Qualified immunity is a judicially created doctrine that shields government officials from constitutional claims for money damages, even if those officials have violated plaintiffs’ constitutional rights, so long as those constitutional rights are not clearly established. The Supreme Court has repeatedly explained that qualified immunity is necessary to protect government officials from financial liability and from distractions associated with discovery and trial. Yet the Court has relied on no empirical evidence to support its assertions that litigation imposes these burdens on government officials, or that qualified immunity doctrine protects against them.

This Article shows that qualified immunity largely fails to serve its intended purposes. Based on a review of 1183 cases filed against law enforcement defendants in five districts, I find that fewer than 1% of Section 1983 cases filed were dismissed at the motion to dismiss stage and just 2% were dismissed at summary judgment on qualified immunity grounds. The Supreme Court has designed qualified immunity doctrine with the goal of protecting government officials from the burdens of discovery and trial, yet the doctrine shields few defendants from these assumed burdens. Qualified immunity is also unnecessary to protect government officials from financial liability, as they are virtually always indemnified.

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might justify reconsideration of the balance struck in its qualified immunity doctrine. It is time for the Supreme Court to adjust qualified immunity doctrine to comport with this evidence.
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INTRODUCTION

Qualified immunity is a judicially-created doctrine that shields government officials from constitutional claims for money damages, even if those officials have violated plaintiffs’ constitutional rights, so long as those constitutional rights are not “clearly established.” Although the concept of qualified immunity was drawn from a history of common law immunities, the Court has made clear that the contours of qualified immunity’s protections are informed not by the common law but instead by the Court’s views about the best way to balance “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”

Since the doctrine’s inception, the Court has repeatedly stated that financial liability is one of the burdens qualified immunity is intended to protect against. Yet, as I showed in a prior study, law enforcement defendants are virtually always indemnified and so rarely pay anything toward settlements and judgments entered against them. Available evidence indicates that law enforcement officers are also almost always provided with defense counsel free of charge when they are sued. Accordingly, qualified immunity is almost never necessary to protect government officials from financial burdens associated with being sued.

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

The scant empirical evidence available on this topic points in opposite directions. Studies of qualified immunity decisions have found that qualified immunity motions are infrequently denied, suggesting that the doctrine plays a controlling role in the resolution of constitutional claims. But when Professor Alex Reinert studied the dockets in Bivens

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1 For further description of qualified immunity doctrine, see generally Part I.
3 See infra notes 21-25 and accompanying text.
5 Schwartz, supra note 4, at 915-16.
6 See infra notes 26-32 and accompanying text.
7 See Part I.B.
8 See Diana Hassel, Living a Lie: The Cost of Qualified Immunity, 64 MO. L. REV. 123, 145 n.106 (1999) (finding qualified immunity was denied in twenty percent of federal cases over a two-year period); Nancy Leong, The Saucier Qualified Immunity Experiment: An Empirical Analysis, 36 PEPP. L. REV. 667, 692 (2009) (finding that qualified immunity was denied in 14-32% percent of district court decisions); Greg Sobolski & Matt Steinberg, Note, An Empirical Analysis of Section
actions—constitutional claims brought against federal actors—he found that grants of qualified immunity led to just two percent of case dismissals over a three-year period.\(^9\) If qualified immunity motions are infrequently denied, how can they lead to dismissal of such a small percentage of claims?

To answer these questions, I reviewed the dockets of 1183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California.\(^10\) I tracked several characteristics of these cases including the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, courts’ assessments of defendants’ qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases’ dispositions. This dataset offers the most robust evidence to date about the frequency with which qualified immunity leads to the dismissal of filed cases before discovery and trial.\(^11\)

Among the 1183 cases in my dataset, qualified immunity doctrine rarely achieved its goal of disposing of cases pre-discovery and pre-trial. Defendants infrequently raised the qualified immunity defense before discovery, and courts appeared reluctant to grant motions to dismiss on qualified immunity grounds. Qualified immunity was raised more often by defendants at summary judgment and was more often granted by courts at that stage. But even when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants were not usually dispositive—additional claims or defendants often remained in the case and continued to expose government officials to the possibility of discovery and trial. Although there is significant variation among the five districts I studied,\(^12\) fewer than 1% of Section 1983 cases filed in these five districts were dismissed at the motion to dismiss stage and just 2% were dismissed at summary judgment on qualified immunity grounds.

Those interested in protecting government officials from discovery and trial should not take from these findings that the Supreme Court simply needs to make qualified immunity stronger. Instead, my study suggests that qualified immunity is fundamentally ill-suited to protect government officials from discovery and trial.\(^13\) Although district courts recognize that they should dispose of cases as early as possible on qualified immunity grounds, plaintiffs can often plausibly plead clearly established constitutional violations in their


\(^10\) See Part II for a description of my study design and methodology.

\(^11\) This dataset cannot measure the frequency with which qualified immunity causes cases never to be filed—another way in which qualified immunity might protect government officials from burdens associated with discovery and trial. For further discussion of this selection effect, see infra notes 68-70 and accompanying text.

\(^12\) For further discussion of that regional variation and future research that could explore the causes and impact of this variation, see infra note 98 and accompanying text.

\(^13\) See infra Part IV.A.2.
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complaints, foreclosing motions to dismiss.\textsuperscript{14} Factual disputes often prevent dismissal at summary judgment.\textsuperscript{15}

My study additionally shows that qualified immunity is less necessary than has previously been assumed to serve its intended protective function.\textsuperscript{16} The Supreme Court suggests in its opinions that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead my study shows that defendants and courts have a wide variety of tools at their disposal to dismiss plaintiffs’ Section 1983 cases in advance of discovery and trial. Qualified immunity rarely shields government officials from discovery and trial not only because it is unfit for the task but also because there are so many other ways that courts and parties can—and do—dispose of Section 1983 cases.

Qualified immunity doctrine has been roundly criticized as incoherent, overly protective of government officials, and a cause of constitutional uncertainty and stagnation.\textsuperscript{17} The doctrine’s most criticized characteristics were inspired in significant part by the Court’s interest in shielding government officials from burdens associated with discovery and trial. Were qualified immunity doctrine regularly protecting government officials from discovery and trial, one could argue that the doctrine’s incoherency, protection of bad actors, and contribution to constitutional uncertainty and stagnation were unfortunate but necessary byproducts of the need to protect government interests. Instead, my study shows that qualified immunity infrequently achieves its intended goal of protecting government officials from discovery and trial and is both ill-suited and largely unnecessary for this task.

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might “justify reconsideration of the balance struck” in its qualified immunity decisions.\textsuperscript{18} Available evidence is at this point robust and supports a single conclusion; qualified immunity doctrine does not protect government officials in the ways imagined by the Supreme Court. Near universal indemnification means that qualified immunity is unnecessary to protect government officials from financial liability. Qualified immunity shields few government officials from burdens associated with discovery and trial. The Supreme Court has stated that qualified immunity should protect “all but the plainly incompetent or those who knowingly violate the law,”\textsuperscript{19} but the justifications for qualified immunity that remain hardly warrant this level of protection. It is time for the Supreme Court to adjust qualified immunity doctrine to comport with this evidence.

The remainder of the Article proceeds as follows. Part I describes the Supreme Court’s assumptions about the burdens of discovery and trial for government defendants, and the ways in which these assumptions have shaped qualified immunity doctrine. In Part II, I describe the methodology of my study. In Part III, I describe my findings about the frequency with which law enforcement defendants raise qualified immunity, the frequency with which courts grant qualified immunity, the frequency and outcome of qualified immunity appeals, and the frequency with which qualified immunity grants dispose of plaintiffs’ claims. In Part IV, I describe the implications of these findings for the Court’s

\textsuperscript{14} See infra notes 101-103 and accompanying text.

\textsuperscript{15} See infra notes 104-105 and accompanying text.

\textsuperscript{16} See infra notes 106-109 and accompanying text.

\textsuperscript{17} See infra notes 37-42 and notes 48-49 and accompanying text for descriptions of these criticisms.

\textsuperscript{18} Anderson v. Creighton, 483 U.S. 635, 642 n.3 (1987).

\textsuperscript{19} Malley v. Briggs, 475 U.S. 335, 341 (1986).
assumptions about the purposes served by qualified immunity, common criticisms of qualified immunity doctrine, and the balance struck by qualified immunity doctrine between the interests of government officials and individuals whose rights have been violated.

I. QUALIFIED IMMUNITY’S INTENDED ROLE AS A SHIELD FROM DISCOVERY AND TRIAL

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

A. The Court’s Concerns about the Burdens of Discovery and Trial

The Supreme Court has made clear that its qualified immunity jurisprudence reflects the Court’s view about how best to balance two competing interests—the need for plaintiffs to be able to vindicate their rights, and the need to protect against the negative effects of damages actions on government officials. Yet the particular policy interests driving qualified immunity doctrine appear to have shifted over time.

When the Supreme Court first announced that law enforcement officials were entitled to a qualified immunity from suits, qualified immunity was justified as a means of protecting government defendants from the financial burdens of liability. Qualified immunity was necessary, according to the Court, because “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does.” Some aspects of the qualified immunity defense are consistent with an interest in protecting government officials from financial liability. For example, qualified immunity does not attach in claims against municipalities, claims against private actors, and claims for injunctive or declaratory relief.

22 Pierson, 386 U.S. at 555.
23 See County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (observing that qualified immunity is not available “in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding”); Pearson v. Callahan, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in “criminal cases and §1983 cases against a municipality, as well as §1983 cases against individuals where injunctive relief is sought instead of or in addition to damages”); Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (175) (“[I]mmunity from damages does not ordinarily bar equitable relief as well.”).
24 See Owen v. City of Independence, 445 U.S. 622, 653 (1980) (concluding that municipalities should not be protected by qualified immunity in part because concerns about overdeterrence are “less compelling, if not wholly inapplicable when the liability of the municipal entity is at stake”); Richardson v. McKnight, 521 U.S. 399, 411 (1997) (finding that private actors’ insurance “increases
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The Supreme Court’s decision in *Harlow v. Fitzgerald*, fifteen years after *Pierson*, expanded the policy goals animating qualified immunity. The Court explained in *Harlow* that qualified immunity was necessary not only to protect government officials from “being mulcted in damages,” but also to protect against “the diversion of official energy from pressing public issues,” “the deterrence of able citizens from acceptance of public office,” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”

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

> The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

The Court intends qualified immunity not only to protect government defendants from burdens associated with discovery and trial but also to protect government officials not named as defendants who may be required to testify, respond to discovery, or otherwise participate in litigation.

