sup> In studies 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 and by the political affiliation of the president who appointed them and other members of their panel.<sup>66</sup> Nielson and Walker found that the Fifth Circuit is more likely than circuit courts, on average, to rule on the merits of constitutional claims in its qualified immunity decisions and less likely than the average circuit to

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62. See *supra* notes 2–5 and accompanying text.

63. See Chemerinsky, *supra* note 50, at 6 (describing the Supreme Court's tendency to "side[] with big business and government power" and limit the rights of smaller, less powerful plaintiffs). For exploration of the Court's restrictive Fourth Amendment rulings, see Friedman, *Unwarranted*, *supra* note 31, at 74–76 (describing the Supreme Court's ineffectual regulation of law enforcement); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 *UCLA L. Rev.* 1508, 1515 (2017) (describing how the doctrine governing stop-and-frisk is "one of the factors that cause African Americans to have repeated interactions with the police in ways that overexpose them to the possibility of violence"); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 *Calif. L. Rev.* 125, 129 (2017) ("[T]he Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling.").

64. See, e.g., Chemerinsky, *supra* note 50, at 197–228 (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).

65. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice* 26–30 (2013) (arguing that ideology plays a role in judicial decisionmaking); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 24–40 (2006) (identifying differences in the ways that judges appointed by Democrats and Republicans interpret the law). But see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *Duke L.J.* 1895, 1928 (2009) (arguing that law, precedent, and deliberation primarily influence judicial decisionmaking); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 *Vand. L. Rev.* 2051, 2097 (2017) ("[P]olitical attitudes have exhibited a weak effect on judicial decisionmaking.").

66. See Nielson & Walker, *The New Qualified Immunity*, *supra* note 24, at 39–49; Nielson & Walker, *Strategic Immunity*, *supra* note 24, at 101–10.

recognize new constitutional rights.<sup>67</sup> The Ninth Circuit is equally unusual but in the opposite way—less likely than circuit courts, on average, to rule on the merits of constitutional claims in its qualified immunity decisions and more likely to recognize new constitutional rights.<sup>68</sup> Nielson and Walker have also found circuit court differences in the application of qualified immunity that correlate with the political affiliation of the president(s) who appointed the members of the panel.<sup>69</sup> 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.”<sup>70</sup>

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, these 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 might restrict constitutional rights—as Jeffries, Fallon, and Levinson have predicted<sup>71</sup>—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 might not change the substance of their rulings—either because they recognize government officials are virtually never held personally responsible for settlements and judgments entered against them,<sup>72</sup> 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 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.<sup>73</sup> Nielson and Walker surmise that courts may

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67. See Nielson & Walker, *The New Qualified Immunity*, supra note 24, at 39–42.

68. See *id.*

69. See *id.* at 43–49; Nielson & Walker, *Strategic Immunity*, supra note 24, at 101–10.

70. Nielson & Walker, *Strategic Immunity*, supra note 24, at 109–10.

71. See supra note 38 and accompanying text.

72. See Schwartz, *Police Indemnification*, supra note 13, at 912–17 (finding officers rarely contribute to settlements and judgments).

73. See, e.g., Nielson & Walker, *The New Qualified Immunity*, supra note 24, 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

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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> In a world without qualified immunity, courts could not have avoided this difficult constitutional question and might have announced the right exists sooner.

Eliminating qualified immunity might hasten the articulation of new rights for another reason—plaintiffs might be more willing to file cases alleging novel constitutional claims. Some plaintiffs’ attorneys decline cases alleging novel claims for fear that courts will grant defendants qualified immunity.<sup>77</sup> 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—plaintiffs and their attorneys will bring fewer such cases, and it will take even longer to get rulings delineating the scope of those rights.<sup>78</sup> 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. Some courts might 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 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

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cases). But see Leong, *supra* note 33, at 693 (arguing that *Saucier* may have caused courts to restrict the scope of rights).

74. Nielson & Walker, *The New Qualified Immunity*, *supra* note 24, at 38.

75. See Blum, *Time to Change*, *supra* note 2, at 1897.

76. See *id.*

77. See *infra* Part IV; see also Schwartz, *Selection Effects*, *supra* note 22 (manuscript at 41–44).

78. 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, 1111–12 (2011).

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-appointed judges and panels would be more likely to announce new constitutional rights, and Republican-appointed judges and panels would be more likely to limit constitutional protections.<sup>79</sup> It also may be that 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.<sup>80</sup> 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 they 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.<sup>81</sup> Some view this prospective expansion of liability in a positive

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79. See *supra* note 70 and accompanying text.

80. See, e.g., Blum, *Time to Change*, *supra* note 2, at 1918–22 (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.* 2065, 2071 (2018) (describing variation across circuits regarding the burdens of establishing qualified immunity); Charles R. Wilson, "Location, Location, Location": Recent Developments in 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' interpretations of relevant procedural and substantive rules, see Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 *Mich. L. Rev.* (forthcoming 2020) (manuscript at 38–41), <https://ssrn.com/abstract=3435911> (on file with the *Columbia Law Review*).

81. 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." (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); see also, e.g., Martin A. Schwartz, *Fed. Judicial Ctr.*, Section 1983 Litigation 143 (Kris Markarian ed., 3d ed. 2014), <https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf> [<https://perma.cc/44MG-G3HG>] ("[C]ourts decide a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity."); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 *Fla. L. Rev.* 851, 852 (2010) [hereinafter Jeffries, *What's Wrong*] ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in

light, imagining it would create greater incentives for government officials to comply with the law.<sup>82</sup> Others take a more negative view. As one commentator has written: “[B]ut for qualified immunity, it’s a bonanza for plaintiff’s lawyers.”<sup>83</sup> 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 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.<sup>84</sup> 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. There would likely be more plaintiff successes in absolute terms, because more suits would be filed,<sup>85</sup> but civil rights plaintiffs’ rates of success would not significantly change in a world without qualified immunity.

In making these 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.<sup>86</sup> I examined the dockets, briefs, and decisions in 1,183 cases filed in these five districts over a two-year period, and tracked the frequency with which qualified immunity was raised, successful, and dispositive.<sup>87</sup> I then surveyed almost one hundred plaintiffs’

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other words, to create immunity from *trial* as well as from *liability*—has been largely successful.” (footnotes omitted)); Levin & Wells, *supra* note 19, at 41 (predicting that eliminating qualified immunity could cause “police officers and other officials who deprive citizens of their constitutional rights [to] be subject to much more liability than the current law permits”); 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”).

82. See, e.g., Levin & Wells, *supra* note 19, at 41 (predicting that doing away with qualified immunity would “incentivize officials acting under the color of law to better respect and protect individuals’ rights, which is more than the Court’s § 1983 doctrine currently encourages”).

83. King, *supra* note 19.

84. See *infra* notes 92–121 and accompanying text (describing data supporting these conclusions).

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

86. My study focuses on suits against law enforcement both because law enforcement officials are often defendants in the Supreme Court’s qualified immunity cases, and because limiting the study to cases against one type of government official creates some substantive consistency across cases. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 22. I chose the five districts—the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Pennsylvania—because I expected judges from these districts would vary in their approaches to qualified immunity, and because the districts have a large number of cases and “a range of small, medium, and large law enforcement agencies.” See *id.* at 19–20.

87. For further discussion of the study’s methodology, see *id.* at 19–25.

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.<sup>88</sup> All empirical studies have limitations, and this study is no exception. It focuses on Section 1983 cases brought against one type of government defendant, in a handful of districts, over a limited period of time.<sup>89</sup> Nevertheless, 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 the docket dataset were dismissed. If one adopts the standard measure of success—as split or full jury verdicts, settlements, and voluntary or stipulated dismissals<sup>90</sup>—plaintiffs succeeded in 682 (57.7%) of the 1,183 cases, and failed in 467 (39.5%) cases.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> Approximately 40% of the cases that failed (191) were dismissed on

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88. See Schwartz, Selection Effects, *supra* note 22 (manuscript at 11–15) (describing the survey and interviews).

89. For further discussion of these methodological limitations, see Schwartz, How Qualified Immunity Fails, *supra* note 21, at 23–25; Schwartz, Selection Effects, *supra* note 22 (manuscript at 13–15).

90. 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) [hereinafter Reinert, Measuring *Bivens* Success] (describing the common definition of plaintiff “success” in similar studies of civil rights litigation).

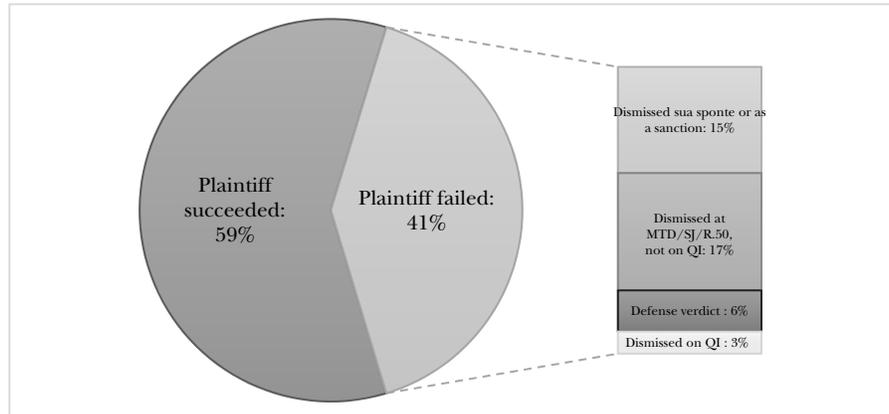
91. See Schwartz, How Qualified Immunity Fails, *supra* note 21, at 46 tbl.12. In line with this definition of “success,” the 682 number is the sum of cases coded as Settlement/R. 68 Judgment (490); Voluntary/stipulated dismissal (182); Trial—plaintiff verdict (7); and Split verdict (3). *Id.* Note that there were thirty-four cases in the 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 are currently on appeal; or fell into a miscellaneous category and so are counted neither as successes nor failures for the purposes of this discussion. *Id.*

92. See *id.* Reinert reached similar findings regarding the frequency with which *Bivens* claims are dismissed on qualified immunity grounds. See Reinert, Measuring *Bivens* Success, *supra* note 90, at 843 (finding qualified immunity to be “the basis for a dismissal in only 5 out of the 244 complaints studied”). Note that I previously reported thirty-eight cases that were dismissed on qualified immunity grounds, see Schwartz, How Qualified Immunity Fails, *supra* note 21, at 46 tbl.12, but when reviewing these thirty-eight opinions for inclusion in this Article’s Appendix I realized I had mischaracterized the dispositions of two cases from the Eastern District of Pennsylvania. I had improperly coded one case as dismissed on qualified immunity grounds at the summary judgment stage and one dismissed on qualified immunity grounds on appeal.

93. Schwartz, How Qualified Immunity Fails, *supra* note 21, at 46 tbl.12.

motions to dismiss or for judgment on the pleadings, at summary judgment, or on motions for judgment as a matter of law at or after trial on grounds other than qualified immunity.<sup>94</sup> Another 14% of cases (67) resulted in defense verdicts after trial.<sup>95</sup> 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 was 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.<sup>96</sup> 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.<sup>97</sup> But twenty-eight (21.4%) were dismissed at the motion to dismiss and summary judgment stages on other grounds, and thirteen (9.9%) were dismissed

94. *Id.* I did not track the causes for dismissal of these cases, but at the motion to dismiss stage, many claims were dismissed because plaintiffs had not pled their claims plausibly or because a criminal conviction barred the claims, and at the summary judgment and directed verdict stages, courts often found that the plaintiffs had not presented sufficient evidence to create a material factual dispute about the existence of a constitutional violation. See *id.* at 34, 57.

95. *Id.* at 46 tbl.12. 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, *Qualified Immunity at Trial*, *supra* note 80, at 2088.

96. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 46 tbl.12, 49–50 (setting out the bases for the dispositions in all five districts and discussing regional variation in the findings).

97. *Id.* at 46 tbl.12.

sua sponte by the court, as a sanction, or for failure to prosecute.<sup>98</sup> 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.<sup>99</sup>

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 her case.<sup>100</sup> I have previously recognized that qualified immunity could play an indirect role in case dispositions,<sup>101</sup> and Aaron Nielson and Chris Walker have suggested that qualified immunity's "core effectiveness" may lie in these types of informal effects.<sup>102</sup>

But the data do not bear out this theory. A closer look at the docket dataset makes clear that there were 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 "failed" but were not formally dismissed on qualified immunity grounds.<sup>103</sup> 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.<sup>104</sup> In nineteen cases, defendants raised qualified immunity at some point during litigation, lost those motions in their entirety, and then prevailed at trial.<sup>105</sup> So, in 407 (94.4%) of the 431

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98. See *id.*

99. See *id.*

100. For further discussion of the costs associated with defending against qualified immunity motions, see *infra* Part III; see also Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 492–94 (2011) (exploring the role qualified immunity plays in attorneys' decisions to file *Bivens* claims, and finding that qualified immunity increases the time and cost of litigation).

101. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 51 (providing data suggesting that qualified immunity defenses, once raised, could encourage settlement and also noting that the doctrine could discourage filing lawsuits in the first place).

102. Nielson & Walker, *Qualified Defense*, *supra* note 17, at 1881 ("[Qualified immunity's] main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all or encouraging plaintiffs to settle before discovery or trial and/or for far less than they would in a world without qualified immunity.").