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24 *Pierson*, 386 U.S. at 555.
25 *Id.*
27 *Mitchell v. Forsyth*, 472 U.S. 511, 526 (describing qualified immunity as a way to “avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.”)
28 *Id.* at 526 (quoting *Harlow*, 457 U.S. at 817).
29 *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86.
30 See *Filarsky v. Delia*, 132 S.Ct. 1657, 1666 (2012) (holding that a private actor retained by the government to carry out its work is entitled to qualified immunity in part because the “distraction
Although the Supreme Court’s early discussions of qualified immunity doctrine suggest the doctrine’s main purpose was to protect officers from financial liability, its more recent decisions focus increasingly on qualified immunity as a protection from burdens associated from discovery and trial. In 1997, the Supreme Court described qualified immunity as a protection primarily from financial liability and made clear that “the risk of ‘distraction’ alone cannot be sufficient grounds for an immunity.”\textsuperscript{31} Twelve years later, in 2009, the Court described protecting government officials from burdens associated from discovery and trial as the “‘driving force’ behind creation of the qualified immunity doctrine.”\textsuperscript{32}

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

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

1. Clearly Established Law

The Court’s interest in shielding government defendants from discovery and trial underlay its decision to eliminate the subjective element of the qualified immunity defense. From 1967, when qualified immunity was first announced by the Supreme Court, until 1982, when \textit{Harlow} was decided, a defendant seeking qualified immunity had to show both that his conduct was objectively reasonable and that he had a “good-faith” belief that his conduct was proper.\textsuperscript{33} In \textit{Harlow}, the Supreme Court concluded that the subjective element of the defense was “incompatible” with the goals of qualified immunity because an official’s subjective intent often could not be resolved before trial.\textsuperscript{34} Moreover, during discovery, gathering evidence of an official’s subjective motivation “may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues.”\textsuperscript{35} By eliminating the subjective component of the qualified immunity analysis, the Court believed it could “avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the

\textsuperscript{31} \textit{Richardson}, 521 U.S. at 411.
\textsuperscript{33} \textit{Harlow}, 457 U.S. at 816.
\textsuperscript{34} \textit{Id}. at 817.
\textsuperscript{35} \textit{Id}.
legal norms the officials are alleged to have violated were not clearly established at the time.”

Many have criticized the Court’s decision in Harlow to disregard a government official’s subjective intent and focus instead on whether the law is clearly established as an objective matter. Scholars have argued that the Court’s focus on “clearly established” law has led to significant confusion, as the Supreme Court has not explained what sources of law can clearly establish a constitutional right or how factually similar prior cases must be to clearly establish the law. Judges are confused as well. One circuit court reported that “[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face.” Moreover, when the Supreme Court has offered hints about what constitutes clearly established law, it has suggested an exceedingly restrictive understanding of the phrase. Even those who believe that qualified immunity doctrine serves a valuable role in the development and enforcement of constitutional rights believe that the doctrine is currently too deferential to government interests.

Critics have also argued that the Court’s focus on clearly established law protects bad actors. The Court’s disregard of subjective intent protects officers who act in bad faith. In addition, government officials who have acted unconstitutionally can be shielded from liability simply because no prior case has held that conduct to be unconstitutional. It is, as Professor John Jeffries has written, “as if the one-bite rule for bad dogs started over with every change in weather conditions.”

37 See, e.g., Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (“One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.”); John C. Jeffries, Jr., What’s Wrong With Qualified Immunity? 62 FLA. L. REV. 851, 852 (2010) (describing qualified immunity as “a mare’s nest of complexity and confusion”).
38 Charles R. Wilson, “Location, Location, Location”: Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). See also Blum, supra note 37, at 945-46 (quoting two judges’ descriptions of the complexities of determining whether a law is clearly established).
39 For discussions of the Supreme Court’s recent decisions that make it more difficult for plaintiffs to defeat qualified immunity motions, see, for example, Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, Qualified Immunity Developments: Not Much Hope Left for Plaintiffs, 29 TOURYO L. REV. 633, 652-53 (2013); Pamela S. Karlan, Foreword: Democracy and Disdain, 126 HARV. L. REV. 1, 61-62 (2012); Kit Kinports, The Supreme Court’s Quiet Expansion of Qualified Immunity, 100 MINN. L. REV. HEADNOTES 62, 70-71 (2016).
41 For example, in Ashcroft v. Al-Kidd, the Supreme Court held that then-Attorney General John Ashcroft was entitled to qualified immunity, even though he authorized federal prosecutors to use the material-witness statute pretextually, because qualified immunity doctrine “demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.” Ashcroft v. Al-Kidd, 563 U.S. 731, 734 (2011).
42 Jeffries, supra note 40, at 256.
2. The Order of Battle

The Court’s decision to eliminate the subjective prong of qualified immunity—prompted by concerns about the burdens of discovery and trial—and focus, instead, on whether the law has been clearly established, is the root cause of another controversial aspect of qualified immunity doctrine often referred to as the “order of battle.” The “order of battle” concerns whether a court can grant qualified immunity on the ground that a constitutional right is not clearly established without first answering whether the defendant violated the constitutional right. In 2001, the Supreme Court held in *Saucier v. Katz* that the answer to this question was no—a court engaging in a qualified immunity analysis must first decide whether the defendant violated the plaintiff’s constitutional rights and then decide whether the constitutional right was clearly established. The Court insisted on this sequence because it would allow “the law’s elaboration from case to case….The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer’s conduct was unlawful in the circumstances of the case.” Eight years later, in *Pearson v. Callahan*, the Court reversed itself and concluded that *Saucier*’s two-step process was not mandatory. In reaching this conclusion, the Court explained that requiring courts to decide whether a plaintiff’s constitutional rights were violated before deciding whether the law was clearly established had been harshly criticized by judges as burdensome for both courts and litigants.

Post-*Pearson*, commentators fear that if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established—leading to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims, and offering little guidance to government officials about the scope of constitutional rights. A recent study of appellate court decisions decided after *Pearson* has found some evidence to support these concerns of constitutional stagnation.

3. Interlocutory Appeals

The Court’s interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials. Generally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right “cannot be effectively vindicated after

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45 *Id*. at 201.
47 *Id*.
The question, then, decided by the Court in *Mitchell v. Forsyth*, was whether qualified immunity should be understood as an entitlement not to stand trial that cannot be remedied by an appeal at the end of the case. In concluding that qualified immunity could be appealed immediately, the Court relied on its assertion in *Harlow* that qualified immunity was “an entitlement not to stand trial or face the other burdens of litigation.” If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants who lose on qualified immunity grounds could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity “is an immunity from suit rather than a mere defense to liability; and...it is effectively lost if a case is erroneously permitted to go to trial.”

**C. Conclusion**

The Supreme Court’s qualified immunity decisions over the past thirty-five years have relied heavily on the assumptions that discovery and trial impose significant burdens on government officials, and that qualified immunity is necessary to shield government officials from these burdens. Concerns about the burdens of discovery and trial led the Court to eliminate consideration of a government defendant’s subjective intent when deciding whether he is entitled to qualified immunity, and focus instead on whether the law was clearly established as an objective matter. The Court’s qualified immunity decisions have led to significant confusion about how to clearly establish the law, as well as concern that the standard is overly protective of government officials and leads to constitutional stagnation. Yet the Court has relied on no empirical evidence to support its assumptions about the burdens of discovery and trial, or the extent to which qualified immunity doctrine protects against these assumed burdens.

**II. Study Methodology**

To explore the frequency with which qualified immunity shields government officials from discovery and trial, I reviewed the dockets of cases filed from January 1, 2011-December 31, 2012 in five districts: the Southern District of Texas; Middle District of Florida; Northern District of Ohio; Eastern District of Pennsylvania; and Northern District of California. There were several considerations that led me to study these five districts.

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50 Mitchell v. Forsyth, 472 U.S. at 525.
51 Id. at 527.
52 Id.
53 Twenty years ago, Alan Chen criticized the Court and its critics for making assertions about the role of qualified immunity in constitutional litigation without evidence to support their claims. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 101 (1997) (“Presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics. While the Court has consistently hypothesized that significant social costs are engendered by §1983 and Bivens litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials’ actual behavior. Similarly, while other commentators also have observed that qualified immunity litigation may generate substantial social costs, they have offered no supporting empirical data either.”) The same is largely true today.
I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh circuits because I expected judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal. Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuit favoring plaintiffs, and judges in the Eleventh circuit so hostile to Section 1983 cases that they are described as applying “unqualified immunity.”

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

I chose to review dockets instead of relying on the most obvious alternative—decisions available on Westlaw. Although Westlaw can quickly sort out decisions in which qualified immunity is addressed by district courts, Westlaw could not capture information key to my analysis about the frequency with which qualified immunity protects government officials from discovery and trial. First, of course, a Westlaw search could capture no information about the number of cases in which qualified immunity was never raised. In addition, a Westlaw search could not capture information about the number of cases in which qualified immunity was raised by the defendant in his motion but not addressed by the court in its decision. Even when a defendant raises qualified immunity and the district court addresses qualified immunity in its decision, the decision may not appear on Westlaw—Westlaw includes only those decisions that courts have submitted to the service. In other words, opinions on Westlaw can offer insights about the ways in

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54 See, e.g., Reinert, supra note 9, at 832 n.126 (citing Lee Epstein, et al., The Judicial Common Space, 23 J.L. ECON. & ORG. 303, 312 fig. 4 (2007)).
55 See Jeffries, supra note 40 at 250 n.151; Wilson, supra note 38 (describing the Eleventh Circuit as having a very restrictive view and the Third Circuit as having a broader view of what constitutes "clearly established law").
57 For example, the Philadelphia and Houston Police Departments are both large, with between 5000-7000 officers); the Cleveland Police Department, San Francisco Police Department, and Jacksonville Sheriff’s Office, are midsized, with between 1600-2000 officers; and all five districts have smaller agencies. See Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies (CSLLEA), NAT'L ARCHIVE CRIMINAL JUSTICE DATA (2008), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681.
58 Most empirical studies examining qualified immunity have relied on decisions available on Westlaw. See studies referenced infra note 8. One notable exception is Professor Reinert’s study of Bivens dockets. See supra note 9.
59 A recent study found that only 2 percent of district court orders appear on Westlaw. David Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, Docketology, District Courts, and Doctrine, 85 WASH. L. REV. 681 (2007). In contrast, 64% of the decisions on qualified immunity motions in my dataset are available on Westlaw. During my study period, fifteen out of thirty-nine qualified immunity motions made in the Southern District of Texas are available on Westlaw; forty of the sixty-eight qualified immunity motions made in the Middle District of Florida are available on Westlaw; thirty-six of the forty-four qualified immunity motions made in the Northern District of
which district courts assess qualified immunity when they choose to address the issue and choose to make the opinion accessible on Westlaw, but can say little about the frequency with which qualified immunity is raised, the ways in which all motions raising qualified immunity are decided, and case dispositions.

I reviewed the docket of cases filed in 2011 and 2012 in the five districts in my study.\textsuperscript{60} I searched case filings in the five districts in my study through BloombergLaw, a website that has docket with. I limited my search to those cases that had been designated under the broad term “civil rights,” code 440.\textsuperscript{62} This search generated 462 dockets in the Southern District of Texas, 465 dockets in the Northern District of Ohio, 674 dockets in the Middle District of Florida, 712 dockets in the Northern District of California, and 1435 cases in the Eastern District of Pennsylvania. I reviewed the complaints associated with these 3,748 dockets and included in my dataset those cases alleging constitutional violations by state and local law enforcement agencies and their employees.\textsuperscript{63} I focused on law enforcement defendants because the Supreme Court’s qualified immunity doctrine has been developed primarily through cases alleging constitutional claims against law enforcement,\textsuperscript{64} and

\textsuperscript{60} I chose this two-year period because it is a recent period in which most (if not all) cases have been resolved by the time of publication.

\textsuperscript{61} See Email from Tania Wilson, BloombergLaw Law School Relationship Manager, West Coast, to Kelley Leong (July 8, 2016, 12:18 PM) (“[BloombergLaw] ha[s] everything on PACER. We are also able to obtain docket sheets and documents via courier retrieval (which would fill in the gap of some cases not available electronically).”).

\textsuperscript{62} There is a more restrictive code that I could have used to narrow the search; 42 U.S.C. 1983. However, I found that many Section 1983 cases were not designated in this manner. Accordingly, I used the broader search. It is possible that some Section 1983 cases against state and local law enforcement officers may not be coded 440 – there is, for example a code for “550: Prisoner – Civil Rights” that some incarcerated plaintiffs may use in cases brought against law enforcement officers.

\textsuperscript{63} I limited my study to state and local law enforcement agencies identified in the Bureau of Justice Statistics Census of State and Local Law Enforcement. See Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies (CSLEA), NAT'L ARCHIVE CRIMINAL JUSTICE DATA (2008), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 [hereinafter BJS LAWENFORCEMENT CENSUS DATA]. I excluded decisions involving other types of government officials, including some government officials that perform law enforcement functions, including law enforcement employed by school districts, state correctional officers, and federal law enforcement. I also removed duplicate filings, cases that were consolidated, and cases that were improperly brought against law enforcement agencies located outside of the five districts.

\textsuperscript{64} Of the eighteen qualified immunity cases that the Supreme Court has decided since 2000, eleven have involved claims of First and/or Fourth Amendment violations by state and local law enforcement (\textit{Groh}, \textit{Mullenix}, \textit{Sheehan}, \textit{Carroll}, \textit{Plumhoff}, \textit{Stanton}, \textit{Reichle}, \textit{Messerschmidt}, \textit{Rybervn}, \textit{Pearson}, \textit{Brosseau}); two cases have alleged constitutional violations by prison guards (\textit{Hope}, \textit{Taylor}); three cases have alleged constitutional violations by federal law enforcement (\textit{Wood} (secret service); \textit{Al-Kidd} (Attorney General); \textit{Saucier} (military police); and two cases have asserted constitutional claims against government officials not involved in the criminal justice system (\textit{Lane}, \textit{Safford}).
because my prior research has focused on lawsuits against state and local law enforcement defendants. 65

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

My data is comprehensive regarding these five districts—it presumably includes all Section 1983 cases filed against state and local law enforcement in these districts over a two-year period, and offers insights about how frequently qualified immunity is raised in these cases, how courts decide these motions, and how the cases are resolved. There are, however, several limitations of the data worth mentioning. First, although I selected these five districts in part to capture regional variation, I am not certain that these five districts represent the full range of court and litigant behavior nationwide. The marked variation in my data does, however, suggest that I have captured at least a significant degree of regional variation. Second, the data offers no information about the role of qualified immunity in state court litigation. I have not studied how qualified immunity fares in state courts because BloombergLaw does not offer much information about the litigation of constitutional cases in state courts, to the extent they are litigated there. 66 A third limitation of this study is that it focuses on the litigation of constitutional claims against state and local law enforcement officers, which often involves First and Fourth Amendment claims.


66 I looked at state court dockets available on BloombergLaw for counties in the Northern District of California and found that very few had any information about motions filed (in the rare instances that they were not removed to federal court). In addition, federal constitutional cases filed in state court may regularly be removed to federal court. In the Northern District of California, 55 of the 248 cases filed during the study period—more than 22%—were initially filed in state court and removed to federal court. In the Northern District of Ohio, 55 of the cases were removed from state court, which constitutes 32% of the cases filed in federal district court over those two years. In the Southern District of Texas, 28 cases were removed from state court, amounting to 21% of the total filings in federal district court. In the Eastern District of Pennsylvania, 62 of the cases were removed from state court, which constitutes 15% of the cases filed in federal court over these two years. In the Middle District of Florida, 61 of the cases were removed from state court, which constitutes 27% of the cases filed in federal court over these two years. Of course, these figures do not capture how many cases were filed in state court but not removed.
Further research could explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations. 67

Finally, my study only captures information about cases that were actually filed. If qualified immunity is intended to protect government officials from burdens associated with discovery and trial, one way the doctrine may achieve this goal is by discouraging people from suing in the first place. We do not know how frequently qualified immunity causes people not to file lawsuits. 68 We also do not know which types of cases are not brought because of qualified immunity. To the extent that qualified immunity doctrine discourages people from filing insubstantial cases, the doctrine is meeting its express goals. 69 But to the extent that the doctrine discourages people from filing meritorious cases because the briefing and interlocutory appeals associated with qualified immunity would be too expensive, the doctrine may not be sorting cases in the way intended by the Court. Further research should attempt to capture the frequency with which qualified immunity causes people not to file lawsuits, and the merits of the claims people choose not to bring. 70

III. FINDINGS

The Supreme Court has described qualified immunity as a necessary protection for government officials from burdens associated with discovery and trial. Yet qualified immunity cannot protect government officials from discovery and trial in filed cases unless four conditions are met. First, the case must be brought against an individual officer and must seek monetary damages—qualified immunity is not available for claims against municipalities or claims for non-economic relief. Second, the defendant must raise the qualified immunity defense early enough in the litigation that it can protect him from discovery or trial. If the defendant seeks to protect himself from discovery, he must raise qualified immunity in a motion to dismiss or a motion for judgment on the pleadings; if a defendant seeks to protect himself from trial, he can raise qualified immunity at the pleadings or at summary judgment. 71 Third, for a qualified immunity motion to protect government officials against burdens associated with discovery or trial, the court must grant the motion. Finally, the grant of qualified immunity must completely resolve the case. This Part describes my findings regarding the frequency with which each of these four conditions are met: the number of cases in which qualified immunity can be raised by

[67] See infra note 93 and accompanying text for a description of this possibility.
[68] Available evidence suggests that just one percent of people who believe they have been harmed by the police file lawsuits against law enforcement. See Joanna C. Schwartz, What Police Learn from Lawsuits, 33 CARDOZO L. REV. 841, 863-64 (2012). Plaintiffs’ attorneys report that the procedural and substantive burdens of qualified immunity are among the factors they consider when deciding whether to accept a case. See Reinert, supra note 9.
[70] For future research that will attempt to address these and other questions, see infra notes 98 and 128 and accompanying text.
[71] In some instances, motions for summary judgment may be made before the parties have engaged in full-fledged discovery, either because the parties will attach documentary evidence to their Rule 12 motion and the court will convert the motion to one for summary judgment, or because the parties will engage in partial discovery sufficient only to address the qualified immunity question. See supra note 100.
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defendants; the number of cases in which defendants choose to raise qualified immunity; the stage(s) of litigation at which defendants raise qualified immunity; the ways in which district courts decide qualified immunity motions; the frequency and outcome of qualified immunity appeals; and, finally, the frequency with which qualified immunity is the reason that a case ends before discovery or trial.

A. Cases in Which Qualified Immunity Cannot Play a Role

There are certain types of cases in which qualified immunity cannot play a role. The Supreme Court has held that qualified immunity does not apply to claims against municipalities and claims for injunctive or declaratory relief. Accordingly, qualified immunity cannot protect government officials from discovery or trial in cases brought solely against municipalities and cases solely seeking injunctive and/or declaratory relief. In my docket dataset of 1183 cases, 102 cases (9%) were brought solely against municipalities and/or sought only injunctive or declaratory relief.

In my docket dataset of 1183 cases, 102 cases (9%) were brought solely against municipalities and/or sought only injunctive or declaratory relief.

**Table 1: Frequency with which Qualified Immunity Can Be Raised, in Five Districts**

<table>
<thead>
<tr>
<th></th>
<th>S.D. TX</th>
<th>M.D. FL</th>
<th>N.D. OH</th>
<th>N.D. CA</th>
<th>E.D. PA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Section 1983 cases filed</td>
<td>131</td>
<td>225</td>
<td>172</td>
<td>248</td>
<td>407</td>
</tr>
<tr>
<td>Total Section 1983 cases against municipalities/seeking injunctive relief</td>
<td>15</td>
<td>27</td>
<td>13</td>
<td>22</td>
<td>24</td>
</tr>
<tr>
<td>Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond</td>
<td>11</td>
<td>44</td>
<td>20</td>
<td>8</td>
<td>24</td>
</tr>
<tr>
<td>Section 1983 cases in which QI can be raised by defendants</td>
<td>105 (80%)</td>
<td>154 (68%)</td>
<td>139 (80%)</td>
<td>218 (88%)</td>
<td>359 (88%)</td>
</tr>
</tbody>
</table>

Even when cases are brought against individual officers and seek monetary relief, there are some cases in which defendants have no opportunity to raise qualified immunity as a defense—cases dismissed sua sponte by the court before the defendants have an opportunity to respond to the complaint. In these types of cases, qualified immunity is unnecessary to protect defendants from discovery and trial. In the five districts in my docket dataset, 107 cases (9%) naming individual law enforcement officers and seeking damages were dismissed sua sponte by district courts. Most often, district courts dismissed these cases pursuant to their statutory power to review pro se plaintiffs’ complaints and

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72 See supra notes 23-24 and accompanying text.
73 In some of these instances, plaintiffs apparently wanted to name individual officers (indicated by the fact that they named Doe defendants) but were unable to identify the Does during the pendency of the case. (When Doe defendants are identified in the complaint and subsequently named, I count these as cases against individual defendants; when Doe defendants are named but their true identities are never identified, I count these as cases only against the municipality, as the Doe defendants could not raise a qualified immunity defense.) In other instances, plaintiffs might have intentionally named only the municipality.
HOW QUALIFIED IMMUNITY FAILS

dismiss actions they conclude are frivolous or meritless. Other cases were dismissed by the court at this preliminary stage because the plaintiffs never served the defendants or failed to prosecute the case, or the case was remanded to state court.