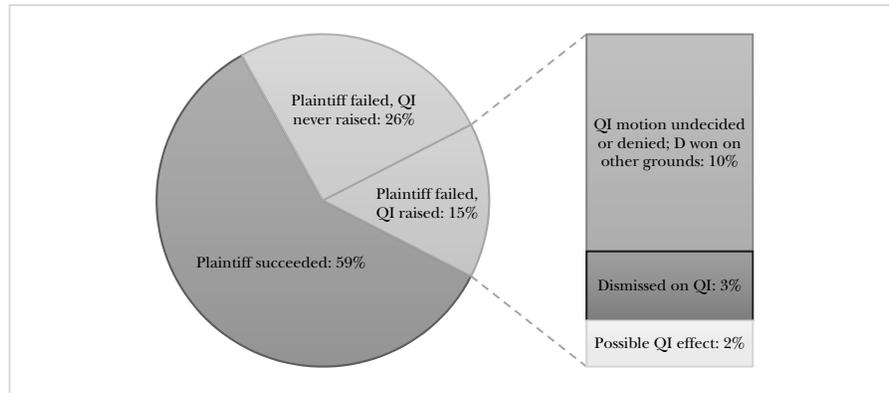
103. See Joanna C. Schwartz, *Five Districts Dataset* (2018) (on file with the *Columbia Law Review*) [hereinafter Schwartz, *Five Districts Dataset*]. I arrived at this figure using my dataset first by isolating the cases where plaintiffs "failed"—meaning plaintiffs' cases were dismissed without payment. For the case dispositions counted as "successes," see *supra* note 90 and accompanying text. My data shows that plaintiffs "failed" in 431 cases across the five districts over a two-year period. Then, I examined whether qualified immunity was ever raised in those 431 cases, whether in a motion for dismissal, motion for summary judgment, or Rule 50 motion. I found that qualified immunity was never raised in 294 of the 431 cases in which plaintiffs failed and was raised in the remaining 137 cases.

104. *Id.*

105. *Id.*

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.<sup>106</sup> 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.<sup>107</sup> 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 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 62.7% across the five districts in my study.

But there is good reason to believe that many if not most of the plaintiffs in these sixty cases would have failed even absent qualified

106. *Id.*

107. *Id.*

immunity. 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.<sup>108</sup> In twenty-five of the thirty-six cases, the 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).<sup>109</sup> 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.<sup>110</sup> 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. It is impossible to 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.<sup>111</sup> When I surveyed attorneys about the biggest obstacle to bringing police misconduct cases, attorneys' most common answer was juries (with judges in second place).<sup>112</sup> Many attorneys I interviewed agreed that juries and judges are often more sympathetic to government defendants, more likely to believe officers at trial, and hostile to plaintiffs' claims.<sup>113</sup> Several attorneys reported losing

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108. *Dunklin v. Mallinger*, No. C-11-01275 JCS, 2013 WL 1501446, at \*19 (N.D. Cal. Apr. 10, 2013) (“The Court finds that there are significant fact questions that preclude summary judgment on the question of whether Mr. Dunklin’s Fourth Amendment right to be free from excessive force was violated.”).

109. See *infra* Appendix (setting out the courts’ rationale in the thirty-six cases dismissed on qualified immunity grounds).

110. See *id.*

111. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, 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. See *id.*

112. See Schwartz, *Selection Effects*, *supra* note 22 (manuscript app. at 57 tbl.6).

113. See, e.g., Telephone Interview with E.D. Pa. Attorney A (May 14, 2017) (explaining that federal juries are often conservative and “when we win . . . they give us very little”); Telephone Interview with M.D. Fla. Attorney F (Dec. 13, 2017) (noting “the jurors here are pretty damn conservative in the federal court” and “the judges are unsympathetic”); Telephone Interview with S.D. Tex. Attorney D (May 1, 2017) (“[A] lot of the judges here are pro-police, pro-government and the cases are just more difficult to prosecute here.”). Note, however, that attorneys varied to some degree in their views depending on their jurisdiction. See, e.g., Telephone Interview with N.D. Cal. Attorney D (Nov. 10, 2017) (“I view [federal judges] generally favorably.”). For discussion of this regional variation, see Schwartz, *Civil Rights Ecosystems*, *supra* note 80 (manuscript at 10–12) (“Judges can differ considerably in their approach to substantive and procedural questions relevant to civil rights litigation, and local communities—from which juries are drawn—can vary considerably in their sympathies toward government defendants and civil rights plaintiffs.” (footnote omitted)).

cases at trial despite egregious facts, and blamed those losses on juries' predisposition against their clients.<sup>114</sup> 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 win more often.<sup>115</sup>

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.<sup>116</sup> 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

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114. See, e.g., Telephone Interview with M.D. Fla. Attorney A (Apr. 28, 2017) (explaining that judges in the Middle District of Florida “see these cases as almost a nuisance, waste of time” and describing a case in which a jury awarded \$1 to a man who, while in handcuffs, was kned in the abdomen so hard that he lost his spleen); Telephone Interview with M.D. Fla. Attorney C (Nov. 15, 2017) (describing an excessive force case in which the plaintiff was awarded \$2,500, which amounted to half of his medical bills); Telephone Interview with M.D. Fla. Attorney E (Nov. 30, 2017) (describing a case where the plaintiff was bitten by a dog, and the plaintiff was left “with [a] leg that look[ed] like a chicken bone” and the jury entered a defense verdict, as well as multiple other cases that resulted in defense verdicts); Telephone Interview with M.D. Fla. Attorney F, *supra* note 113 (describing a week-long trial in a case involving a beaten inmate in which the jury found in favor of the plaintiff and awarded punitive damages but no compensatory damages).

115. See, e.g., Telephone Interview with M.D. Fla. Attorney E, *supra* note 114 (predicting that, absent qualified immunity, cases would “actually get to go to juries more often and let them decide . . . [but] [i]t's still a hard road to hoe”); Telephone Interview with N.D. Cal. Attorney C (Nov. 7, 2017) (predicting that, without qualified immunity, some additional cases “would settle or would go to trial and be successful, but . . . it's kind of hard to predict what juries are going to do . . . there's just too many people out there who want to support the police, right or wrong”); Telephone Interview with N.D. Cal. Attorney E (Nov. 17, 2017) (“[I]f they eliminated qualified immunity, I would have more cases [going] to trial. And I would be in front of a jury. In terms of my overall success rate, in all honest[y], I don't think it would make . . . that much difference.”); Telephone Interview with N.D. Ohio Attorney D (Nov. 20, 2017) (responding “no, not really” when asked whether he would win cases more often in a world without qualified immunity); Telephone Interview with N.D. Ohio Attorney F (Dec. 9, 2017) (responding, when asked about whether he would win more often at trial absent qualified immunity, “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”); Telephone Interview with N.D. Ohio Attorney G (Dec. 11, 2017) (predicting more trials, but also stating, “I don't think I'd win any more cases”).

116. *Porter v. City of Santa Rosa*, No. 11-cv-04886-EDL, slip op. at 6–12 (N.D. Cal. July 2, 2012) (granting in part and denying in part defendants' motion for summary judgment).

motions were denied or granted in part on other grounds before the attorney's failure to comply.<sup>117</sup> Nine of the cases dismissed for failure to prosecute were litigated by pro se plaintiffs who failed to respond to motions or comply with court orders.<sup>118</sup> Cases brought by pro se plaintiffs often fail, regardless of whether defendants raise qualified immunity.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

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117. See Docket for *Whitaker v. Alameda Cty.*, No. 3:12-cv-05923-JD (N.D. Cal. filed Nov. 20, 2012) (denying defendant's motion to dismiss on qualified immunity but ultimately dismissing the case for failure to prosecute when the plaintiff's attorney missed two pretrial conferences, writing to the court that he had been on medical leave); Docket for *Powell v. County of Delaware*, No. 2:12-cv-06285-PBT (E.D. Pa. filed Nov. 7, 2012) (granting in part the defendant-detectives' motion for judgment on the pleadings in an unwritten order but ultimately dismissing the rest of the claims because plaintiff never wrote a requested letter); Docket for *Lathan v. City of Cleveland*, No. 12-cv-0037, 2012 WL 1708762, at \*3–6 (N.D. Ohio May 15, 2012) (granting defendants' motion to dismiss in part on grounds other than qualified immunity with leave to file an amended complaint, but the attorney never served an amended complaint on defendants)).

118. See Order Dismissing Action for Failure to Comply with Court Orders, *Cannon v. City of Petaluma*, 3:11-cv-00651-JST (N.D. Cal. filed July 8, 2013) (dismissing a pro se plaintiff's case for failing to comply with the court's orders); Order Dismissing This Matter for Want of Prosecution, *Murphy v. Nw. Sch. Dist.*, No. 5:12-cv-02429-JRA (N.D. Ohio filed Apr. 26, 2013) (dismissing a pro se plaintiff's case for failure to prosecute); Order Dismissing Case with Prejudice, *Durham v. City of Palo Alto*, No. 5:12-CV-00666-LHK (N.D. Cal. filed Jan. 23, 2013) (dismissing a pro se plaintiff's case for failure to prosecute after the plaintiff failed to respond to a motion for summary judgment); Docket for *Barberi v. Freitas*, No. 3:12-cv-06311-WHA (N.D. Cal. filed Dec. 12, 2012) (dismissing a pro se plaintiff's case for failure to prosecute while a motion to dismiss on qualified immunity grounds was pending); Docket for *Collura v. City of Philadelphia*, No. 2:12-cv-04398-JD (E.D. Pa. filed Aug. 2, 2012) (dismissing the case as a sanction because the pro se plaintiff did not comply with several court orders); Docket for *Johnson-Slaughter v. Ahern*, No. 3:12-cv-02385-SI (N.D. Cal. filed May 11, 2012) (same); Docket for *Grogg v. Gee*, No. 8:11-cv-02646-MSS-MAP (M.D. Fla. filed Nov. 25, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after the plaintiff's counsel withdrew from the case while the motion to dismiss raising qualified immunity was pending); Docket for *Hickman v. City of Berkeley*, No. 3:11-cv-04395-EDL (N.D. Cal. filed Sept. 2, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after plaintiff's counsel withdrew from the case while a summary judgment motion raising qualified immunity was pending, and granting the summary judgment motion on qualified immunity in the alternative); Docket for *Silverman v. City & County of San Francisco*, No. 4:11-cv-01615-SBA (N.D. Cal. filed Apr. 1, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after plaintiff's counsel withdrew from the case while a summary judgment motion raising qualified immunity was pending).

119. See Schwartz, *Selection Effects*, supra note 22 (manuscript at 26) (describing failure rates in pro se cases).

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

121. See supra note 94 and accompanying text (describing the frequency of and bases for dismissal at the motion to dismiss and summary judgment stages); supra notes 111–115 and accompanying text (describing the likelihood of success at trial).

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 because 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.<sup>122</sup>

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 docket dataset were never decided, presumably because the cases settled while the motions were pending.<sup>123</sup> 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.<sup>124</sup> As I have explained, defendants win the vast majority of cases that go to trial and attorneys view jurors as hostile to these cases.<sup>125</sup> 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 plaintiffs' success rate is unlikely to change markedly 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 country 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.<sup>126</sup> Many of

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122. For further discussion of the ways qualified immunity can reduce the value of plaintiffs' claims, see Schwartz, Selection Effects, *supra* note 22 (manuscript at 51).

123. See Schwartz, How Qualified Immunity Fails, *supra* note 21, at 51.

124. See *supra* note 115 (describing attorneys' predictions that more cases would go to trial without qualified immunity).

125. See *supra* notes 112–115 and accompanying text.

126. See, e.g., *Chambers v. Pennycook*, 641 F.3d 898, 901–02 (8th Cir. 2011) (finding that the plaintiff's constitutional rights were violated when police officers kicked and choked him while he was restrained and intentionally drove erratically so that the plaintiff

these decisions describe tragic facts and clear misconduct: defendants who have searched homes without probable cause, fabricated evidence, and used excessive force, but are nevertheless shielded from liability.<sup>127</sup> These decisions deny what is often the best available relief<sup>128</sup> to plaintiffs who have been grievously wronged by government actors, suggest to government officials that they can violate the law with impunity,<sup>129</sup> and send the troubling message to victims of misconduct that they are not deserving of constitutional protection.<sup>130</sup> 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.<sup>131</sup> Yet courts infrequently grant qualified immunity after finding constitutional violations.<sup>132</sup> Far more often, courts granting qualified immunity also find that the plaintiff failed on their constitutional claim, or express great skepticism about the merits of that claim.<sup>133</sup> 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

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was “jerked back and forth in his seat,” but granting qualified immunity); *Coates v. Powell*, 639 F.3d 471, 476–77 (8th Cir. 2011) (finding that the plaintiff’s constitutional rights were violated when an officer remained in the plaintiff’s house after consent was revoked, but granting qualified immunity); *Costanich v. Dep’t of Soc. & Health Servs.*, 627 F.3d 1101, 1113–14 (9th Cir. 2010) (finding that the 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); *Bryan v. MacPherson*, 630 F.3d 805, 827, 832–33 (9th Cir. 2010), superseding 608 F.3d 614 (9th Cir. 2010) (finding that an officer violated the Fourth Amendment when he used a Taser against a plaintiff who was unarmed and “far from an ‘immediate threat,’” but granting qualified immunity); *Cordova v. Aragon*, 569 F.3d 1183, 1189, 1195 (10th Cir. 2009) (finding that the decedent’s constitutional rights were violated when an officer shot him in the back of his head as he was driving away, but granting qualified immunity). For additional decisions see *Allah Cross-Ideological Amicus Brief*, *supra* note 16, at 15–17 (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’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); *Schwartz, Case Against*, *supra* note 1, at 1840–51 (describing forty-three cases in which courts found constitutional violations but granted qualified immunity).

127. See *supra* note 126.

128. Although there are other possible forms of oversight—including criminal prosecution and internal discipline—these approaches “often fail or are otherwise unavailable.” *Allah Cross-Ideological Amicus Brief*, *supra* note 16, at 12–13. See generally Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. Chi. Legal Forum 437 (describing various forms of government regulation and their strengths and limitations).

129. See *supra* notes 6–8.

130. For the legal estrangement that can result from being denied constitutional protections, see generally Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054 (2017).

131. See *supra* note 81 and accompanying text.

132. See *supra* note 53.

133. See *supra* note 54.

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.<sup>134</sup>

For reasons I will soon explain, eliminating qualified immunity would likely result in more civil rights cases filed.<sup>135</sup> More attorneys might be inclined to take civil rights cases, and attorneys who already take some civil rights cases might devote a greater percentage of their docket to this area of their practice.<sup>136</sup> Plaintiffs' attorneys who currently bring civil rights cases might also be more inclined, absent qualified immunity, to file cases alleging novel constitutional violations, false arrest cases, and cases with limited damages.<sup>137</sup> It is impossible to know how many more cases would be filed in a world without qualified immunity. But these additional cases would likely have a similar success rate as cases filed today.<sup>138</sup> Plaintiffs in these cases would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary bases for dismissal.<sup>139</sup> And

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134. See *supra* notes 91–99 and accompanying text.

135. See *infra* Part IV.

136. See *infra* note 221 and accompanying text.

137. See *infra* notes 217–220 and accompanying text.

138. 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. Legal 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. Legal 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, 431 (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 believe that plaintiff success rates are impervious to changes in legal standards. Instead, a combination of factors—including state and federal liability rules, procedural rules, jury pools, judges, and the plaintiffs' bar—influence plaintiffs' success rates. See Schwartz, *Civil Rights Ecosystems*, *supra* note 80, at 38–41. My prediction that success rates would not change absent qualified immunity is based on my view that qualified immunity currently plays a limited role in most case dispositions, and so eliminating qualified immunity without adjusting other legal rules and characteristics of civil rights litigation is unlikely to dramatically affect the distribution of dispositions.

139. See *supra* notes 91–99 and accompanying text (describing the bases for dismissal of cases in my dataset); see also *Allah* Cross-Ideological Amicus Brief, *supra* note 16, at 19–20 (“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 other[] [contexts].”); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 *Wm. & Mary Bill Rts. J.* 913, 915, 964 (2015) [hereinafter Blum, *Section 1983 Litigation*] (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).

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.<sup>140</sup> 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.”<sup>141</sup>

### 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.<sup>142</sup> 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. Doing away with qualified immunity will likely cause the total number of cases filed to increase,<sup>143</sup> but eliminating qualified immunity would likely decrease the average 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 1,183 cases in my docket dataset.<sup>144</sup> In sixty of these cases, defendants raised qualified immunity two or more times during the course of litigation.<sup>145</sup> 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

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140. For further discussion of attorneys’ case selection decisions absent qualified immunity, see *infra* Part IV.

141. King, *supra* note 19.

142. See, e.g., *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.’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))); *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.” (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987))); *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”).

143. See *infra* Part IV.

144. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 29 & tbl.2. 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 *id.*

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

similar cases—that would put the defendant on notice that their conduct was unlawful.<sup>146</sup> So, for a plaintiff to effectively respond to a qualified immunity motion, they 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.<sup>147</sup> But qualified immunity, criticized by both commentators and courts for its complexity, is considered a particularly difficult issue to brief and decide.<sup>148</sup> As one attorney I interviewed explained, eliminating qualified immunity would make litigation “less burdensome definitely” because it is “the biggest [defense] that you have to confront.”<sup>149</sup>

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.<sup>150</sup> 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.<sup>151</sup> Attorneys must take time to research, brief, and argue

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146. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (explaining that defendants violate “clearly established law” only when “[t]he contours of [a] right [are] sufficiently clear” that every “reasonable official would [have understood] that what he is doing violates that right” (quoting *Anderson*, 483 U.S. at 640)); *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).

147. See Schwartz, *How Qualified Immunity Fails*, supra note 21, at 35 & figs.1 & 2 (reporting the frequency with which motions to dismiss and summary judgment motions included a qualified immunity argument).

148. See, e.g., Blum, *Section 1983 Litigation*, supra note 139, at 925 (“One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.” (footnote omitted)); 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, *What’s Wrong*, supra note 81, at 852 (calling qualified immunity “a mare’s nest of complexity and confusion”).

149. Telephone Interview with N.D. Cal. Attorney B (Oct. 23, 2017); see also Telephone Interview with E.D. Pa. Attorney A, supra note 113 (explaining that defendants use qualified immunity to “beat down the plaintiff’s counsel” and make their lives “somewhat miserable”); Telephone Interview with M.D. Fla. Attorney B (Oct. 30, 2017) (explaining that qualified immunity requires attorneys to “litigate everything to the nth degree”); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (predicting that his fees would “go down” if qualified immunity were eliminated).

150. See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (“[A] district court’s denial of qualified immunity, to the extent it turns on an issue of law, is an appealable ‘final decision’ . . . .”) (quoting 12 U.S.C. § 1291 (1984)).

151. See Schwartz, *How Qualified Immunity Fails*, supra note 21, at 40 tbl.9. 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 filed cases. In contrast, in the Northern District of Ohio, defendants filed interlocutory appeals in almost 10% of filed cases. See *id.*

oppositions to interlocutory appeals, and courts of appeals must take time to consider and decide the appeals.

Third, cases can be suspended while qualified immunity motions and appeals are pending. The Supreme Court has described qualified immunity as “an immunity from suit rather than a mere defense to liability,”<sup>152</sup> and has instructed that, when defendants raise qualified immunity, lower courts “should resolve that threshold question before permitting discovery.”<sup>153</sup> District courts appear to have heeded the Court’s instruction: Although they have broad discretion to grant stays,<sup>154</sup> district courts have characterized this power as particularly important when qualified immunity motions are pending.<sup>155</sup> Defendants received formal discovery stays—lasting 152 days, on average—in almost 6% of the cases in the docket dataset in which qualified immunity was raised at the motion to dismiss stage.<sup>156</sup> Cases are also suspended while interlocutory appeals are pending; among the cases in the docket dataset, interlocutory appeals were pending for 441 days on average before being decided.<sup>157</sup> Several attorneys I interviewed predicted that eliminating qualified immunity would reduce the amount

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152. *Mitchell*, 472 U.S. at 526.

153. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).

154. 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.”); *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

155. See, e.g., *Slocum v. Fowler*, No. 2:16-cv-02169-JAD-CWH, 2018 WL 4468998, at \*2–3 (D. Nev. Sept. 18, 2018) (quoting *Crawford-El*, 523 U.S. at 597–98) (granting stay of discovery while a qualified immunity motion was pending, observing that “[o]nce the issue of qualified immunity is raised, the court must exercise its discretion to protect the substance of the qualified immunity defense, and to prevent subjecting officials to ‘unnecessary and burdensome discovery.’”); *Alvarez-Cortez v. Vallaria*, No. 11-cv-02307-WYD-KMT, 2012 WL 12863, at \*3 (D. Colo. Jan. 4, 2012) (granting a stay of discovery while a motion to dismiss raising qualified immunity was pending, noting that, “[b]ecause qualified immunity is meant to free a defendant from the burdens of litigation, allowing discovery to proceed would necessarily burden the Defendants as the defense would be lost”); *Ransaw v. United States*, No. 1:10 CV 01672, 2011 WL 1752160, at \*2 (N.D. Ohio May 5, 2011) (“When a defendant motions for dismissal on grounds of qualified immunity, the Court must not only determine that issue at the earliest possible moment, but also stay discovery while the motion is pending. . . . [I]f the Court were to allow discovery to proceed in the present case, the benefit of the immunity doctrine would be lost . . . .” (citations omitted)).

156. See Schwartz, Selection Effects, *supra* note 22 (manuscript at 18). A total of eight discovery stays were granted, amounting to 5.9% of the cases in which qualified immunity was raised at the motion to dismiss stage (136), and 5.2% of the total motions to dismiss raising qualified immunity that were filed (154). (In eighteen cases, there were multiple motions to dismiss filed that raised qualified immunity.) See Schwartz, How Qualified Immunity Fails, *supra* note 21, at 30 tbl.3, 33 tbl.4.

157. See Schwartz, Selection Effects, *supra* note 22 (manuscript at 22).

of time spent litigating civil rights cases because there would be fewer discovery stays and no interlocutory appeals.<sup>158</sup>

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.<sup>159</sup> 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.<sup>160</sup> Litigants and courts report dedicating significant time and resources to understanding the intricacies of the doctrine.<sup>161</sup>

Qualified immunity increases the cost, complexity, and time associated with civil rights litigation in each of these ways. Accordingly, as one attorney I interviewed observed, eliminating qualified immunity “would make the cases a lot simpler.”<sup>162</sup> 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 themselves to respond to questions under oath at deposition and trial. And some

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158. See, e.g., Telephone Interview with M.D. Fla. Attorney E, *supra* note 114 (predicting that, absent qualified immunity, “we wouldn’t spend so much [time] flailing around with these huge motions waiting for the judge to rule”); Telephone Interview with N.D. Cal. Attorney B, *supra* note 149 (describing a case that took eight years to resolve because of qualified immunity appeals); Telephone Interview with N.D. Ohio Attorney D, *supra* note 115 (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”); Telephone Interview with N.D. Ohio Attorney G, *supra* note 115 (explaining that one of his cases “got delayed for a year and a half when it went up [to the] Sixth Circuit and back”).

159. See *supra* note 148 and accompanying text.

160. See Blum, Section 1983 Litigation, *supra* note 139, at 924–25 (reporting that courts are “hopelessly conflicted both within and among themselves” about qualified immunity standards).

161. See, e.g., Wilson, *supra* note 80, 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.”); Telephone Interview with M.D. Fla. Attorney C, *supra* note 114 (“[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.”); Telephone Interview with N.D. Ohio Attorney C (Nov. 10, 2017) (explaining that civil rights cases “require a huge amount of work, investment of time by the attorney and you better know your stuff like qualified immunity for example”); Telephone Interview with S.D. Tex. Attorney C (Apr. 26, 2017) (“I went through a three-year learning curve to get up to grasp—up to speed on [civil rights doctrines], and it’s a lot of information.”); Telephone Interview with S.D. Tex. Attorney F (Nov. 15, 2017) (explaining that “qualified immunity is not easily understandable” and “[y]ou have to read a lot of cases and do a lot of research”).

162. Telephone Interview with M.D. Fla. Attorney B, *supra* note 149.

government attorneys reportedly consider motion practice less burdensome than trial.<sup>163</sup>

But my research suggests that qualified immunity motion practice does not usually obviate the need for discovery and trial. Among the cases in my dataset, defendants most often raised qualified immunity at summary judgment, after litigants had already participated in discovery.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup> 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.<sup>169</sup> Absent qualified immunity, it appears that 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.<sup>170</sup> 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.<sup>171</sup> For this

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163. See Blum, *Time to Change*, supra note 2, at 1890 n.23 (describing defense attorneys' views that "the costs of trying a case are a lot greater than the costs of taking an [interlocutory] appeal [of qualified immunity]").

164. See Schwartz, *How Qualified Immunity Fails*, supra note 21, 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 0.7% were filed at or after trial).

165. See *id.* at 60.

166. See *id.* at 46 tbl.12; supra text accompanying note 92 (correcting the data from the original study).

167. See Schwartz, *How Qualified Immunity Fails*, supra note 21, at 60–61.

168. See supra note 92.

169. See supra notes 109–110 and accompanying text.

170. See *Dunklin v. Mallinger*, No. C-11-01275 JCS, 2013 WL 1501446, at \*19 (N.D. Cal. Apr. 10, 2013). For a description of the thirty-six rulings, see *infra* Appendix.

171. See Telephone Interview with N.D. Cal. Attorney B, supra note 149 (describing the time it takes to prepare oppositions to summary judgment motions).

reason, Alan Chen has observed that “the pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense.”<sup>172</sup> Northern District of Ohio Judge James Gwin has criticized interlocutory appeals of qualified immunity denials on similar grounds.<sup>173</sup> 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.<sup>174</sup> Even when a defendant is awarded qualified immunity on interlocutory appeal, the decision might not save time. As Judge 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 . . .<sup>175</sup>

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.<sup>176</sup> But several 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.<sup>177</sup> My docket dataset suggests that both views may sometimes be correct. Among the 368 cases in which

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172. 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).

173. See *Wheatt v. City of East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at \*4 (N.D. Ohio Dec. 6, 2017).

174. See *id.*

175. *Id.*

176. See, e.g., Nielson & Walker, *Qualified Defense*, *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”).

177. See, e.g., Telephone Interview with M.D. Fla. Attorney B, *supra* note 149 (predicting that “[t]here would be more and earlier settlements” if there was not qualified immunity); Telephone Interview with M.D. Fla. Attorney E, *supra* note 114 (explaining that defense counsel offers “peanuts” at mediation because they want to see if they can win their qualified immunity motions); Telephone Interview with N.D. Ohio Attorney G, *supra* note 115 (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”); Telephone Interview with S.D. Tex. Attorney C, *supra* note 161 (explaining that “[a]fter [defendants] take their shot at qualified immunity then they’ll start talking [about settlement]”); see also Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 *Geo. Wash. L. Rev.* 1165, 1191 (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”).

qualified immunity was raised at some point during the course of litigation,<sup>178</sup> 186 were settled or voluntarily dismissed.<sup>179</sup> Seventy-seven (41.4%) of those 186 cases were settled while qualified immunity motions or interlocutory appeals were pending.<sup>180</sup> 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 motions to dismiss and for summary judgment raising qualified immunity were far more likely to be granted on other grounds.<sup>181</sup> 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.<sup>182</sup> Settlements in these eighty cases appear to have been hastened not by plaintiffs' concerns about qualified immunity, but by defendants' inability to convince a judge or jury that the case should be dismissed. If so, defense attorneys in these cases were doing what plaintiffs' counsel described<sup>183</sup>—waiting to pursue settlement until after they lost their qualified immunity 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, uncertain, and shifting 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 average 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

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178. See Schwartz, *How Qualified Immunity Fails*, supra note 21, at 29 tbl.2.