Qualified immunity can only protect defendants from discovery and trial if the claim is such that a government official can raise the defense. Defendants could not raise qualified immunity in 9% of cases in my docket dataset because those cases did not name individual defendants. Qualified immunity was unnecessary to shield government officials from discovery or trial in another 9% of cases in my dataset because these cases were dismissed by the district courts before defendants could raise the defense. Accordingly, of the 1183 Section 1983 cases filed during the two-year study period in the five districts in my study, defendants could raise a qualified immunity defense in 974 (82%) of the cases.

B. Defendants’ Choices: The Frequency and Timing of Qualified Immunity Motions

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

Defendants raised qualified immunity in 37% of the 974 cases in the docket dataset which defendants could raise the defense. The frequency with which defendants raised qualified immunity varied significantly by district. Defendants in the Southern District of

74 See 28 U.S.C. § 1915(e). Note that district courts could exercise this power based on a belief that the defendants were entitled to qualified immunity. I have not tracked the frequency with which qualified immunity was identified as a basis for dismissal.

75 Because qualified immunity is an affirmative defense, government defendants may also raise qualified immunity in their answers. I did not track the frequency with which government defendants raised qualified immunity in their answers because my focus is on the frequency with which qualified immunity leads to case dismissal, and a defense raised in an answer will rarely (if ever) lead to dismissal without a separate motion raising the defense.

76 In some cases, defendants made multiple motions to dismiss or for summary judgment on qualified immunity grounds. I have not counted each separate motion made by the parties. If, for example, defendants move to dismiss on qualified immunity grounds, the court grants the motion with leave to amend, the plaintiff files an amended complaint, and the defendants move again to dismiss on qualified immunity, I do not count the second motion. In contrast, if a defendant raises qualified immunity at multiple stage of litigation, I have counted each of those motions separately. In the Southern District of Texas, there were six cases in which defendants raised qualified immunity at both the motion to dismiss and summary judgment stages. In the Northern District of Ohio, there were three cases in which defendants raised qualified immunity at both the motion to dismiss and summary judgment stages. In the Northern District of California, there were six cases in which defendants raised qualified immunity at both the motion to dismiss and summary judgment stages and one case in which defendants raised qualified immunity at summary judgment and after trial. In the Eastern District of Pennsylvania, there were eight cases in which defendants raised qualified immunity at both the motion to dismiss and summary judgment stages. In the Middle District of Florida there were seventeen cases where qualified immunity was raised in both the motion to dismiss and summary judgment, and one case in which qualified immunity was raised at summary judgment and a motion for judgment as a matter of law.
Texas and the Middle District of Florida were most likely to raise the qualified immunity defense; in these districts, defendants brought one or more motions raising qualified immunity in 54% and 55% of the cases in which the defense could be raised, respectively. Defendants in the Eastern District of Pennsylvania were least likely to raise the qualified immunity defense; defendants brought one or more motions raising qualified immunity in 24% of cases in which the defense could be raised. In the Northern District of California, defendants raised the qualified immunity defense in one-third of possible cases, and in the Northern District of Ohio defendants raised qualified immunity in 47% of possible cases.

<table>
<thead>
<tr>
<th>District</th>
<th>Total Cases Raising QI</th>
<th>Total Cases in which QI could be raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. TX</td>
<td>57 (54%)</td>
<td>105</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>84 (55%)</td>
<td>154</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>65 (47%)</td>
<td>138</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>72 (33%)</td>
<td>218</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>87 (24%)</td>
<td>359</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>365 (37%)</strong></td>
<td><strong>974</strong></td>
</tr>
</tbody>
</table>

The most common time to raise qualified immunity is at summary judgment. Defendants in the Middle District of Florida were equally likely to raise qualified immunity at the pleadings stage and at summary judgment; in the other four districts, defendants were significantly more likely to raise qualified immunity at summary judgment. Of the 407 qualified immunity motions made in the five districts in my study, 34% were made in a motion to dismiss or motion for judgment on the pleadings and 65% were made in a summary judgment motion. Based on the information available on BloombergLaw, it appears that less than one percent of qualified immunity motions were made at or after trial.77

<table>
<thead>
<tr>
<th>District</th>
<th>D raising QI at MTD/pleadings</th>
<th>D raising QI at SJ</th>
<th>D raising QI at or after trial</th>
<th>Total QI motions</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. TX</td>
<td>21 (33%)</td>
<td>42 (67%)</td>
<td>0</td>
<td>63</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>51 (50%)</td>
<td>50 (49%)</td>
<td>1 (1%)</td>
<td>102</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>17 (25%)</td>
<td>51 (75%)</td>
<td>0</td>
<td>68</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>17 (22%)</td>
<td>61 (77%)</td>
<td>1 (1%)</td>
<td>79</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>31 (33%)</td>
<td>63 (66%)</td>
<td>1 (1%)</td>
<td>95</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>137 (34%)</strong></td>
<td><strong>267 (66%)</strong></td>
<td><strong>3 (1%)</strong></td>
<td><strong>407</strong></td>
</tr>
</tbody>
</table>

I also explored how frequently defendants raise other types of defenses in their motions to dismiss, for summary judgment, and for judgment as a matter of law. Qualified immunity is usually one of several arguments defendants make in their motions to dismiss and

77 The docket dataset may understate the number of times that defendants moved for judgment as a matter of law on qualified immunity grounds if such motions were made orally and were decided without a written opinion.
summary judgment motions. And defendants regularly move to dismiss or for summary judgment without raising qualified immunity at all.\(^{78}\)

**FIGURE 1: MOTIONS ON THE PLEADINGS IN FIVE DISTRICTS**

![Graph showing percentage of motions to dismiss on pleadings that raise QI and those that do not raise QI in five districts.]

**FIGURE 2: SUMMARY JUDGMENT MOTIONS IN FIVE DISTRICTS**

![Graph showing percentage of defense summary judgment motions that raise QI and those that do not raise QI in five districts.]

Of the 428 cases in my docket dataset in which defendants could raise qualified immunity and defendants filed one or more motions to dismiss, defendants in 137 (32\%) of the cases included a qualified immunity argument. Defendants in the Middle District of Florida were the most likely to raise qualified immunity in motions to dismiss or for judgment on the pleadings—defendants included a qualified immunity argument in 45\% of their motions, compared with 39\% of the motions filed by defendants in the Southern District of Texas, 33\% of the motions filed by defendants in the Northern District of Ohio, 25\% of the motions filed by defendants in the Eastern District of Pennsylvania, and 20\% of the motions filed by defendants in the Northern District of California. Many motions to dismiss or for judgment on the pleadings were based not on qualified immunity but on arguments that plaintiffs’ complaint did not satisfy plausibility pleading requirements,

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\(^{78}\) I have included in my count of motions to dismiss and for summary judgment instances in which the municipality moved to dismiss, but the individual defendant(s) did not. One could take issue with this choice, as municipalities are not protected by qualified immunity. Yet I included these motions in my calculation because they reflect opportunities in which the law enforcement defendants moved to dismiss, but declined to raise qualified immunity in the motion. This rationale relies on the assumption that, in each of these cases, the same attorney represents both the individual defendants and the municipality, and so would file a single motion on their joint behalf. This is not always the case.
concerned a claim that was barred by a criminal conviction, or otherwise did not state a legally cognizable claim.\textsuperscript{79}

Defendants in all five districts were far more likely to include a qualified immunity argument in their summary judgment motions. Of the 345 summary judgment motions filed in these five districts in which qualified immunity could be raised, 267 (77\%) included an argument based on qualified immunity. There was some variation among the districts in this area as well, although the variation was less pronounced than in other aspects of qualified immunity litigation practice.\textsuperscript{80}

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

This subpart examines how frequently district courts grant motions to dismiss and summary judgment on qualified immunity grounds. As I have shown, qualified immunity is almost always raised in conjunction with other arguments in motions to dismiss or for summary judgment. My focus here is on the way in which the qualified immunity argument is evaluated by the district court.\textsuperscript{81}

In the five districts in my docket dataset, defendants raised qualified immunity in a total of 407 motions. Table 4 reflects the way in which district courts resolved those motions. There is variation across the districts in my study: the Southern District of Texas has the lowest rate of qualified immunity denials (19\%) and the highest rate of qualified immunity grants (27\%). The remaining four districts have comparable rates of qualified immunity denials, but differ in the frequency with which they grant qualified immunity

\textsuperscript{79} See Ashcroft v. Iqbal, 556 U.S. 662 (2009) (setting out the plausibility pleading standard); Heck v. Humphrey, 512 U.S. 477 (1994) (holding that a plaintiff seeking damages for unconstitutional conviction or sentence must have that conviction or sentence declared invalid before a Section 1983 claim can proceed).

\textsuperscript{80} Qualified immunity was raised in 64\% of summary judgment motions filed in the Eastern District of Pennsylvania; 78\% of summary judgment motions filed in the Southern District of Texas; 79\% of summary judgment motions filed in the Northern District of California; 81\% of summary judgment motions filed in the Middle District of Florida, and 94\% of summary judgment motions filed in the Northern District of Ohio.