179. Schwartz, *Five Districts Dataset*, supra note 103.

180. *Id.*

181. See Schwartz, *How Qualified Immunity Fails*, supra note 21, at 39 (finding that courts more often than not grant both summary judgment motions and motions to dismiss on grounds other than qualified immunity when such motions raised qualified immunity).

182. Schwartz, *Five Districts Dataset*, supra note 103. 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 prompted these settlements.

183. See supra note 177.

litigation.<sup>184</sup> Although the Court appears to believe that qualified immunity achieves this goal by causing insubstantial cases to be dismissed before discovery and trial,<sup>185</sup> defenders of qualified immunity have suggested that the doctrine may achieve this goal by discouraging plaintiffs from ever filing insubstantial cases.<sup>186</sup> If so, eliminating qualified immunity might result in a massive influx of frivolous suits.<sup>187</sup> But those sharing this concern overlook two critically important features of civil rights litigation: plaintiffs' attorneys' strong incentives to decline weak cases and the many other barriers to relief in these cases.<sup>188</sup> Attorneys would likely file more civil rights cases absent qualified immunity, but there would not be a dramatic increase in "frivolous and distracting litigation."<sup>189</sup>

Plaintiffs' attorneys generally accept civil rights cases on contingency,<sup>190</sup> with an agreement that they can seek reasonable attorneys' fees under Section 1988 if the plaintiff prevails.<sup>191</sup> Congress intended that the

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184. See *supra* note 142.

185. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("[T]he 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." (second alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987))).

186. See, e.g., *Nielson & Walker, Qualified Defense*, *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 . . .").

187. See, e.g., *Fallon, Bidding Farewell*, *supra* note 19, at 975 (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation").

188. See generally *supra* Part II (discussing the variety of reasons—other than qualified immunity—that most unsuccessful civil rights cases fail).

189. *Fallon, Bidding Farewell*, *supra* note 19, at 975. It is unlikely that eliminating qualified immunity would change *pro se* plaintiffs' case-filing decisions because *pro se* plaintiffs are, presumably, unfamiliar with the doctrine. See *Schwartz, Selection Effects*, *supra* note 22 (manuscript at 10–11) (noting that *pro se* plaintiffs are likely to "be unaware of the precise doctrinal challenges associated with these claims and unfamiliar with the contours of qualified immunity"). Accordingly, this discussion focuses on attorneys' case-selection decisions.

190. Although there are some attorneys who represent civil rights plaintiffs *pro bono* and others who work for nonprofits like the ACLU, they "are the exceptions rather than the rule . . . . [M]ost 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, 767–69 (1988); see also *Samuel R. Bagenstos, Mandatory Pro Bono and Private Attorneys General*, 101 *Nw. U. L. Rev.* 182, 183–84 (2007) (explaining that most civil rights litigation is brought "by individual lawyers who are trying to make a living").

191. See 42 U.S.C. § 1988(b) (2012) (giving district courts the discretion to grant "the prevailing party . . . a reasonable attorney's fee" if the litigation is brought pursuant to enumerated civil rights statutes). See generally *Mark R. Brown, A Primer on the Law of Attorney's Fees Under § 1988*, 37 *Urb. Law.* 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, 11–21 (2008) (describing typical fee arrangements in Section 1983 cases).

availability of attorneys' fees would create financial incentives for attorneys to bring civil rights cases, including cases with limited recoverable damages.<sup>192</sup> 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.<sup>193</sup> If a case is settled, the lawyer's fee will usually be a percentage of the settlement award.<sup>194</sup> If the plaintiff loses, the attorney bears the entire costs of litigation.<sup>195</sup>

This financial arrangement influences which cases plaintiffs' attorneys are willing to accept.<sup>196</sup> Scholars assume that attorneys representing plaintiffs on contingency will only accept a case if the expected recovery is greater than the anticipated litigation costs.<sup>197</sup> Given contingency fee arrangements, and the general unavailability of fee shifting absent a jury verdict, one might assume that plaintiffs' attorneys would only accept cases they are likely to win (so that the attorney is not shouldered with the costs of litigation), and that are likely to result in large damages awards (so that the attorney can be assured adequate compensation if the case resolves in plaintiff's favor before trial).<sup>198</sup>

When I interviewed thirty-five plaintiffs' attorneys around the country about their case selection decisions, I found more variation in attorneys' case-selection calculations.<sup>199</sup> Some attorneys take 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.<sup>200</sup> Other attorneys are willing to bring

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192. See S. Rep. No. 1011, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5910 (explaining that the availability of attorneys' fees for civil rights cases were necessary because "civil rights laws depend heavily upon private enforcement").

193. See Reingold, *supra* note 191, 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).

194. See Reingold, *supra* note 191, at 13–18.

195. See *id.*

196. See *id.*

197. See, e.g., Herbert M. Kritzer, *Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States* 67–88 (2004) ("[L]awyers should evaluate potential cases in terms of the risks involved and the potential returns associated with those risks. An attorney will reject cases which do not satisfy the attorney's [] return criteria."); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. Chi. L. Rev. 693, 706–07 (2016) ("A plaintiffs' attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases."); Schwab & Eisenberg, *supra* note 190, at 742 ("The plaintiff will file suit if the expected recovery from the suit outweighs the expected costs.") .

198. See, e.g., Kritzer, *supra* note 197, at 84 (reporting that, for contingency fee attorneys, "lack of liability and inadequate damages (singly or together) are the dominant reasons for declining cases, accounting for about 80 percent").

199. See generally Schwartz, *Selection Effects*, *supra* note 22 (finding that qualified immunity may increase costs and risks of litigation, but attorneys do not reliably decline cases because of the risks of qualified immunity, and the cases they do decline are not necessarily insubstantial).

200. See, e.g., Telephone Interview with N.D. Cal. Attorney E, *supra* note 115 ("Somebody who's been beaten up, bruises, no broken bones . . . . Those cases aren't worth

cases they expect to lose if there are other associated benefits—establishing a constitutional right, or uncovering evidence that can be useful to the plaintiff or to future cases.<sup>201</sup> These attorneys tend to 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.<sup>202</sup> And some offset the risks of their civil rights practice with other types of cases—criminal defense, personal injury, employment discrimination, and medical malpractice—where they believe recoveries are more predictable.<sup>203</sup> Although attorneys’ case-selection decisions do not conform precisely to theoretical models, the fundamental intuition stands: If plaintiffs’ attorneys want to stay in business, they must earn more than they spend.<sup>204</sup>

As a result, plaintiffs’ attorneys are extremely selective in the cases they accept.<sup>205</sup> The thirty-five attorneys I interviewed reported declining the vast majority of civil rights cases they consider.<sup>206</sup> Twenty-two attorneys

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the time on the damages side. But you can play them up on the attorney’s fees side. So, I don’t think about the damages when I take the case. I’m thinking more about the indignity.”).

201. See, e.g., Telephone Interview with E.D. Pa. Attorney A, *supra* note 113 (“[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, the potential for institutional reform.”); Telephone Interview with N.D. Ohio Attorney D, *supra* note 115 (“[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.”); Telephone Interview with N.D. Ohio Attorney E (Dec. 6, 2017) (“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.”); Telephone Interview with N.D. Ohio Attorney F, *supra* note 115 (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”).

202. See, e.g., Telephone Interview with M.D. Fla. Attorney F, *supra* note 113 (reporting that he files low-damages cases when the evidence is strong, but will file high-damages cases that are harder to prove).

203. See Schwartz, Selection Effects, *supra* note 22 (manuscript at 41–44) (describing the practice areas of interviewed attorneys and the amount of time spent on civil rights work).

204. To the extent that pro bono attorneys and nonprofits 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 Hubbard, *supra* note 197, at 713 (suggesting that because plaintiffs’ attorneys are generally “oversubscribed,” they tend “to screen cases on plausible merit before filing” regardless of whether their “motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both)”).

205. 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 (1997).

206. See, e.g., Telephone Interview with E.D. Pa. Attorney A, *supra* note 113 (estimating they decline 90–95% of cases); Telephone Interview with E.D. Pa. Attorney F (Apr. 25, 2017) (estimating they decline 96% of cases); Telephone Interview with M.D. Fla. Attorney B, *supra* note 149 (estimating they decline 99% of cases); Telephone Interview with M.D. Fla. Attorney C, *supra* note 114 (suggesting they decline many more cases than they take on); Telephone Interview with N.D. Cal. Attorney B, *supra* note 149 (estimating that they decline 83% of cases); Telephone Interview with N.D. Cal. Attorney F (Dec. 6, 2017) (estimating

reported that vulnerability to motion practice and dismissal on qualified immunity are considerations they take into account.<sup>207</sup> But all of the attorneys reported considering a wide range of factors related to a case's costs, risks, and potential rewards, including: whether the judge and jury would be sympathetic to the plaintiff; the strength of the evidence supporting the plaintiff's claim(s); the legal merits of the claim(s); the cost of litigating the case; and the amount of recoverable damages.<sup>208</sup> Because attorneys believe juries are skeptical of plaintiffs' claims in police misconduct cases,<sup>209</sup> many report selecting only cases with egregious government misconduct, a plaintiff whose story will be compelling, and/or video or eyewitness evidence that a jury will believe.<sup>210</sup> Because attorneys are often paid a 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.<sup>211</sup> Eliminating qualified immunity would do away with one challenge that increases the cost, risks, and complexity of these cases. But many other

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that they decline 85–87% of cases); Telephone Interview with N.D. Ohio Attorney A (May 1, 2017) (estimating that they decline 94–99% of cases); Telephone Interview with N.D. Ohio Attorney G, *supra* note 115 (estimating that they decline 90% of cases); Telephone Interview with S.D. Tex. Attorney A (Apr. 25, 2017) (estimating that they decline 80–85% of cases); Telephone Interview with S.D. Tex. Attorney D, *supra* note 113 (estimating that they decline 99% of cases). See also Schwartz, Selection Effects, *supra* note 22 (manuscript at 67 tbl.7) (listing the estimated percentage of cases declined by all thirty-five interviewed attorneys).

207. For further discussion of these findings, see Schwartz, Selection Effects, *supra* note 22 (manuscript at 38–39).

208. For further discussion of these considerations, see *id.* (manuscript at 27–32).

209. See *supra* notes 112–115 and accompanying text.

210. See, e.g., Telephone Interview with E.D. Pa. Attorney G (May 15, 2017) (“[T]he excessive force cases we bring, we almost always have something more than our client’s versions whether it’s on video or a photograph or very strong medical documentation or a witness.”); Telephone Interview with M.D. Fla. Attorney A, *supra* note 114 (“[T]he conduct has to be somewhat egregious [and] the client didn’t provoke the conduct or cause what happened to him.”); Telephone Interview with N.D. Cal. Attorney C, *supra* note 115 (“[P]art of [case selection] is the overall circumstances[,] . . . 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 to . . . represent[] somebody who is going to come across sympathetic and articulate . . .”); see also Schwartz, Selection Effects, *supra* note 22 (manuscript at 27–32) (describing attorneys’ case selection considerations).

211. See, e.g., Telephone Interview with M.D. Fla. Attorney B, *supra* note 149 (“You know distance might make a difference [in case selection], so it’s kind of a mathematical calculation of miles divided by damages or . . . whatever the formula is . . . I’ve done some pretty serious police cases in Key West which is . . . 12 to 14 hours from here.”); Telephone Interview with N.D. Ohio Attorney G, *supra* note 115 (reporting declining some cases because “[s]ometimes it’s just the damages are really, really low”); Telephone Interview with S.D. Tex. Attorney C, *supra* note 161 (explaining that the main factor in case selection “is the extent of the injuries[.] [A] lot of people get handcuffed or falsely arrested . . . It’s kind of like getting hit by a car but you don’t sustain any personal injury . . . I’ll let those go . . .”); see also Schwartz, Selection Effects, *supra* note 22 (manuscript at 27–32) (describing attorneys’ case selection considerations).

barriers to relief would remain, and lawyers would continue to be very selective in the cases that they accept.<sup>212</sup>

With that said, eliminating qualified immunity would likely 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.<sup>213</sup> Other attorneys reported that they knew of lawyers who took one or two Section 1983 cases and then declined to take more because various challenges—including qualified immunity—made these cases economically unfeasible to bring.<sup>214</sup> Some attorneys additionally reported that they had reduced the number of civil rights cases they bring because of these same challenges.<sup>215</sup> Accordingly, some of the attorneys I interviewed predicted that more lawyers might be willing to file civil rights cases were qualified immunity eliminated.<sup>216</sup> Eliminating qualified immunity

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212. Federal Rule of Civil Procedure 11—which authorizes federal courts to sanction attorneys who file cases without factual or legal support—provides an additional incentive to file only strong cases, and it would remain in effect absent qualified immunity, although no attorneys mentioned it during their interviews. See Fed R. Civ. P. 11(c).

213. See Telephone Interview with S.D. Tex. Attorney G (Dec. 18, 2017).

214. See, e.g., Telephone Interview with E.D. Pa. Attorney D (Apr. 24, 2017) (explaining that qualified immunity is “certainly a high burden and that’s why a lot of attorneys don’t like to do” civil rights work); Telephone Interview with M.D. Fla. Attorney D (Nov. 20, 2017) (“I think it’s important work so I keep doing it but the colleagues I know that used to do it have dropped out, because they don’t find it to be lucrative enough.”); Telephone Interview with M.D. Fla. Attorney E, *supra* note 114 (explaining that there are very few lawyers who can make a living just doing civil rights claims); Telephone Interview with N.D. Cal. Attorney C, *supra* note 115 (stating that they’ve “seen a lot of lawyers who were successful personal injury attorneys” who are then unprepared to litigate police misconduct cases because they are in federal court and juries are less able to relate to the plaintiffs); Telephone Interview with S.D. Tex. Attorney A, *supra* note 206 (“[T]here are people that I hear of occasionally filing [a civil rights case], but they’re the same people that eventually decide they never want to file one again, and usually call me . . . saying, ‘oh my god this case is screwed up, can you help me?’”). For further discussion of attorneys’ decisions to stop bringing civil rights cases, see Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51 (explaining how qualified immunity can increase the cost and complexity of civil rights litigation, and reporting attorneys’ observations that qualified immunity and other barriers to suit may discourage some lawyers from bringing civil rights cases).