\textsuperscript{81} I have coded decisions in a way that focuses on the role of qualified immunity in the decision. If a defendant’s motion raises multiple arguments and qualified immunity is granted but all other bases for the motion are denied, I code that decision as granted on qualified immunity grounds. Similarly, if defendant’s motion raises multiple arguments and qualified immunity is denied and all other bases for the motion are denied, I code that decision as denied on qualified immunity. Included in the “QI Granted in Part” column are decisions in which one or more defendants who have moved to dismiss on qualified immunity grounds were awarded qualified immunity, but qualified immunity was not granted for all defendants or claims. If a motion is granted by a court but the decision clearly states that the motion was granted because the plaintiff has failed to establish a constitutional violation, or that the motion is granted on qualified immunity in the alternative, I have included those decisions in a separate category—“QI in the Alternative/Fails 1st Step”—as a way of separating out those motions that would have been decided in defendants’ favor even without qualified immunity. In the “Grant/GiP (Not on QI)” category are decisions in which the motions are granted in full or in part on grounds other than qualified immunity—decisions in which the district court does not mention qualified immunity, or mentions qualified immunity but states that the decision is not based on qualified immunity grounds.
motions in whole or part.\textsuperscript{82} Across the five districts in my study, qualified immunity motions were denied 30\% of the time. Qualified immunity motions in these five districts are granted in part 8\% of the time and granted in full 12\% of the time. One-third of the time, motions raising qualified immunity were granted in whole or part because the court found no constitutional violation or on other grounds. And district courts in my study did not decide 17\% of the motions raising qualified immunity, usually because the cases settled or were voluntarily dismissed while the motions were pending. If one considers only those decisions in which the court has ruled on qualified immunity (or ruled on qualified immunity in the alternative or based on a finding that plaintiffs did not suffer a constitutional violation), both denial rates and grant rates rise significantly.\textsuperscript{83}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
& QI Denied & QI GiP & QI Granted & QI in the Alternative/ Fails 1\textsuperscript{st} step & Grant/GiP (Not on QI) & Not Decided & Total \\
\hline
S.D. TX & 12 (19\%) & 4 (6\%) & 17 (27\%) & 6 (10\%) & 11 (17\%) & 13 (21\%) & 63 \\
\hline
M.D. FL & 34 (33\%) & 7 (7\%) & 17 (17\%) & 10 (10\%) & 16 (16\%) & 18 (18\%) & 102 \\
\hline
N.D. OH & 22 (32\%) & 8 (12\%) & 4 (6\%) & 10 (15\%) & 15 (22\%) & 9 (13\%) & 68 \\
\hline
N.D. CA & 24 (30\%) & 9 (11\%) & 7 (9\%) & 9 (11\%) & 15 (19\%) & 15 (19\%) & 79 \\
\hline
E.D. PA & 30 (32\%) & 3 (3\%) & 4 (4\%) & 14 (15\%) & 29 (31\%) & 15 (16\%) & 95 \\
\hline
Total & 122 (30\%) & 31 (8\%) & 49 (12\%) & 49 (12\%) & 86 (21\%) & 70 (17\%) & 407 \\
\hline
\end{tabular}
\caption{Success of Motions Raising Qualified Immunity in Docket Dataset}
\end{table}

I additionally evaluated courts’ decisions at the motion to dismiss and summary judgment stages. Parsing the data in this way reveals more striking regional variations: in the Southern District of Texas, 24\% of motions to dismiss on qualified immunity grounds were granted, whereas no motions to dismiss were granted on qualified immunity grounds in the Northern District of Ohio and the Northern District of California. And while summary judgment motions were granted on qualified immunity grounds almost 30\% of the time in the Southern District of Texas, such motions were granted just 3\% of the time in the Eastern District of Pennsylvania.

\textsuperscript{82} Courts in the Middle District of Florida granted qualified immunity motions in full or part 24\% of the time, courts in the Northern District of Ohio and the Northern District of California granted qualified immunity motions in whole or part 18\% and 19\% of the time, respectively, and courts in the Eastern District of Pennsylvania granted qualified immunity motions in full or part 7\% of the time.

\textsuperscript{83} If one eliminates columns five and six of Table 4, qualified immunity motions in the Southern District of Texas are denied 31\% of the time and granted 44\% of the time; qualified immunity motions in the Middle District of Florida are denied 50\% of the time and granted 29\% of the time; qualified immunity motions in the Northern District of Ohio are denied 50\% of the time and granted 18\% of the time; qualified immunity motions in the Northern District of California are denied 49\% of the time and granted 16\% of the time; and qualified immunity motions in the Eastern District of Pennsylvania are denied 58\% of the time and granted 33\% of the time.
Despite these differences, my data suggest that, on average, courts are more likely to grant qualified immunity at summary judgment than at the motion to dismiss stage: Courts granted qualified immunity in whole or part in 28% of the cases in which the defense was raised at summary judgment, and in 15% of the cases in which it was raised in a motion to dismiss. Courts were also more likely to resolve motions to dismiss on grounds other than qualified immunity: Courts granted motions in whole or part on grounds other than qualified immunity in 27% of the motions to dismiss and 18% of the summary judgment motions.

D. Circuit Courts’ Decisions: The Frequency and Success of Qualified Immunity Appeals

A complete study of the frequency with which qualified immunity leads to the disposition of cases before discovery and trial must additionally examine the frequency and outcome of appeals. Defendants can appeal denials of qualified immunity immediately, and any qualified immunity decision can be appealed after a final judgment in the case. Defendants immediately appealed twenty-five of the 153 qualified immunity decisions in my docket dataset that were denied or granted in part. Defendants brought interlocutory appeals of another three decisions in which the district courts denied defendants’ motions

<p>| TABLE 5: OUTCOME OF MOTIONS ON THE PLEADINGS THAT RAISED QUALIFIED IMMUNITY IN FIVE DISTRICTS |
|---------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|</p>
<table>
<thead>
<tr>
<th></th>
<th>QI Denied</th>
<th>QI Granted in Part</th>
<th>QI Granted</th>
<th>QI in the Alternative/ Fails 1st step</th>
<th>Grant/GiP (Not on QI)</th>
<th>Not Decided</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. TX</td>
<td>5 (24%)</td>
<td>1 (4%)</td>
<td>5 (24%)</td>
<td>1 (4%)</td>
<td>4 (19%)</td>
<td>5 (24%)</td>
<td>21</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>19 (37%)</td>
<td>1 (2%)</td>
<td>5 (10%)</td>
<td>1 (2%)</td>
<td>14 (27%)</td>
<td>11 (22%)</td>
<td>51</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>4 (24%)</td>
<td>1 (6%)</td>
<td>0 (0%)</td>
<td>4 (24%)</td>
<td>4 (24%)</td>
<td>4 (24%)</td>
<td>17</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>4 (24%)</td>
<td>5 (29%)</td>
<td>0 (0%)</td>
<td>5 (29%)</td>
<td>3 (18%)</td>
<td>17 (28%)</td>
<td>17</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>12 (39%)</td>
<td>0 (0%)</td>
<td>2 (6%)</td>
<td>3 (10%)</td>
<td>10 (32%)</td>
<td>4 (13%)</td>
<td>31</td>
</tr>
<tr>
<td>Total</td>
<td>44 (32%)</td>
<td>8 (6%)</td>
<td>12 (9%)</td>
<td>9 (7%)</td>
<td>37 (27%)</td>
<td>27 (20%)</td>
<td>137</td>
</tr>
</tbody>
</table>

<p>| TABLE 6: OUTCOME OF SUMMARY JUDGMENT MOTIONS THAT RAISED QUALIFIED IMMUNITY IN FIVE DISTRICTS |
|---------------------------------|----------------|----------------|----------------|----------------|----------------|----------------|</p>
<table>
<thead>
<tr>
<th></th>
<th>QI Denied</th>
<th>QI Granted in Part</th>
<th>QI Granted</th>
<th>QI in the Alternative/ Fails 1st step</th>
<th>Grant/GiP (Not on QI)</th>
<th>Not Decided</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. D. TX</td>
<td>7 (17%)</td>
<td>3 (7%)</td>
<td>12 (29%)</td>
<td>5 (12%)</td>
<td>7 (17%)</td>
<td>8 (19%)</td>
<td>42</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>14 (28%)</td>
<td>6 (12%)</td>
<td>12 (24%)</td>
<td>9 (18%)</td>
<td>2 (4%)</td>
<td>7 (14%)</td>
<td>50</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>18 (35%)</td>
<td>7 (14%)</td>
<td>4 (8%)</td>
<td>6 (12%)</td>
<td>11 (22%)</td>
<td>5 (10%)</td>
<td>51</td>
</tr>
<tr>
<td>N. D. CA</td>
<td>20 (33%)</td>
<td>4 (7%)</td>
<td>7 (11%)</td>
<td>8 (13%)</td>
<td>10 (16%)</td>
<td>12 (20%)</td>
<td>61</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>17 (27%)</td>
<td>3 (5%)</td>
<td>2 (3%)</td>
<td>11 (17%)</td>
<td>19 (30%)</td>
<td>11 (17%)</td>
<td>63</td>
</tr>
<tr>
<td>Total</td>
<td>76 (28%)</td>
<td>23 (9%)</td>
<td>52 (19%)</td>
<td>24 (9%)</td>
<td>49 (18%)</td>
<td>43 (16%)</td>
<td>267</td>
</tr>
</tbody>
</table>
on grounds other than qualified immunity. Among the five districts in my dataset, defendants in the Northern District of Ohio and Northern District of California together brought the lion’s share (82%) of the interlocutory appeals. Twelve (52%) of the interlocutory appeals in these two districts were withdrawn due to settlement by the parties, six (26%) were affirmed, and three (13%) were reversed in whole or part. Of the five interlocutory appeals filed in the other three districts, four of the qualified immunity denials were affirmed and one was reversed.

**Table 7: Interlocutory Appeals of Qualified Immunity Denials in Five Districts**

<table>
<thead>
<tr>
<th>District</th>
<th>Total Appeals</th>
<th>Affirmances</th>
<th>Reversals</th>
<th>Affirmances in Part</th>
<th>Withdrawn</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. TX</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>15</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>8</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>28</strong></td>
<td><strong>9</strong></td>
<td><strong>2</strong></td>
<td><strong>2</strong></td>
<td><strong>13</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

**Table 8: Outcomes of Final Appeals of Qualified Immunity Decisions in Five Districts**

<table>
<thead>
<tr>
<th>District</th>
<th>Total Appeals by Plaintiff(s)</th>
<th>Affirmances</th>
<th>Reversals</th>
<th>Affirmances in Part</th>
<th>Withdrawn</th>
<th>Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>S.D. TX</td>
<td>10</td>
<td>8</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>8</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>N.D. CA</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>7</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>9</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>35</strong></td>
<td><strong>23</strong></td>
<td><strong>3</strong></td>
<td><strong>1</strong></td>
<td><strong>7</strong></td>
<td><strong>1</strong></td>
</tr>
</tbody>
</table>

I also tracked the frequency with which plaintiffs appealed qualified immunity grants after a final judgment in the case. Among these thirty-five appeals, decisions granting qualified immunity were affirmed 66% of the time and reversed in whole or part 11% of the time. The remaining appeals were withdrawn or are still pending.