215. See, e.g., Telephone Interview with E.D. Pa. Attorney E (Apr. 26, 2017) (explaining that they have brought police misconduct cases for twenty-four years but that, in recent years, they “transitioned into . . . easier work that pays a lot more money, which is personal injury and medical malpractice”); Telephone Interview with M.D. Fla. Attorney E, *supra* note 114 (“I’d say that I probably went from 50%, maybe 60% [civil rights cases] to 20 to 25% over the years . . . [A]s I commonly say[,] if you like to have your teeth in your hand after a fight, then do civil rights litigation.”). For further discussion of attorneys’ decisions to reduce the number of civil rights cases they bring, see Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51.

216. See, e.g., Telephone Interview with M.D. Fla. Attorney G (Dec. 19, 2017) (“I think you would encourage other lawyers to take these cases [were qualified immunity eliminated]. They don’t take them because they don’t want an interlocutory appeal.”); see also Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51 (describing attorneys’ views that qualified immunity and other challenges associated with civil rights litigation cause lawyers to take fewer cases or stop bringing civil rights cases).

would also likely encourage attorneys to file certain types of claims more frequently. One-third of the attorneys I interviewed reported that qualified immunity discourages them from taking 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.<sup>217</sup>

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.<sup>218</sup> Attorneys would not be dissuaded from bringing novel constitutional claims simply because a court had not previously held the conduct at issue unconstitutional.<sup>219</sup> When attorneys estimate the cost of litigating a case, they would not have to factor in the cost and time necessary to litigate qualified immunity denials on interlocutory appeal.<sup>220</sup> 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.<sup>221</sup>

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

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217. See Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51.

218. See, e.g., *Lawrence v. Gwinnett County*, 557 F. App'x 864, 870 (11th Cir. 2014) (describing arguable probable cause); see also Telephone Interview with E.D. Pa. Attorney G, *supra* note 210 (describing false-arrest cases he has reviewed where he believes there is a Fourth Amendment violation, but the judge is likely to find "arguable probable cause."); Telephone Interview with S.D. Tex. Attorney F, *supra* note 161 (explaining the challenges of disproving "arguable probable cause" in false arrest cases).

219. See, e.g., Telephone Interview with N.D. Cal. Attorney D, *supra* note 113 ("[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."); Telephone Interview with S.D. Tex. Attorney B (May 15, 2017) ("[Q]ualified immunity [plays a role in case selection] and whether or not there was any established law that would support the position that the officer knew that the conduct was unconstitutional at the time."); see also Schwartz, *Selection Effects*, *supra* note 22 (manuscript at 46–47) ("[A]ttorneys reported they were more inclined to decline cases when they could not find factually similar precedent because of concerns about qualified immunity . . .").

220. See, e.g., Telephone Interview with N.D. Cal. Attorney B, *supra* note 149 (explaining that they consider the costs and delays associated with qualified immunity motions and interlocutory appeals when deciding whether to accept a case); see also Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51.

221. See, e.g., Telephone Interview with M.D. Fla. Attorney G, *supra* note 216 (predicting that more attorneys might file civil rights cases if qualified immunity did not exist); see also Schwartz, *How Qualified Immunity Fails*, *supra* note 21, at 50–51.

would no longer be discouraged by the qualified immunity standard applied in these cases, but might 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 would no longer be discouraged by the fact that they cannot point to another factually similar case on point, but might 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 would not have to litigate qualified immunity in the district court or on appeal, but would still recognize that, unless the case goes to trial and they can recover fees pursuant to Section 1988, their payment will be limited to a portion of the plaintiff's modest settlement.<sup>222</sup> And, even in the absence of qualified immunity, attorneys might 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' perceived predisposition in favor of government officials.<sup>223</sup>

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 and distracting litigation."<sup>224</sup> 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, one lawyer predicted that there would be "a fairly small number" of cases he would decline today but accept in a world without qualified immunity.<sup>225</sup> 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 would continue to reject the vast majority of cases that came their way.

#### 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.<sup>226</sup> Qualified immunity is considered a critically important protection

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222. See *supra* note 191 and accompanying text.

223. See *supra* note 113 and accompanying text.

224. Fallon, *Bidding Farewell*, *supra* note 19, at 975, 982 (explaining the persistent concern of frivolous litigation).

225. Telephone Interview with E.D. Pa. Attorney G, *supra* note 210.

226. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). The Court noted that: [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

against these harms. If it were, doing away with the doctrine would jeopardize 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 presumed ill effects of civil rights litigation.

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” and “being mulcted in damages if he does.”<sup>227</sup> Fred Smith recently echoed this concern, arguing that, absent qualified immunity, “We 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.”<sup>228</sup> 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.”<sup>229</sup>

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.”<sup>230</sup> The majority of surveyed officers in two different studies reported that legal liability was not among their top ten thoughts when doing their work.<sup>231</sup> 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

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energy from pressing public issues, and the deterrence of able citizens from acceptance of 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.”

Id. (alteration in original) (citation omitted) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); see also *infra* notes 227–229, 237–238 and accompanying text (describing these concerns).

227. *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974) (internal quotation marks omitted) (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”).

228. Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 *Notre Dame L. Rev.* 2093, 2108 (2018).

229. Wells, *supra* note 19, at 391.

230. 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.*, nos. 3 & 4, 1995, at 19, 28; see also Schwartz, *Case Against*, *supra* note 1, at 1811–13 (describing other similar studies).

231. See Garrison, *supra* note 230, at 26; Daniel E. Hall, Lois A. Ventura, Yung H. Lee & Eric Lambert, *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 *Policing: Int’l J. Police Strategies & Mgmt.* 529, 542 (2003).

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 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<sup>232</sup>—and there is no reason to believe that other types of government officials have different arrangements with their government employers.<sup>233</sup> Second, available evidence suggests that most law enforcement agencies do not gather and analyze information from lawsuits brought against their officers—and there is no reason to believe that other government agencies pay closer attention to the information in lawsuits brought against their employees.<sup>234</sup> 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.”<sup>235</sup> Officers unquestionably

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232. See Schwartz, *Police Indemnification*, supra note 13, at 912–17 (finding that officers rarely contribute to settlements and judgments against them, and that their contributions amounted to 0.02% of the total dollars paid to plaintiffs in the eighty-one jurisdictions studied).

233. See Wells, supra note 19, at 406 (observing that my studies of indemnification and litigation, Schwartz, *How Qualified Immunity Fails*, supra note 21 and Schwartz, *Police Indemnification*, supra note 13, 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 Federal Bureau of Prisons, see James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 *Stan. L. Rev.* (forthcoming 2020) (manuscript at 57–58), <https://ssrn.com/abstract=3343800> (on file with the *Columbia Law Review*).

234. See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 *UCLA L. Rev.* 1023, 1045–52 (2010) [hereinafter Schwartz, *Myths and Mechanics*] (discussing police departments that ignore information from lawsuits); see also Pfander et al., supra note 233 (manuscript at 32–33) (describing a similar failure to collect lawsuit information by the Federal Bureau of Prisons).

235. Schwartz, *Case Against*, supra note 1, at 1813 (citing and describing these reports); see also Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Pew Research Ctr., *Behind the Badge 64–65* (2017), [http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report\\_FINAL\\_web.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf) [<https://perma.cc/27FH-N7S7>] (reporting that nine in ten officers report increased concerns about their safety following high-profile police shootings and protests of those shootings).

dislike being sued.<sup>236</sup> But these three 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 these three factors 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.”<sup>237</sup> Were qualified immunity eliminated, settlements and judgments might increase, municipal budgets might be further compromised, and government officials might encourage inaction to reduce payouts.<sup>238</sup> 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.

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,<sup>239</sup> liability costs are a small part of most government budgets. One

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236. For some reasons that officers might dislike being sued, see Smith, *supra* note 228, at 2109 (observing that, when an officer is sued or has a judgment entered against him, there might be implications for the officer's credit history or background checks); see also Margo Schlanger, *Inmate Litigation*, 116 *Harv. L. Rev.* 1555, 1675 n.389 (2003) (offering similar observations regarding suits against corrections officers). But, as Schlanger notes, because officers rarely bear personal financial responsibility, “litigation is mostly a minor inconvenience.” Schlanger, *supra*, at 1675–76.

237. Nielson & Walker, *Qualified Defense*, *supra* note 17, at 1877; see also Fallon, *Bidding Farewell*, *supra* note 19, at 975 (predicting that eliminating qualified immunity would impose “unanticipated drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs”).

238. See Jeffries, *Liability Rule*, *supra* note 38, at 245–46 (“[W]hile 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.”).

239. See, e.g., John Rappaport, *How Private Insurers Regulate Public Police*, 130 *Harv. L. Rev.* 1539, 1588 & n.282 (2017) (describing examples of municipalities that closed their police forces after losing liability insurance); Schwartz, *How Governments Pay*, *supra* note 23, at 1190–91 (describing towns and small cities that lost liability coverage following lawsuit payouts and disbanded their police departments). In these cases, the damages award is often the straw that breaks 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 the judgment. See, e.g., Andrew Cockburn, *Blood Money: Taxpayers Pick Up the Tab for Police Brutality*, *Harper's Mag.*, Nov. 2018, at 61, 61–62, <https://harpers.org/archive/2018/11/blood-money-police-brutality-taxpayers/> [<https://perma.cc/FV6S-4WY4>] (describing this type

study found that liability costs amount to approximately one percent of the budgets for counties, cities, villages, and towns in New York State.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> Moreover, lawsuit payouts usually have little or no direct financial impact on the budget of the agency that employs the defendant officials.<sup>243</sup> It is impossible to know how much more plaintiffs would recover in a world without qualified immunity, but the increase would have to be dramatic to create significant drains on most governments’ budgets.

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 them to make personnel and policy changes.<sup>244</sup> But

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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. See, e.g., Office of Cmty. Oriented Policing Servs., Final Report of the President’s Task Force on 21st Century Policing 28 (2015), [https://www.cops.usdoj.gov/pdf/taskforce/Interim\\_TF\\_Report.pdf](https://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf) (on file with the *Columbia Law Review*) (recommending that the DOJ “provide technical assistance and incentive funding to jurisdictions with small police agencies that take steps towards shared services, regional training, and consolidation”); Police Exec. Research Forum, *Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County 2* (2015), <https://www.policeforum.org/assets/stlouis.pdf> [<https://perma.cc/LA2P-D2F6>] (finding that St. Louis County’s “patchwork of police departments, many of which have jurisdiction over very small areas . . . [leads] 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”). These anecdotes offer another reason to support growing calls to consolidate small law enforcement agencies. But all available evidence suggests that lawsuit payouts are not too large for most jurisdictions to handle. See *infra* notes 240–244 and accompanying text.

240. Sydney Cresswell & Michael Landon-Murray, *Taking Municipalities to Court: An Examination of Liability and Lawsuits in New York State Local Governments*, at vii (2013).

241. See Schwartz, *How Governments Pay*, *supra* note 23, at 1164–65 n.74 (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 . . . are minimal in a local government’s overall budget” and are, at the maximum, “just a percent or two of a city’s budget” (quoting Email from Ann Gergen, Exec. Dir., AGRiP, to author (June 23, 2015))).

242. See *id.* at 1165 (reporting that lawsuit payouts in police misconduct cases are less than one percent of municipal budgets in my study).

243. See *id.* at 1172–74, 1193–94 (finding that at least 60% of large law enforcement agencies studied suffered no financial consequences of payouts in lawsuits against them and their officers).

244. 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

my research has shown that law enforcement agencies infrequently gather or analyze information about run-of-the-mill lawsuits brought against them, and there is no reason to believe that other types of government agencies are more attentive to lawsuit filings and information.<sup>245</sup> 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 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.<sup>246</sup> Furthermore, several of the largest cities and counties in the country reported that they kept no records in any government agency or office reflecting how much they paid in lawsuits brought against their employees.<sup>247</sup> 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 there is no reason to believe eliminating qualified immunity would change government indemnification, budgeting, or risk-management practices, eliminating

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“informational” and “fault-fixing” functions of constitutional damages actions); Schlanger, *supra* note 236, at 1681 (describing how negative publicity regarding lawsuits “can trigger embarrassing political inquiry and even firings, resignations, or election losses”); Schwartz, *How Governments Pay*, *supra* note 23, 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”).

245. See generally Schwartz, *Myths and Mechanics*, *supra* note 234, at 1066–67 (reporting that the overwhelming majority of police departments and sheriff's departments studied failed to collect or review litigation information).

246. See Schwartz, *Police Indemnification*, *supra* note 13, at 956.

247. See *id.*

qualified immunity might lead to changes in constitutional litigation that could influence government behavior in several important ways.

Because qualified immunity increases the cost, complexity, and risk associated with civil rights litigation, eliminating qualified immunity might encourage plaintiffs' attorneys to file more cases,<sup>248</sup> and might encourage plaintiffs to take their cases to trial more often.<sup>249</sup> As I have explained, plaintiffs' success rate is unlikely to increase—jurors' sympathies for government defendants mean that plaintiffs would continue to regularly lose at trial.<sup>250</sup> 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 directly involved in the cases. The Supreme Court has assumed that participating in discovery and trial is taxing and time-consuming for government officials.<sup>251</sup> If so, more suits and more trials might cause officers to change their behavior to avoid being sued again.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup>

More lawsuits and trials could also influence officer behavior in a less direct way—through the disclosure of information about government behavior.<sup>255</sup> Complaints, discovery, motion practice, and trial can bring to the surface valuable information about government behavior previously unknown to the public—and sometimes unknown to the government entities whose employees are implicated in the suit.<sup>256</sup> This additional information can inform government officials about areas of concern and

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248. See *supra* notes 213–221 and accompanying text.

249. See *supra* notes 123–124 and accompanying text.

250. See *supra* notes 112–115 and accompanying text.

251. See *supra* note 142 and accompanying text.

252. For further exploration of the deterrent effect of certain practical consequences of being sued, such as having to sit for a deposition, see Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 *Colum. L. Rev.* 247, 283–86 (1988) (discussing the possible deterrent effects of tort liability imposed on law enforcement); Reinert, *Measuring Bivens Success*, *supra* note 90, at 847–49 & n.179.

253. 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 (2003) (surveying and observing Cincinnati police officers, and finding that “[o]fficers who have previously been sued for on-the-job behavior were observed to use an impact weapon in a higher proportion of encounters with citizens than their counterparts”).

254. See *supra* notes 230–235 and accompanying text.

255. See generally Joanna C. Schwartz, *Introspection Through Litigation*, 90 *Notre Dame L. Rev.* 1055 (2015) (examining how law enforcement can use information from lawsuits to “identify and correct weaknesses in personnel, training, management, and policies”).

256. See *id.* at 1066–72 (providing examples of how lawsuits provided organizations with important information about internal practices and potential misconduct).

can heighten political pressures on them to make personnel, policy, or training adjustments. These personnel, policy, and training adjustments can, in turn, improve officer behavior.<sup>257</sup> Influencing official and officer behavior in this manner is far less certain than theoretical models would presume.<sup>258</sup> It depends upon suits and trials that reveal damaging information, officials motivated to take action, and well-designed policies and trainings that influence officers in intended ways. But, given what we know, it is most plausible to imagine that additional lawsuits and trials would influence government officials' and officers' decisions in this manner.

Eliminating qualified immunity could also 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.<sup>259</sup> 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 six circuits still have not ruled on whether such a right exists.<sup>260</sup> Absent qualified immunity, courts would more regularly announce the law. Patrol officers are unlikely to study these circuit and Supreme Court decisions themselves, much less compare the situation they are confronting on the job to the facts or holding of a prior case.<sup>261</sup>

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257. See, e.g., Emily Owens, David Weisburd, Karen L. Amendola & Geoffrey P. Alpert, Can You Build a Better Cop? Experimental Evidence on Supervision, Training, and Policing in the Community, 17 *Criminology & Pub. Pol'y* 41, 43 (2018) (finding that when officers participated in a training program focused on procedural justice, they “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”); DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, Police Use of Force Project, <http://useofforceproject.org/#project> [<https://perma.cc/S7D7-8FAB>] (last visited Oct. 29, 2019) (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”).

258. For foundational theories of the relationship between liability rules and behavior, see generally 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).

259. See *supra* Part I.

260. See Blum, *Time to Change*, *supra* note 2, at 1897 (“[B]oth the Third Circuit and the Fifth Circuit, after years of disposing of the issue on the second prong, have recently joined the First, Seventh, Ninth, and Eleventh Circuits in recognizing a First Amendment right to film police when they are engaged in performing their duties in public.” (footnotes omitted)).

261. See, e.g., *Manzanas v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (criticizing the Supreme Court “assum[ption] that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work”). The court added 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*?’” *Id.* (citing *York v. City of Las Cruces*, 523 F.3d 1205 (10th Cir. 2008)).

And 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 the substance of those rulings into their policies and trainings.<sup>262</sup> Presumably, absent qualified immunity, courts' decisions would clarify the scope of constitutional protections; these decisions would 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.

In addition, eliminating qualified immunity would do away with the slow but steady stream of district and circuit 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,<sup>263</sup> these types of decisions may send the message to government officials that they can violate the law with impunity, as Justice Sotomayor has written she fears.<sup>264</sup> By eliminating qualified immunity, courts would no longer send this message in this way.

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262. See, e.g., David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567, 580–81 (2008) (observing that California law enforcement agencies started training their officers to ignore the California Constitution's ban on warrantless searches of trash after the United States Supreme Court rejected this prohibition as a matter of federal constitutional law); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1123–25 (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> [<https://perma.cc/LFC2-ZSAZ>] (reporting that the Los Angeles Police Commission changed how it evaluates use of deadly force by officers following a California Supreme Court decision that deemed “tactical conduct and decisions preceding the use of deadly force” as relevant considerations in assessing whether the force used was proper (citation omitted)). For other examples, see Schwartz, *Case Against*, *supra* note 1, at 1819 n.138.

263. See *supra* notes 52–56 and accompanying text.

264. See *supra* note 11 and accompanying text. Although law enforcement has not agreed with Justice Sotomayor that the Court's qualified immunity decisions promote a “shoot first, think later” approach to policing, one police publication did applaud the Court's qualified immunity decisions for “demonstrat[ing] the Court's continued determination to give police officers the benefit of 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/> [<https://perma.cc/N4BX-CHDQ>].

All available evidence suggests that civil rights cases do not deter constitutional violations in the manner courts and commentators expect. 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 and judgments make up less than one percent of most jurisdictions' budgets.<sup>265</sup> Although high-profile lawsuits can have political consequences, governments generally do not gather or analyze information from run-of-the-mill lawsuits brought against them such that they can 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 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 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.<sup>266</sup> For supporters, qualified immunity is the only shield against an avalanche of frivolous suits<sup>267</sup>—thus, its “importan[ce] to society as a whole.”<sup>268</sup> Not surprisingly, commentators

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265. See *supra* notes 239–243 and accompanying text.

266. 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) (“Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another.”); Reinhardt, *supra* note 81, at 1245 (arguing that through qualified immunity “the Court has . . . 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”). See generally Blum et al., *Qualified Immunity Developments*, *supra* note 2 (describing recent cases expanding the power of qualified immunity).

267. See, e.g., King, *supra* note 19.

268. *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks omitted) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015)).

hold opposing views about how the elimination of qualified immunity might influence constitutional litigation and government officials' conduct. To some, doing away with qualified immunity would result in more suits and larger judgments that would "incentivize officials acting under the color of law to better respect and protect individuals' rights, which is more than the Court's § 1983 doctrine currently encourages."<sup>269</sup> To others, eliminating qualified immunity would result in a massive influx of meritless suits and damages awards, causing officers to become overly cautious on the street, discouraging people from accepting government employment, and leading government officials to promote inaction as a means of reducing legal liabilities.<sup>270</sup> This Article presents 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.

This Article offers three reasons to conclude that the direst predictions—of an avalanche of frivolous suits and payouts, overdeterred officers and officials, and imperiled government budgets—are overblown.

First, qualified immunity is one of many barriers to success in civil rights actions against government officials.<sup>271</sup> 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 dismiss and summary judgment stages, cases are 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 may 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.

Second, these same barriers to relief would protect against a flood of meritless suits.<sup>272</sup> 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 believe they can win. Today, qualified immunity is one of many risks on attorneys' minds. In a world without qualified immunity, attorneys would continue to consider the other risks and challenges associated with bringing civil rights cases, and would continue to have strong financial incentives only to accept what they consider to be the strongest cases.

Third, eliminating qualified immunity would not dramatically change the pressures on officers and government officials.<sup>273</sup> Lawsuit payouts

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269. Levin & Wells, *supra* note 19, at 41.

270. See *supra* notes 19, 226 and accompanying text (describing these concerns).

271. See *supra* Part II.

272. See *supra* Part IV.

273. See *supra* Part V.

currently have a limited impact on officers' and governments' decision-making for reasons that have nothing to do with qualified immunity: Officers are almost always indemnified; lawsuit payments are rarely a significant portion of local budgets; and both officers and government officials weigh multiple other considerations when making policy decisions and taking action on the street. In a world without qualified immunity, government indemnification, budgeting, and risk-management practices, and the many other drivers of government behavior would continue to minimize lawsuits' deterrent effects.

Although many aspects of constitutional litigation would remain the same absent qualified immunity, this Article also predicts at least five important changes in a post-qualified immunity world.

First, the cost, risk, and complexity of constitutional litigation would decrease.<sup>274</sup> Lawyers would no longer have to brief qualified immunity motions, wait months or years while motions and interlocutory appeals are pending, or prepare for the possibility that their cases will be dismissed on qualified immunity grounds after lengthy discovery. Attorneys would 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.<sup>275</sup> Lawyers may be more willing to file 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 would still have strong incentives to select only cases they believe they can win, but more plaintiffs would likely be able to secure representation.

Third, more cases might go to trial.<sup>276</sup> These trials would not likely result in a dramatic increase in plaintiff victories, given juries' apparent predisposition against plaintiffs in civil rights 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.

Fourth, courts would offer more clarity about the scope of constitutional rights.<sup>277</sup> 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. Constitutional rights are unlikely to change dramatically

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274. See *supra* Part III.

275. See *supra* Part IV.

276. See *supra* Part II.

277. See *supra* Part I.

in their scope, but clarity about constitutional rights would benefit the public and assist local governments as they guide and train their officers.<sup>278</sup>

Fifth, courts would no longer issue decisions shielding defendants from liability even when they have violated plaintiffs' constitutional rights.<sup>279</sup> Although courts issue these types of decisions in relatively few civil rights cases, they deny justice to deserving plaintiffs and send a message to government officials that they can violate plaintiffs' rights without consequence.<sup>280</sup> Eliminating qualified immunity would end these types of decisions and curtail this type of message from the courts.

How should defenders and critics of qualified immunity view these predictions? If we take the Supreme Court at its word—that its qualified immunity jurisprudence is motivated by an interest in shielding government officials from the burdens of suit in insubstantial cases, and avoiding overdeterrence of officers and officials—the Court need not fear doing away with qualified immunity. And if the Court does do away with qualified immunity, neither it nor Congress need craft another protection to put in its place. Given the multiple doctrinal, institutional, and bureaucratic shields that protect government defendants from suit, discovery, trial, damages awards, and overdeterrence, eliminating qualified immunity will not fundamentally disrupt the functioning of government or society as a whole. Each of these shields will continue to exist absent qualified immunity and will continue doing qualified immunity's intended work.

For these same reasons, doing away with qualified immunity will not be the silver bullet that critics of qualified immunity hope. In qualified immunity's absence, there would remain multiple other substantive and procedural barriers to relief, judges and juries predisposed against civil rights plaintiffs, and local government practices—including widespread officer indemnification, budgetary arrangements that shield agencies from the financial consequences of suits, and inattention to lawsuit data—that dampen the deterrent effect of civil rights suits. Eliminating qualified immunity will not address these barriers to relief and reform. Yet eliminating qualified immunity will also prompt several significant shifts in civil rights litigation: It will clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority. Eliminating qualified immunity should, therefore, be understood as a preliminary—but important—step toward greater accountability and deterrence.

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278. See *supra* notes 35–36 and accompanying text.

279. See *supra* Part IV.

280. See *supra* notes 11, 122–126 and accompanying text.

## APPENDIX

The following thirty-six cases in my dataset were dismissed on qualified immunity grounds. This Appendix sets out the operative language in these thirty-six opinions regarding the courts' views of the underlying merits of plaintiffs' constitutional claims.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Rollerson v. City of Freeport, No. 4:12-cv-01790, 2013 WL 2189892 (S.D. Tex. May 16, 2013)	Yes. Plaintiff did not plead a constitutional violation. Id. at *12–13.	Motion to dismiss granted after plaintiff, represented by counsel, did not file a response to the motion. Id. at *1, *15. The court found that “[p]laintiff’s complaint fails to allege facts that would support a substantive due process claim under the Fourteenth Amendment” or negate defendant’s qualified immunity defense, and rejected plaintiff’s excessive force handcuffing claim because he had not pled “facts and law to support his excessive force claim and to negate Bryant’s qualified immunity defense.” Id. at *12–13.
Johnson v. Galveston Police Dep’t, No. 3:11-cv-00473 (S.D. Tex. filed Oct. 17, 2011)	Yes. Plaintiff did not plead a constitutional violation. Memorandum and Order at 6, <i>Galveston</i> , No. 3:11-cv-00473 (S.D. Tex. Jan. 31, 2012).	Motion to dismiss granted (pro se plaintiff). Id. at 7. “Because probable cause existed for both arrests, and because the plaintiff has admitted the circumstances were such that an officer, exercising his own judgment, could make an arrest, the doctrine of qualified immunity applies and shields the City of Galveston and the police officers from civil liability.” Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
<p>Allen v. City of Houston, No. 4:11-cv-04095 (S.D. Tex. Nov. 16, 2012)</p>	<p>Yes. Plaintiff did not plead a constitutional violation. Order at 11, <i>Allen</i>, No. 4:11-cv-04095 (S.D. Tex. Nov. 16, 2012).</p>	<p>Motion to dismiss granted for all defendants (pro se plaintiff). <i>Id.</i> at 9–12. “Allen has failed to articulate a violation of his right to due process.” <i>Id.</i> at 13. His racial profiling claim failed because “Allen’s Second Amended Complaint does not identify any facts supporting a claim of discrimination or unequal treatment . . . . In sum, Allen has failed to plead facts which, if true, provide a fair inference that Captain Ellen and Sergeant Musick violated a clearly established constitutional right.” <i>Id.</i> “Because Allen’s Second Amended Complaint fails to plead facts which, if true, show that Officer Kennedy violated his constitutional rights, her qualified immunity defense stands.” <i>Id.</i> at 22.</p>