**E. The Impact of Qualified Immunity on Case Disposition**

A final question concerns the impact of qualified immunity on the outcome of cases against law enforcement. As a preliminary matter, it is important to note that qualified immunity may influence the outcome of constitutional litigation in many ways that are difficult to measure through the docket and Westlaw datasets. For example, the threat of qualified immunity may cause plaintiffs to accept settlements in cases lower than they would have in the absence of the defense. Indeed, 17% of the qualified immunity motions in my docket dataset were never decided because the cases settled while the motions were

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84 There is only one case in the docket dataset in which a defendant appealed a qualified immunity decision at the end of the case; that appeal is still open and is not included in table 12.
Plaintiffs’ fears of a grant of qualified immunity could be one of the many reasons the parties decided to settle at this point during the litigation. Given this possibility, my dataset likely underestimates the frequency with which the qualified immunity defense leads to case dispositions. In other ways, my dataset likely overestimates the role of qualified immunity in case dispositions. There may well be times that judges grant defendants’ qualified immunity motions but would have dismissed the case on other grounds had qualified immunity not been available. When courts stated that they were granting qualified immunity in the alternative, or were granting qualified immunity because the plaintiff did not show a constitutional violation, I have categorized those decisions as grants on grounds other than qualified immunity. Yet there are other decisions in the dataset in which courts implied—but not did explicitly state—that they were granting a motion to dismiss or summary judgment because the plaintiff had not adequately shown a constitutional violation. I counted these decisions as decisions granting qualified immunity, although it is likely that qualified immunity was not necessary for the court’s decision.

This study does not examine the frequency with which qualified immunity causes parties to settle, or the frequency with which courts would have granted motions to dismiss or summary judgment motions in the absence of qualified immunity. Instead, it examines the frequency with which qualified immunity is the stated reason that cases close.

One way to measure the impact of qualified immunity on case outcomes is to calculate how frequently a grant of qualified immunity is dispositive. When one looks only at those decisions in which district courts grant a motion for qualified immunity in its entirety, it appears that qualified immunity grants are dispositive just over half the time. Among the five districts in my docket dataset, grants of qualified immunity led to case dismissals 56% of the time, on average.

One might assume that these numbers should be higher—that a grant of qualified immunity will always end a case. Yet there are many scenarios in which a case can continue after a grant of qualified immunity. Not all defendants will necessarily move for qualified immunity, or a defendant may move for qualified immunity regarding some but not all claims against him. Under these circumstances, even if a court grants qualified immunity, the case can continue with the remaining defendants or claims. In addition, municipalities cannot assert qualified immunity; accordingly, if there is a municipality named in the case at the time qualified immunity is granted, the case will continue. Although individual government officials are not named in the case, government officials still face the

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85 See supra Tables 5 and 6.
86 I have excluded cases from this calculation in which the court concluded that a motion to dismiss or for summary judgment should be granted because the plaintiff could not establish a constitutional violation, or held that qualified immunity should be granted in the alternative. Counting these decisions as grants on qualified immunity grounds does not, however, significantly change my findings. See infra note 92.
87 See Table 9. There was significant regional variation on this front. In the Northern District of Ohio qualified immunity grants led to dismissal 88% of the time. In the Middle District of Florida and Southern District of Texas, qualified immunity grants led to dismissal 76%, and 71% of the time, respectively. In the Northern District of California qualified immunity grants led to dismissal 43% of the time and in the Eastern District of Pennsylvania qualified immunity grants led to dismissal 24% of the time.
possibility that they will be required to participate in discovery and trial as representatives of the defendants’ agency or and witnesses to the events in question. 88

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

<table>
<thead>
<tr>
<th>District</th>
<th>Total cases raising QI on the pleadings</th>
<th>Total QI Grants on the pleadings</th>
<th>Case dismissals on QI at the pleadings</th>
<th>Total cases raising QI at summary judgment</th>
<th>Total QI Grants at SJ</th>
<th>Case Dismissals on QI at SJ</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. D. TX</td>
<td>21</td>
<td>5</td>
<td>4</td>
<td>42</td>
<td>12</td>
<td>8</td>
</tr>
<tr>
<td>M.D. FL</td>
<td>51</td>
<td>5</td>
<td>3</td>
<td>50</td>
<td>12</td>
<td>10</td>
</tr>
<tr>
<td>N.D. OH</td>
<td>17</td>
<td>0</td>
<td>0</td>
<td>51</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>N. D. CA</td>
<td>17</td>
<td>0</td>
<td>0</td>
<td>61</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>E.D. PA</td>
<td>31</td>
<td>6</td>
<td>2</td>
<td>63</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>137</td>
<td>16</td>
<td>9</td>
<td>267</td>
<td>46</td>
<td>26</td>
</tr>
</tbody>
</table>

Another way to think about the impact of qualified immunity is to consider the frequency with which a motion to dismiss, for summary judgment, or for judgment as a matter of law on qualified immunity grounds actually leads to the dismissal of a case—whether because the motion is granted or because the motion is denied at the district court but reversed on appeal. When viewed from this perspective, the qualified immunity motions in my docket dataset appear less successful; qualified immunity motions raised by defendants resulted in the dismissal of cases an average of 9% of the time. 89 Qualified immunity motions are more likely to lead to case dismissal at summary judgment than at the motion to dismiss stage. An average of 7% of motions to dismiss on qualified immunity grounds were dispositive, compared to an average of 10% of motions for summary judgment on qualified immunity grounds.

A third way to assess the impact of qualified immunity on the outcome of cases against law enforcement is to consider what percentage of all cases 90 are dismissed on qualified immunity grounds. To assess the effect of qualified immunity on case disposition in this manner, I have tracked case outcomes in the cases in my docket dataset.

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88 See supra note 30 and accompanying text, describing the Court’s concerns about burdens on government officials who are not named defendants.

89 In the Southern District of Texas, qualified immunity motions led to case dismissal 14% of the time; in the Middle District of Florida, qualified immunity motions led to case dismissal 13% of the time; and in the Northern District of Ohio, the Northern District of California, and the Eastern District of Pennsylvania, qualified immunity motions led to case dismissal 4% of the time.

90 One could think about this question in terms of all case dispositions, including those cases in which only municipalities were named as defendants, as it shows what role qualified immunity plays overall in the resolution of Section 1983 cases against law enforcement. Or one could think about this question more narrowly, in terms of the cases brought against individual defendants seeking damages; thinking of the question this way shows what role qualified immunity plays in the universe of cases in which it could be raised. I think that the former framing is more useful for this particular question.
In each district, settlement is the most common disposition, with voluntary dismissals and stipulated dismissals (which are likely often the result of settlements) the second most common disposition. Qualified immunity was the basis for dismissal in just 3% of the 1183 cases in my dataset. Across all five districts, dismissals on qualified immunity grounds were more likely at summary judgment: One percent of cases were dismissed on qualified immunity grounds at the motion to dismiss stage and 2% of cases were dismissed on qualified immunity grounds at summary judgment.\(^9\)

As with other aspects of my study, there is regional variation regarding the frequency with which qualified immunity results in the dismissal of suits. Dismissals based on qualified immunity were the most common in the Southern District of Texas, where 9% of all case dispositions were dismissals based on qualified immunity, followed by the Middle District of Florida, where 5% of cases were dismissed based on qualified immunity. Two percent of the cases in the Northern District of Ohio, 1% of cases in the Eastern District of

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91 These findings are consistent with another study that used dockets to track case outcomes in Bivens actions. See Reinert, supra note 9.
Pennsylvania, and less than one percent of cases in the Northern District of California were dismissed on qualified immunity grounds.92

My data cannot capture how frequently qualified immunity influences plaintiffs’ decisions to settle, or how frequently cases are—but need not have been—decided on qualified immunity grounds. Instead, my datasets reflect the frequency with which a grant of qualified immunity formally ends a case. And, despite regional variation across the five districts I studied most closely, it appears that grants of qualified immunity motions infrequently end Section 1983 suits.

IV. IMPLICATIONS

This study offers the most comprehensive evidence to date about the frequency with which qualified immunity protects government officials from assumed burdens associated with discovery and trial. This study focuses on cases brought against law enforcement agencies and officers. It may be that qualified immunity is litigated in a different way in cases against prison officials, teachers, and other local government employees.93 Yet the Supreme Court’s qualified immunity doctrine has developed largely through the analysis of Section 1983 claims against law enforcement, and law enforcement officers are among the most frequent defendants named in Section 1983 actions. Accordingly, this study offers important insights about the extent to which qualified doctrine serves its underlying purposes and its proper scope.

A. Implications for the Purposes Served by Qualified Immunity

In Harlow, the Supreme Court explained that qualified immunity was necessary to protect government officials from four harms: 1) “the expenses of litigation”; 2) “the diversion of official energy from pressing public issues”; 3) “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public

92 When a court concluded that a motion to dismiss or for summary judgment should be granted because the plaintiff could not establish a constitutional violation, or held that qualified immunity should be granted in the alternative, I have not counted those cases as ending because of qualified immunity. Were I to include these cases in my count, the percentage of cases dismissed on qualified immunity grounds would increase by between 2-4%: a total of seventeen cases (13%) in the Southern District of Texas; a total of twenty-one cases (9%) in the Middle District of Florida; a total of 11 cases (6%) in the Northern District of Ohio; a total of eleven cases (4%) in the Northern District of California; and a total of fourteen cases (3%) in the Eastern District of Pennsylvania.

93 It is difficult to predict how qualified immunity rates in other types of claims, against other types of government employees, might differ. It may be that the types of constitutional claims often raised in cases against law enforcement—Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches—are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to plead in a plausible manner, and such claims may be particularly prone to factual disputes. If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because the Fourth Amendment requires a very fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene. See Jeffries, supra note 37, at 859-60.
officials], in the unflinching discharge of their duties’”; and 4) “the deterrence of able citizens from acceptance of public office.” The Court relied on no empirical evidence to support its conclusions that protections were necessary in these areas; nor has it relied on empirical evidence to measure the extent to which qualified immunity doctrine has met its goals. Yet empirical evidence is now available, and suggests that qualified immunity doctrine is largely unqualified to provide some of these protections, and largely unnecessary to provide others.

I. Qualified Immunity’s Limited Protection from Discovery and Trial

The Court’s qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should function in litigation—it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial. My study shows that qualified immunity does not function as expected and rarely serves its intended purposes.