Case	Ruling on first step of qualified immunity analysis?	Reasoning
<p>Miller v. City of Houston, No. 4:11-cv-00429, 2013 WL 6222539 (S.D. Tex. Nov. 29, 2013)</p>	<p>Yes. No evidence of constitutional violation. Id. at *7-8.</p>	<p>Summary judgment motion granted to supervisor because evidence showed that she was not personally involved and that she was not present at the scene. Id. at *7. And there was no “competent” evidence that “(1) she inadequately supervised and/or trained [the involved officer] . . . ; (2) a causal relationship existed between her failure to train and/or supervise and the plaintiff’s alleged constitutional deprivations; and (3) her failure to train or supervise amounted to gross negligence or deliberate indifference.” Id. The officer involved in the use of force is granted qualified immunity because “[a] reasonable person could conclude that the plaintiff posed a danger to Deputy James[] and to herself. Therefore, [the officer] was correct to use such force as was necessary to repel the plaintiff’s aggression.” Id. at *8. The court found that the claim of sexual assault failed as a matter of law because plaintiff did not dispute the deputy’s description of the facts. Id.</p>

Case	Ruling on first step of qualified immunity analysis?	Reasoning
<p>Cooper v. City of La Porte Police Dep't, No. 4:12-cv-02651 (S.D. Tex. June 2, 2014)</p>	<p>Yes. No evidence of constitutional violation. Memorandum and Recommendation at 21, 23, <i>Cooper</i>, No. 4:12-cv-02651 (S.D. Tex. June 2, 2014).</p>	<p>The district court adopted the Memorandum and Recommendation that defendant's summary judgment motion be granted. <i>Id.</i> at 23–24. “Taking into account the totality of the circumstances at the time Plaintiff was arrested, the court finds that Davidson’s conduct was not objectively unreasonable. Based on two eyewitness accounts and Davison’s [sic] own observation that Plaintiff’s children were playing near the street, a reasonable officer could have believed with ‘fair probability’ that Plaintiff’s children were ‘in imminent danger of death, bodily injury, or physical or mental impairment.’ A reasonable officer could have further believed that Plaintiff acted with the requisite mental state by allowing her children to be placed in such danger. That Davidson sought the input of [an] Assistant District Attorney who advised that probable cause existed further supports the conclusion that sufficient facts existed to support an arrest. Accordingly, Davidson is entitled to qualified immunity from Plaintiff’s false arrest claim under Section 1983.” <i>Id.</i> at 20–21 (citations omitted).</p>

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Goodarzi v. Hartzog, No. H-12-2870, 2014 WL 722109 (S.D. Tex. Feb. 21, 2014)	Yes. No evidence of constitutional violation. Id. at *13.	“The Court concludes that Plaintiff has failed to satisfy her burden to show that Gonzalez is not entitled to qualified immunity. In turn, Gonzalez has demonstrated that he is entitled to qualified immunity . . . [Gonzalez] has established from the facts within his knowledge on which he reasonably relied and what occurred within his presence that he had probable cause to believe Goodarzi was committing an offense and to arrest Goodarzi, who intentionally impeded him from detaining her and effecting her arrest and by refusing his commands to stop and to provide identification by violent physical [resistance]; he also demonstrated his right to act as he did under the law.” Id.
Stewart v. City of Corpus Christi, No. 2:12-cv-00207, 2013 WL 2422370 (S.D. Tex. June 3, 2013)	Yes. No evidence of constitutional violation. Id. at *3–4.	Summary judgment motion granted. Id. at *11. “Plaintiffs have failed to create a genuine issue of material fact that the force used under the circumstances or any seizure of Stewart was objectively unreasonable. Neither have they shown that the law was so ‘clear,’ under reasonably analogous circumstances confronted by the Officers, that ‘no reasonable officer’ would have used that quantum of force.” Id. at *3.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
<p>Carlton v. Miller, No. 4:12-cv-00704 (S.D. Tex. Dec. 5, 2013)</p>	<p>Yes. No evidence of constitutional violation. Order at 10–14, <i>Carlton</i>, No. 4:12-cv-00704 (S.D. Tex. Dec. 5, 2013).</p>	<p>Summary judgment motion granted. Id. at 16. “[T]he Court concludes that Miller did not seize Esteban [when his gun accidentally went off] and no excessive force violation can be maintained on that basis. Nor does the summary judgment evidence show that Miller acted objectively unreasonably by deciding to arrest Esteban, drawing his firearm, or not reholstering it before attempting to apprehend Esteban. . . . Because the evidence does not show that it was objectively unreasonable for Miller to approach Esteban’s truck with his firearm drawn and to not reholster the firearm before attempting to apprehend Esteban, Plaintiffs cannot maintain a Fourth Amendment claim on any of these bases. . . . Plaintiffs have not identified any evidence that Miller’s act in discharging his firearm was anything other than an accident. Absent any evidence of intentional action, Plaintiffs cannot maintain a due process claim . . . [because] Plaintiffs have not responded to Defendants’ motion for summary judgment with respect to the equal protection claim, which the Court construes as a representation of no opposition.” Id. at 10–14.</p>

<b>Case</b>	<b>Ruling on first step of qualified immunity analysis?</b>	<b>Reasoning</b>
<p>Grant v. City of Houston, No. 4:11-cv-03278, 2014 WL 4966224 (S.D. Tex. Sept. 30, 2014), aff'd, 625 F. App'x 670 (5th Cir. 2015)</p>	<p>Yes. No evidence of constitutional violation. Id. at *13, *18.</p>	<p>Summary judgment motion granted because defendants' "conduct . . . did not violate any clearly established constitutional or statutory rights of which a reasonable person would have known. There is no evidence that Simpson shot the dog without good cause and in bad faith. The shooting was justified because he was caught off guard and cornered by a snarling dog. The fact that the officers entered the house in reasonable reliance on a search warrant issued by a neutral magistrate indicates they acted in an objectively reasonable manner of in [sic] 'objective good faith.'" Id. at *13 (citation omitted). "Moreover, the warrant was based on credible information and observation. . . . In sum, the Court concurs with Defendants that Grant has failed to prove that . . . the police officers are not shielded from suit by qualified immunity." Id. at *13-18.</p>

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Wallace v. Foster, No. H-11-3388, 2013 WL 1155247 (S.D. Tex. Mar. 19, 2013)	Unclear.	Summary judgment motion granted. Id. at *1. “Plaintiff has failed to cite to case law that would support her contention that Officer Foster’s refusal to call a Vietnamese-speaking officer to the scene when he was able, in his opinion, to adequately communicate with Plaintiff in English violated any clearly established right protected by federal law. Likewise, Plaintiff has failed to cite, and the court has not located, case law supporting her claims that the officer’s alleged rude remarks, alleged refusal to locate her car keys, alleged failure to investigate the accident or alleged threat to place her in handcuffs for failing to follow his verbal instructions violated her clearly established constitutional rights. . . . Only the claim that Officer Foster deprived her of her driver’s license without due process of law potentially raises a claim of constitutional dimension. However, crediting Plaintiff’s version of the events as true, that claim has limited factual support . . . [If] Plaintiff has stated a claim for the wrongful seizure of her driver’s license, as opposed to the wrongful deprivation

<b>Case</b>	<b>Ruling on first step of qualified immunity analysis?</b>	<b>Reasoning</b>
		of her license, the court considers Officer Foster's claim of qualified immunity for that action. In order for Plaintiff's claim for wrongful seizure to survive, the facts must show that a reasonable official would understand that what he was doing violated a clearly established right." <i>Id.</i> at *6. "Plaintiff has not overcome Officer Foster's claim of qualified immunity concerning his initial seizure of her driver's license because these facts do not support a conclusion that Officer Foster would have known that his actions were unconstitutional." <i>Id.</i>

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<p>Salazar-Limon v. City of Houston, 97 F. Supp. 3d 898 (S.D. Tex. 2015), <i>aff'd</i>, 826 F.3d 272 (5th Cir. 2016)</p>	<p>Yes. No evidence of constitutional violation. <i>Id.</i> at 909.</p>	<p>Summary judgment granted. <i>Id.</i> at 911. “Thompson’s use of deadly force was justified, however, by the officer’s reasonable belief that Salazar was reaching for a weapon and turning to shoot him. The undisputed summary judgment evidence shows that: Thompson had not checked Salazar for weapons; Salazar appeared intoxicated; Salazar did not obey repeated orders to stop and an order to show his hands; and that, as he walked away from Officer Thompson toward his own truck, he reached toward his waistband . . . .” <i>Id.</i> at 906. “A reasonable officer in the circumstances Thompson faced could have believed [Salazar posed an immediate threat], based on the facts that Salazar struggled with Thompson to resist detention and handcuffing, walked away from Thompson toward his truck, [and] refused to obey repeated commands . . . .” <i>Id.</i> at 907. “Because Thompson reasonably believed that Salazar posed an immediate threat, his use of deadly force was not excessive. Thompson’s use of deadly force did not violate Salazar’s clearly established constitutional rights.” <i>Id.</i> at 909.</p>

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Pratt v. Harris County, No. H-12-1770, 2015 WL 224945 (S.D. Tex. Jan. 15, 2015), <i>aff'd</i> , 822 F.3d 174 (5th Cir. 2016)	Yes. No evidence of constitutional violation. <i>Id.</i> at *13.	Summary judgment granted. <i>Id.</i> at *12. “Plaintiff, Deputy Wilks is entitled to qualified immunity for his actions in restraining Pratt, because hog-tying Pratt under these circumstances did not constitute unreasonably excessive force. . . . Assuming all disputed facts in favor of Plaintiff, Deputy Medina is entitled to qualified immunity for his use of a taser against Pratt, because tasing Pratt five times under these circumstances did not constitute unreasonably excessive force.” <i>Id.</i> at *11–12. The court concluded that officers who used lesser force and the bystanders were also entitled to qualified immunity because the officers directly involved did not violate clearly established law. <i>Id.</i> at *12–13.
Hargis v. City of Orlando, No. 6:12-cv-723-Orl-37KRS, 2013 WL 4080121 (M.D. Fla. Aug. 13, 2013)	Unclear.	Summary judgment granted. <i>Id.</i> at *1. The court found that the facts were similar to <i>United States v. Briggman</i> , 931 F.2d 705 (11th Cir. 1991), an Eleventh Circuit case finding no constitutional violation, and concluded that qualified immunity should be granted because “[h]ere, the standard is <i>arguable</i> reasonable suspicion, a lower threshold than the one met on similar facts in <i>Briggman</i> .” <i>Id.</i> at *4.

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<p>Pantelakos v. Spadafora, No. 6:11-cv-00947-Orl-36DAB, 2012 BL 332536 (M.D. Fla. Dec. 19, 2012)</p>	<p>Yes. Plaintiff did not plead a constitutional violation. Order at 12, <i>Pantelakos</i>, No. 6:11-cv-947-Orl-36-CEH-DAB (M.D. Fla. Oct. 5, 2012).</p>	<p>Motion to dismiss granted (pro se plaintiff). <i>Id.</i> at 25. The court described the pro se complaint as “barely comprehensible” and concluded that “Plaintiff has not sufficiently alleged the Individual Defendants’ violation of any clearly established constitutional right nor, in most cases, stated a plausible claim upon which relief can be granted.” <i>Id.</i> at 6, 12. For three claims, the court found no constitutional violation. <i>Id.</i> at 12–14. For the fourth, a claim of false arrest, the court observed that the plaintiff “asserts this claim without factual support” but accepts the defendants’ explanation that the plaintiff is claiming it was improper to arrest him in his home despite the fact that they had a search warrant. <i>Id.</i> at 14–15. The court cited Supreme Court authority suggesting they could and concluded “because it was not clearly established that the Individual Defendants’ conduct was unconstitutional, they are entitled to qualified immunity on Plaintiff’s claim for false arrest.” <i>Id.</i> at 15.</p>

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<p>Borsella v. Parker, No. 6:11-cv-1249-Orl-28GJK, 2013 WL 375480 (M.D. Fla. Jan. 31, 2013)</p>	<p>Yes. No evidence of constitutional violation. Id. at *4-5.</p>	<p>Summary judgment granted. Id. at *5. The plaintiff was arrested, handcuffed, and kept in a hot police vehicle. Id. at *2. On claims concerning the plaintiff's detention in police vehicle, the officer's threatening demeanor, and the use of force in searching plaintiff, the court found no constitutional violation. Id. at *4-5. Regarding the handcuffing, the court observed: "Although Jones arrested Borsella for relatively minor motor-vehicle violations and Borsella did not resist arrest or pose an immediate threat to Jones's safety, arrests typically involve handcuffing the suspect, and 'painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal.' . . . Jones is therefore entitled to qualified immunity with respect to the force he used in handcuffing Borsella." Id. at *4 (citation omitted).</p>

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Desravines v. Fla. Dep't of Fin. Servs., No. 6:11-cv-00235-ACC-DAB, 2011 WL 2292180 (M.D. Fla. Feb. 14, 2012)	Yes. Plaintiff did not plead a constitutional violation. Id. at *12-13.	Motion to dismiss granted (pro se plaintiffs). Id. at *15. The court concluded that the pro se plaintiffs "fail to allege facts sufficient to state a plausible claim for constitutional violations as a result of false affidavits for arrest warrants" although they allege, "though in a conclusive manner, that probable cause for the affidavits was lacking." Id. at *12-13. So, "[i]n an abundance of caution, the Court proceeds to the second prong of the two-step inquiry" and concludes that there was "arguable probable cause when the Defendants executed the affidavits in question." Id. at 13.
Hill v. Lee Cty. Sheriff's Office, No. 2:11-cv-00242, 2012 WL 4356818 (M.D. Fla. Sept. 24, 2012)	Unclear.	Motion to dismiss and summary judgment granted. Id. at *1. The Court concluded there was arguable probable cause to arrest and rejected plaintiff's argument that the police should have reviewed surveillance videos before making the arrest because probable cause does not require officers "to sift through conflicting evidence or resolve issues of credibility, so long as the totality of the circumstances present a sufficient basis for believing that an offense has been committed." Id. at *14.