Defendants could not or did not need to raise qualified immunity in 18% of the cases in my docket dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were discharged sua sponte by the court before the defendants had an opportunity to answer. Defendants raised qualified immunity in motions to dismiss in 14% of the cases in the docket dataset in which the defense could be raised. Courts granted defendants’ motions to dismiss on qualified immunity grounds an average of 13% of the time, and those grants were not always dispositive of the cases. All in all, just nine of the 1183 cases in my docket dataset were dismissed at the motion to dismiss stage on qualified immunity grounds.

Qualified immunity more often prevented cases from proceeding past summary judgment. Defendants were more likely to include qualified immunity in their motions for summary judgment, and courts were more likely to grant summary judgment motions on qualified immunity grounds. Yet qualified immunity motions at the summary judgment stage are unlikely to protect government officials from discovery; some summary judgment motions are made based on limited or no discovery, but many will require at least some depositions or document exchange. And grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial—such decisions disposed of plaintiffs’ cases just twenty-six times across the five districts in my study, amounting to 2% of total dispositions of cases in my dataset. It may be that qualified immunity regularly causes people not to file insubstantial cases, and thereby meets its goal of shielding government officials from the burdens of litigation. But

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95 There were a total of 974 cases in which qualified immunity could be raised, and defendants raised motions to dismiss on qualified immunity grounds in 137 of those cases. See Table 2-3.
96 See Table 3 (showing that 66% of qualified immunity motions were made at summary judgment); Table 6 (showing that 19% of qualified immunity motions made at summary judgment were granted).
97 See supra note 71 and accompanying text.
my study shows that qualified immunity infrequently protects government officials from discovery and trial in cases that are actually filed.

Although qualified immunity is rarely the reason that cases in my dataset were dismissed, my dataset does suggest significant regional variation in the litigation of Section 1983 claims around the country. Defendants in the Southern District of Texas and the Middle District of Florida appear more likely to raise qualified immunity than defendants in the Eastern District of Pennsylvania and the Northern District of California; courts in the Southern District of Texas and the Middle District of Florida appear more likely to grant defendants’ qualified immunity motions than are judges in the Eastern District of Pennsylvania and the Northern District of California, and grants of qualified immunity appear to end more cases in the Southern District of Texas and the Middle District of Florida than in the other three districts of my study. More study is necessary to understand the scope of regional variation in the litigation of constitutional claims against law enforcement and I plan to examine this regional variation in future work. Yet even in the Southern District of Texas—the district most likely to dismiss cases on qualified immunity grounds—just three percent of suits were dismissed on qualified immunity grounds at the motion to dismiss stage, and just six percent of suits were dismissed at summary judgment on qualified immunity grounds. Despite this sometimes significant regional variation, qualified immunity appears infrequently to serve its intended purpose of protecting government officials from discovery and trial.

2. The Incompatibility of Qualified Immunity Doctrine with its Intended Purposes

Those who believe qualified immunity should protect more government officials from discovery and trial might conclude, given my findings, that qualified immunity should be strengthened. The Supreme Court appears to hold this view, given its slew of recent summary reversals of lower court denials of qualified immunity. But I believe this is the wrong conclusion to draw from my findings. Instead, my study suggests that qualified immunity leads to few case dispositions because qualified immunity doctrine is fundamentally ill-suited and often unnecessary to dispose of most cases before discovery and trial.

Although the Supreme Court has explained that qualified immunity is intended to protect government officials from the burdens associated with discovery, few cases can be dismissed on qualified immunity grounds before discovery. As one district judge from the Middle District of Tennessee observed,

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98 See Table 10.
100 Some courts do allow for a qualified immunity motion after limited discovery. I have not attempted to measure the frequency with which courts in my datasets limited discovery in anticipation of a qualified immunity motion. But as one district court observed, “[i]mmunity-related discovery as to the objective reasonableness of a public official’s actions usually encompass most of the factual disputes in a case. One expects this to be the case, as the defendant’s actions must be assessed in light of the circumstances surrounding them. For this reason, defendants frequently elect to reserve their fact-based qualified immunity arguments until after general discovery has been completed.” Watkins v. Hawley, 2013 WL 3357703, at *1 (S.D. Miss. July 3, 2013).
The rationale for the existence of qualified immunity is to avoid imposing needless discovery costs upon government officials, so determining whether the immunity applies must be made at an early stage in the litigation. At the same time, the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court. Since plaintiffs are not required to anticipate a qualified immunity defense in their pleadings, and since at this stage of the litigation the exact contours of the right at issue—and thus the degree to which it is clearly established—are unclear, the Sixth Circuit advises that qualified immunity should usually be determined pursuant to a summary judgment motion rather than a motion to dismiss.101

This is a common refrain in circuit courts across the country,102 and decisions in my dataset.103

Qualified immunity is also often ill-suited to resolve cases at summary judgment. Alan Chen has argued that the Supreme Court’s qualified immunity decisions “have embedded a central paradox into the doctrine”: Although the Court repeatedly writes that “qualified immunity claims can and should be resolved at the earliest stages of litigation,” it ignores the fact that these determinations “inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context.”104 My data offer anecdotal evidence to support Chen’s observation. In the five districts in my study, courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds.105 In these decisions, courts again recognized the benefits of resolving qualified immunity at the earliest possible stage and qualified immunity’s intended role as protection from discovery and trial. Yet courts found that factual disputes made summary judgment inappropriate. Although it is difficult to know how qualified immunity motions in the law enforcement context fare compared to such motions raised against other types of government officials, it appears that qualified

102 See, e.g., Field Day v. Cty. of Suffolk, 463 F.3d 167, 191–92 (2d Cir. 2006); Newland v. Reehorst, 328 F. App’x 788, 791 n.3 (3d Cir. 2009); Owens v. Baltimore City State’s Attorneys’ Office, 767 F.3d 379, 396 (4th Cir. 2014); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976); Wesley v. Campbell, 779 F.3d 421, 433–34 (6th Cir. 2015); Alvarado v. Litscher, 267 F.3d 648, 651–52 (7th Cir. 2001); St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002).
immunity is not well-suited to dismiss most cases at either the motion to dismiss or summary judgment stages in cases against law enforcement.

A second reason qualified immunity may rarely serve its intended function is that there are so many other ways that courts and defendants can dispose of Section 1983 cases before discovery and trial. District courts dismissed 8% of the 1183 case in my docket dataset before defendants even responded. These cases were dismissed for a variety of reasons: Some were dismissed by the court who exercised their power to review and dismiss pro se pleadings; some were dismissed for failure to serve the defendant or prosecute the case.

Even when cases are not dismissed sua sponte, and defendants have the opportunity to raise the qualified immunity defense in a motion to dismiss, defendants in the majority of cases in my docket dataset chose not to do so. Defendants seeking to avoid discovery most often rely in their motions to dismiss not on qualified immunity but on other arguments. Even when defendants raise qualified immunity in motions to dismiss and motions for judgment on the pleadings, courts more often grant the motions in whole or part on grounds other than qualified immunity.

Defendants seeking summary judgment more often raise qualified immunity, and courts are more likely to grant defendants’ summary judgment motions on qualified immunity grounds. But courts are equally likely to grant a defendant’s summary judgment motion on grounds other than qualified immunity. And, of course, when a government defendant does not want to proceed further toward discovery or trial, he or she can settle the claim with the plaintiff or the parties can agree to dismiss the claim for some other reason—the outcome of between 43%-62% of cases in the five districts in my study.

When the Supreme Court discusses the role of qualified immunity, it seems to presume that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead, my study illustrates the wide variety of tools defendants and courts can use to dismiss Section 1983 cases in advance of discovery and trial.

3. The Unanticipated Burdens Created by Qualified Immunity

Qualified immunity not only fails to protect government officials from burdens associated with discovery and trial in Section 1983 cases—it may, in fact, increase the costs and delays associated with these cases. Qualified immunity was the reason for dismissal in just 3% of the cases in my docket dataset. But qualified immunity was raised in 37% of the Section 1983 cases in which the motion could be made in the five districts in my study—and was sometimes raised multiple times, at the motion to dismiss stage, at summary

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106 See supra note 79 and accompanying text for a description of some of the arguments defendants raise in motions to dismiss and motions for judgment on the pleadings.
107 See Table 5 (showing that courts granted 15% of motions in whole or part on qualified immunity grounds, and courts granted 34% of motions in whole or part on grounds other than qualified immunity).
108 See Table 6 (showing that courts granted 28% of summary judgment motions in whole or part on qualified immunity grounds, and courts granted 27% of summary judgment motions in whole or part on grounds other than qualified immunity).
109 See Table 10. Of the cases in my docket dataset, 62% of cases in the Eastern District of Pennsylvania, 58% of cases in the Northern District of California, 59% of cases in the Northern District of Ohio, 52% of the cases in the Southern District of Texas, and 43% of cases in the Middle District of Florida were resolved through settlement, accepted Rule 68 offers of judgment, stipulated dismissals, voluntary dismissals, or withdrawn complaints.
judgment, and through interlocutory appeals. Each time qualified immunity is raised by a defendant, it must be researched, briefed, and argued by both the defendants and plaintiffs and decided by the judge.

Litigating qualified immunity is no small feat. Although qualified immunity’s focus on whether law is clearly established as an objective matter and disregard for officers’ subjective intent was intended to simplify and streamline the qualified immunity analysis, courts and commentators agree that the shift has made the qualified immunity analysis more complicated in several ways. Indeed, judges have described qualified immunity as one of the most complex areas of law that they face. Ironically, these complexities are largely the result of the Court’s efforts to streamline the qualified immunity analysis and allow resolution of cases before discovery and trial.

The time and effort necessary to resolve qualified immunity would, arguably, be worthwhile if it effectively protected defendants from discovery and trial. But in the five districts in my study, an average of just 9% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. The remaining 91% of qualified immunity motions brought by defendants required the parties and judges to dedicate time and resources to briefing, arguing, and deciding the motions without serving their intended purpose of shielding defendants from discovery and trial.

Even in the 9% of cases in which qualified immunity motions were granted and those grants resulted in case dismissals, it is far from certain that qualified immunity saved the parties’ and the courts’ time. As Alan Chen has observed, when considering the efficiencies of qualified immunity, “the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case…. The pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by the defense.”

In this study, I cannot calculate how much time was spent litigating qualified immunity motions, or compare that time with the amount of time spent preparing for and conducting a trial. Yet, given the complexity of qualified immunity doctrine, the use of interlocutory appeals of qualified immunity denials, the fact that most trials in my docket dataset lasted just a few days, and the possibility that a case will settle instead of going to trial when qualified immunity is denied, it is fair to assume that qualified immunity does not save much time even when it leads to the dismissal of a case.