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Granger v. Williams, No. 6:12-cv-00223, 2013 WL 4494312 (M.D. Fla. Aug. 19, 2013)	Unclear.	Summary judgment granted. Id. at *4. The court concluded that “[o]fficers had arguable probable cause to arrest Plaintiffs for being involved in an altercation” but also noted that “[i]n this case there is sufficient evidence, viewed in the appropriate light, to support Plaintiffs’ arrest.” Id. at *3–4.
Quiles v. City of Tampa Police Dep’t, 596 F. App’x 816 (11th Cir. 2015)	Yes. No evidence of constitutional violation. Id. at 819.	Eleventh Circuit decision, reversing denial of summary judgment. Id. at 816. “The evidence, viewed in the light most favorable to Plaintiff, shows that Officer Savitt violated no constitutional right when he shot Quiles: [T]he officer’s act was objectively reasonable. . . . Furthermore, we feel certain that it was not clearly established—as a matter of law—at the time of the shooting that Officer Savitt acted unreasonably in the Fourth Amendment sense.” Id. at 819.
Flowers v. City of Melbourne, 6:12-cv-202-Orl-18KRS, 2013 WL 12098771 (M.D. Fla. Aug. 21, 2013)	Yes. No evidence of constitutional violation. Id. at *5.	Summary judgment granted. Id. at *6. Court concluded: “[U]nder the Fourth Amendment’s reasonableness standard, none of the Officer Defendants violated Albert Flowers’ constitutional rights.” Id. at *5.

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Bodden v. Cole, No. 3:11-cv-00127-J-20MCR, 2012 U.S. Dist. LEXIS 194585 (M.D. Fla. May 31, 2012)	Yes. No evidence of constitutional violation. See id. at *21–23.	Summary judgment granted. Id. at *24. “This Court concludes, based on the perspective of a reasonable officer at the scene, Cole’s use of deadly force was reasonable. . . . Considering this situation as a whole, this Court concludes that Cole’s use of deadly force was reasonable, and this determination entitles Cole to qualified immunity.” Id. at *15–16.
Smith v. Dixon, No. 8:11-cv-02388-T-27TGW, 2013 WL 1651813 (M.D. Fla. Apr. 16, 2013)	No. See id. at *6.	Summary judgment granted. Id. at *7. “Construing the facts and inferences in the light most favorable to Plaintiff, it is evident that the officers had at least arguable probable cause to arrest Mr. Smith for obstruction.” Id. at *6.
Southerland v. Carey, No. 3:11-cv-01193-J-37MCR, 2013 WL 1912716 (M.D. Fla. May 9, 2013)	Yes. No evidence of constitutional violation. See id. at *5.	Summary judgment granted. Id. at *7. “[T]he Plaintiffs have failed to establish that Sergeant Carey’s belief that Southerland posed a risk of serious physical injury to the officers, ride-along civilian Halstead, or the public was objectively unreasonable.” Id. at *4.

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Vinson v. Jewett, No. 3:11-cv-00817 (M.D. Fla. Mar. 6, 2013)	Yes. No evidence of constitutional violation. See Order at 25–26, <i>Vinson</i> , No. 3:11-cv-00817 (M.D. Fla. Mar. 6, 2013).	Summary judgment granted. Id. at 30. “The Court determined that Defendant is protected by qualified immunity because he had arguable probable cause to submit the Complaint Affidavit in support of Plaintiff’s arrest. Alternatively, the Court determines that actual probable cause existed at the time Plaintiff was charged and arrested.” Id. at 29–30.
Bussey-Morice v. Gomez, 587 F. App’x 621 (11th Cir. 2014) (per curiam)	No. Id. at 627.	Eleventh Circuit, reversing lower court denial of summary judgment. Id. at 631. “On this record, despite the tragic nature of Bussey’s death, we simply cannot conclude that clearly established law precluded Gomez and Hewatt from using their Tasers in the manner used here. Rather we find the circumstances of this case to be more akin to the facts of <i>Hoyt v. Cooks</i> , a case in which we determined that police officers were entitled to qualified immunity on excessive-force claims in a situation where they repeatedly used their Tasers in an attempt to subdue a mentally unstable arrestee.” Id. at 630 (citation omitted).

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<p>Olin v. Scales, No. 6:12-cv-1455-Orl-28TBS, 2014 WL 1621952 (M.D. Fla. Apr. 22, 2014)</p>	<p>No. Id. at *7.</p>	<p>Summary judgment granted. Id. at *1. “Deputy Scales had at least arguable probable cause to believe that Mr. Olin had committed the offense of resisting an officer without violence. Because he had arguable probable cause, there was no clearly established constitutional violation, and Deputy Scales is entitled to qualified immunity.” Id. at *7.</p>
<p>Hunsader v. Melita, No. 8:12-cv-2080-T-27MAP, 2013 WL 6866468 (M.D. Fla. Dec. 31, 2013)</p>	<p>Unclear.</p>	<p>Summary judgment granted. Id. at *5. “[T]he Cruses’ history with Plaintiff and their suspicions of him were just not enough to create ‘serious doubt’ as to their identification of Plaintiff such that a reasonable officer would have taken additional steps to confirm the [identity] of the individual depicted in the video. Defendant’s reliance on the sworn affidavits of the Cruses identifying Plaintiff and the fact that they were one hundred percent certain was reasonable under the circumstances. In sum, reasonable officers in the same circumstances and possessing the same knowledge as Defendant could have believed that Plaintiff was the individual who damaged the Cruses’ floodlights, and thus, that arguable probable cause existed to arrest Plaintiff. Therefore, Defendant is entitled to qualified immunity.” Id. at *4–5.</p>

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<p>Apsey v. Chester Township, 608 F. App'x 335 (6th Cir. 2015)</p>	<p>Yes. No evidence of constitutional violation. Id. at 339.</p>	<p>Sixth Circuit, reversing lower court denial of summary judgment. Id. at 336. “We REVERSE the district court because the undisputed facts show probable cause existed to arrest and prosecute Apsey . . . .” Id. Regarding Officer Pocek, his “‘contribution to the arrest’ appears to be helping with the initial stop of Apsey’s pickup, standing by the pickup while Brickman questioned Apsey, and then contacting the daycare. That conduct alone did not violate the Constitution.” Id. at 339 (citation omitted) (quoting Brief of Plaintiff-Appellee at 32, <i>Apsey</i>, 608 F. App’x 335 (No. 14-3875), 2014 WL 7339431 at 32). Regarding Officer Brickman, he “could have reasonably concluded that Apsey was driving under a suspended license. And even if Apsey was permitted to drive under certain restrictions, Brickman could have reasonably concluded that Apsey was violating those restrictions by driving not to a job site but to the daycare. . . . Because Brickman had probable cause to arrest Apsey for driving under suspension and for obstruction of official business, we reverse the denial of qualified immunity to Brickman on the false arrest claim.” Id.</p>

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Kinlin v. Kline, No. 1:12-cv-581, 2013 WL 3364405 (N.D. Ohio July 3, 2013)	Yes. No evidence of constitutional violation. Id. at *7.	Summary judgment granted. Id. at *7. The stop was lawful “[b]ecause the undisputed evidence establishes that Kline pulled Kinlin over for an unsafe lane change, and because he had probable cause to do so . . . Kinlin’s arrest claim fails because he cannot show that Trooper Kline lacked probable cause to arrest him . . . Assuming, arguendo, that Kinlin could show that his arrest did in fact violate the Fourth Amendment, the Court would still find that Trooper Kline is protected by qualified immunity.” Id. at *3, *5, *7.
Shepherd v. Sheldon, No. 1:11-cv-127, 2012 WL 1231856 (N.D. Ohio Apr. 12, 2012)	Yes. No evidence of constitutional violation. Id. at *10.	Summary judgment granted. Id. “Even if Bosco’s false statements in his search warrant affidavit that Shepherd was ‘involuntarily’ transported and committed to the VA facility in Brecksville are disregarded or set aside, there was still probable cause to believe that Shepherd committed the felony of possessing a weapon under a disability under Ohio Revised Code § 2923.13. Shepherd sought mental health treatment similar to treatment found to constitute ‘commitment’ to a mental institution in <i>Pivar</i> . Accordingly, Bosco is entitled to qualified immunity on the basis that his false statements were not material to a finding of probable cause.” Id.

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<p>Mason v. Holmes, No. 4:12-CV-2717, 2014 WL 696418 (N.D. Ohio Feb. 24, 2014)</p>	<p>Yes. No evidence of constitutional violation. Id. at *11.</p>	<p>Summary judgment granted. Id. at *12. “The Court GRANTS Defendants’ motion for summary judgment as to Plaintiff’s claims of false imprisonment, false arrest and/or lack of probable cause for arresting her. The Sixth Circuit Court of Appeals has interpreted Ohio law as barring plaintiffs from litigating false imprisonment claims where they pleaded no contest to charges of disorderly conduct in state court.” Id. at *7 (citation omitted). Regarding the excessive force (taser) claim, the court found that an audio recording contradicted the plaintiff’s allegations of the event. “The Court finds that Officer Holmes’ tasing of Plaintiff was objectively reasonable. The audio recording clearly revealed that Plaintiff repeatedly failed to comply with his orders to put her hands behind her back after he told her that she was under arrest. . . . The fact that Plaintiff was yelling and screaming and failing to comply with the officers’ multiple requests to put her hands behind her back to be handcuffed posed a threat to the officers and to others in the house. For these reasons,</p>

Case	Ruling on first step of qualified immunity analysis?	Reasoning
		the Court finds that Officer Holmes' tasing of Plaintiff was reasonable. Moreover, Plaintiff has produced insufficient evidence to show that Officer Holmes is not entitled to qualified immunity under the circumstances that existed at the time that she was tasered. No reasonable juror could conclude based upon the totality of the circumstances that Officer Holmes' actions were objectively unreasonable due to the uncertainties surrounding him at the time." <i>Id.</i> at *9.
Killian v. City of Monterey, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr. 16, 2014).	Yes. No evidence of constitutional violation. <i>Id.</i> at *3.	Summary judgment granted. <i>Id.</i> at *3. "In light of the uncontroverted factual record[,] summary judgment . . . is warranted on Killian's remaining equal protection claim. Because Killian has not identified similarly-situated individuals who were treated differently, a reasonable jury could only find that the defendant officers did not violate Killian's constitutional right to the equal protection of the laws. Because Killian cites no case law that the defendant officers violated any clearly established constitutional right by acting on the probable cause that was present when they arrested Killian, the officers are entitled to qualified immunity on Killian's equal protection claim." <i>Id.</i>

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<p>Dunklin v. Mallinger, No. 3:11-cv-01275-JCS, 2013 WL 1501446 (N.D. Cal. Apr. 10, 2013)</p>	<p>Yes. Jury could find constitutional violation based on the record. Id. at *20.</p>	<p>Summary judgment granted. Id at *31. “The Court finds that there are significant fact questions that preclude summary judgment on the question of whether Mr. Dunklin’s Fourth Amendment right to be free from excessive force was violated. Assuming that excessive force was used, however, the Court concludes, based on the circumstances of this case as reflected in the undisputed facts, that Defendants’ use of force did not violate a right that was ‘clearly established.’” Id. at *19</p>
<p>McClain v. City &amp; County of San Francisco, No. C 12-3225 MEJ, 2014 WL 465595 (N.D. Cal. Feb. 3, 2014)</p>	<p>No evidence of constitutional violation. Id. at *10, *11, *13.</p>	<p>Summary judgment granted. Id. at *15. The court concluded that defendants had statutory authority to inspect the plaintiff’s boat and seize it for lack of a visible Hull Identification Number (HIN) under state law. Id. at *13. “As discussed above, when inspecting the boat for the HIN and being unable to locate one, and when towing the vessel, the officers were acting pursuant to California Vehicle Code sections 9845 and 9872.1. The officers thus could have reasonably believed that their actions were legal. The Court therefore finds that the officers are entitled to qualified immunity.” Id.</p>

<b>Case</b>	<b>Ruling on first step of qualified immunity analysis?</b>	<b>Reasoning</b>
Keahey v. Bethel Township, No. 2:11-cv-07210, 2012 WL 6525543 (E.D. Pa. Dec. 13, 2012)	No. Id. at *6, *8.	Summary judgment granted. Id. at *10. The court concluded defendants were entitled to qualified immunity. “In the whole [arrest] process, the officers used no physical force against Keahey. The officers never displayed a weapon. Even taking the facts in a light most favorable to Keahey, a reasonable jury could not find that a constitutional right was clearly violated. . . . Plaintiff alleges that Officers Register and Buck illegally seized his property by removing him from his home and instructing him that he could not return and by refusing to allow him the use of the F150 or Mustang. Again, even if the facts are taken in a light most favorable to Keahey, there is nothing to suggest that the officers['] actions were so blatantly unconstitutional such that no reasonable officer would have taken them.” Id. at *6–7.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Mathai v. City of Philadelphia, No. 2:11-cv-03056 (E.D. Pa. filed May 9, 2011)	Yes. No evidence of constitutional violation. See Order at 5, <i>Mathai</i> , No. 2:11-cv-03056 (E.D. Pa. Feb. 29, 2012).	Motion to dismiss granted. Id. at 10. "I conclude that Plaintiff has not made out a claim that his rights were violated or the officers acted unreasonably. . . . The warrant obtained by Officer Doughten was supported by probable cause. . . . Even if the warrant were not supported by probable cause, the Defendant Officers did not violate rights so clearly established 'that a reasonable officer would understand that what he is doing violates that right.'" Id. at 4-6 (quoting <i>Ray v. Township of Warren</i> , 626 F.3d 170, 174 (3d Cir. 2010)).