In Pearson, the Supreme Court wrote that the Saucier two-step qualified immunity analysis “disserves the purpose of qualified immunity’ when it ‘forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.” But given the costs and delays associated with qualified immunity motion practice and infrequency which qualified immunity motions result in dismissal of Section 1983 cases, the doctrine appears to disserve its own purposes.

110 See supra note 76 and accompanying text. See also supra Tables 7 and 8.
111 See infra note 37 and accompanying text.
112 See infra note 38 and accompanying text.
114 Pearson v. Callahan, 129 S.Ct. 808, 818 (209) (citation omitted).
4. Other Purposes Served by Qualified Immunity

Having shown that qualified immunity rarely disposes of Section 1983 suits against law enforcement before discovery or trial, and that qualified immunity may in fact increase the time and costs associated with these cases, what remains of the Supreme Court’s justifications for qualified immunity? Although the Court has described protecting government officials from burdens associated from discovery and trial as the “‘driving force’ behind creation of the qualified immunity doctrine,” the Court has offered a few additional reasons they believe qualified immunity benefits government officials.115

One often-mentioned justification for qualified immunity is that it protects government officials from the burdens of financial liability. But my prior research has shown that qualified immunity is unnecessary to serve this role—virtually all law enforcement defendants are provided with counsel free of charge, and are indemnified for settlements and judgments entered against them.116 Between 2006-2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just .02% of the dollars awarded to plaintiffs in police misconduct suits. In thirty-seven small and midsized agencies, no officer paid a penny of settlements or judgments to plaintiffs awarded during this period. Officers were indemnified even when they were disciplined, fired, and criminally prosecuted for their misconduct. And officers did not pay a penny of the punitive damages awarded to plaintiffs in these jurisdictions. I could confirm only two jurisdictions in which officers contributed to settlements and judgments during the study period—New York City and Cleveland.117 In these jurisdictions, the median contribution was $2250, and no officer contributed more than $25,000.118 Under these circumstances, qualified immunity cannot be justified as a means of protecting officers from financial burdens of personal liability.

If qualified immunity is unnecessary to protect law enforcement defendants from financial liability, and is unfit to protect law enforcement officials from burdens associated with discovery and trial, what else is left of the justifications supporting qualified immunity? The Supreme Court has mentioned, but dwelled little upon, two other benefits of the doctrine, including “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties” and “the deterrence of able citizens from acceptance of public office.”119 Neither justification is particularly compelling. The Court has written that dangers of overdeterrence should dissipate for officials who are not financially responsible for settlements and judgments.120 Consistent with this prediction, available evidence suggests that officers’ decisions on the job are minimally influenced by the threat of suit.121

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116 See Schwartz, supra note 4.
117 See id. at 926. An officer was not indemnified for a $300 punitive damages judgment in Los Angeles, but the officer never paid the award. And officials believed—but could not confirm—that employees of the Jacksonville Sheriff’s Office and the Illinois State Police may have been required to contribute to a settlement during the study period.
118 Id. at 939.
120 Owen at 654, 656 (explaining that the overdeterrence rationale for qualified immunity “loses its force” when “the damages award comes not from the official’s pocket, but from the public treasury.”)
121 Schwartz, supra note 4, at 942-43.
And there is no reason to believe that qualified immunity plays much of a role in people’s decisions to apply to become police officers. Police departments around the country report difficulties finding recruits, but the threat of litigation is not included among the long list of reasons police officials believe people are not applying to join their forces.122

Although available evidence greatly weakens the justifications offered by the Supreme Court for qualified immunity doctrine, the justifications underlying qualified immunity are not entirely without substance. There is always the risk, however slight, that a law enforcement officer may have to contribute to a settlement or judgment entered against him. There is, most likely, a sense of relief that a government official feels when a lawsuit is dismissed against him on qualified immunity grounds, even if the dismissal of claims against him does not shield him from being deposed or testifying at trial as a witness in the case. Qualified immunity may sometimes prevent people from filing insubstantial claims, thus protecting government officials from suffering inconveniences associated with being sued. And qualified immunity may sometimes result in the termination of insubstantial cases, even if it does so less frequently than the Court imagines. Further research could attempt to measure the frequency with which qualified immunity serves each of these purposes. Yet my research dramatically weakens the justifications for qualified immunity doctrine relied upon by the Supreme Court. Remaining justifications surely do not merit a defense so strong that it protects “all but the plainly incompetent or those who knowingly violate the law.”123

B. Implications for Criticisms of Qualified Immunity

Commentators have long criticized qualified immunity doctrine for being incoherent and unduly protective, creating constitutional uncertainty and stagnation, and protecting bad actors. Does my finding that only three percent of Section 1983 cases against law enforcement are dismissed on qualified immunity grounds undermine common criticisms of qualified immunity doctrine? I believe not.

Although more study is necessary to better understand the impact of qualified immunity on plaintiffs and on constitutional litigation more generally, qualified immunity doctrine may influence the litigation of Section 1983 cases in several ways that are consistent with common criticisms of the doctrine and harmful to people whose rights have been violated, even as qualified immunity is infrequently the cause for case dismissals.

First, qualified immunity doctrine may make it difficult for people to find lawyers. Nearly all the plaintiffs’ lawyers Professor Alexander Reinert interviewed about qualified immunity in Bivens cases reported that “the qualified immunity defense play[s] a

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substantial role at the screening stage.” Attorneys described being discouraged from accepting civil rights cases both because qualified immunity motions can be difficult to prevail against, and because the costs and delays associated with litigating qualified immunity in district courts and on appeal can make the cases too expensive or time-consuming to litigate. Of course, if qualified immunity discouraged people only from bringing insubstantial claims, then the doctrine would be meeting its intended goal. But Professor Reinert’s interviews suggest otherwise; that qualified immunity may cause plaintiffs’ attorneys “to avoid any possible qualified immunity issues arising in litigation” and thereby avoid cases that “test the limits of existing law.” Moreover, attorneys may decline to accept cases because they will be delayed by qualified immunity motions and appeals, “even when the plaintiff’s attorney thinks that the qualified immunity defense will ultimately be rejected.”

Second, when people do file Section 1983 suits, qualified immunity may raise the cost and delay associated with litigating their cases. My study indicates that the qualified immunity motions are often brought but succeed in achieving their intended goal of dismissing a case in advance of discovery or trial only 9% of the time. The other 91% of qualified immunity motions filed expend parties’ resources without disposing of the case. Uncertainties about how to clearly establish the law only add to the costs and burdens associated with litigating these cases.

Third, qualified immunity may reduce the value of plaintiffs’ claims. The costs of litigating qualified immunity and uncertainty about whether a court will dismiss a case on qualified immunity grounds may cause a plaintiff to accept a discounted settlement. In addition, a partial dismissal of a plaintiff’s case on qualified immunity grounds will limit the defendants or causes of action remaining in the case, and may, thereby, reduce the scope of the plaintiff’s recovery.

Further research should explore each of these effects of qualified immunity on the litigation of constitutional claims. Further research should also explore regional variation in the role that qualified immunity plays in the litigation of constitutional claims. But the fact that a small percentage of lawsuits are dismissed on qualified immunity grounds does not fundamentally undermine critics’ claims that qualified immunity doctrine is overly complicated, overly protective of government officials, creates constitutional uncertainty and stagnation, and protects bad actors.

C. Recalibrating the Balance Stuck by Qualified Immunity

The Supreme Court has written that its qualified immunity doctrine is intended to balance “the importance of a damages remedy to protect the right of citizens” against “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.” The Court has also written that evidence undermining its assumptions about the realities of constitutional litigation might “justify reconsideration of the balance struck” in its qualified immunity

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124 Reinert, supra note 9, at 492.
125 Id. at 493-94.
126 Id. at 494.
127 Id. at 495.
128 See supra note 98 and accompanying text.
decisions. My research has examined the realities of constitutional litigation as they relate to the purposes underlying qualified immunity doctrine. I have found that qualified immunity is largely unnecessary to protect against the burdens of financial liability, and ill-suited to protect against burdens associated with discovery and trial. Evidence therefore exists that undermines the Court’s assumptions, and it is high time to reconsider the balance struck by the Supreme Court in their qualified immunity cases.

The Court should consider whether qualified immunity doctrine should continue to exist in any form. Commentators have compellingly argued that there is no basis for qualified immunity in the common law at the time the Civil Rights Act of 1871 was passed. To the extent that a good faith immunity existed, it looked nothing like qualified immunity doctrine as it exists today. If the Court takes seriously the historical foundations of qualified immunity doctrine and evidence undermining its functional justifications, it should significantly limit qualified immunity’s reach or eliminate it altogether.

At a bare minimum, my findings about the role qualified immunity plays in constitutional litigation should cause the Court to return the subjective prong to the qualified immunity analysis. The Supreme Court’s interest in protecting government officials from burdens associated with discovery led the Court in Harlow to eliminate consideration of officers’ subjective intent. The Court believed that doing so could “avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.” But this study shows that the Court’s elimination of the subjective prong of qualified immunity in Harlow—and all the associated doctrinal adjustments that have followed—should be viewed as failed experiments. Eliminating the subjective prong and requiring plaintiffs to find clearly established law showing their rights were violated has protected few government officials from discovery and trial. Qualified doctrine is ill-suited to resolve cases before discovery and trial and often unnecessary for this task, given the many other ways cases can be resolved before discovery and trial.

Even if the Supreme Court does nothing to adjust the structure or scope of qualified immunity doctrine, district and circuit courts can take evidence about the realities of Section 1983 litigation into consideration when deciding qualified immunity motions. Courts’ operating assumption should be that officers will not bear the financial burdens of their legal defense or of liability. To the extent that courts intend qualified immunity as protection from the burdens of discovery and trial, courts considering qualified immunity motions should consider those motions in light of the procedural posture of the case and any other claims that will survive qualified immunity. It makes no sense to grant qualified immunity at or after trial if the goal of the doctrine is to protect officers from the burdens of discovery and trial. For that matter, it makes no sense to grant qualified immunity at summary judgment if the goal is to protect government officials from the burdens of discovery. It makes little sense to grant qualified immunity if another claim remains against

132 Baude, supra note 99.
133 Mitchell, 472 U.S. at 526 (quoting Harlow, 457 U.S. at 817-18).
that same officer that will be equally burdensome to defend against. And the value of
qualified immunity is also diminished if the case will proceed on other claims that will
require that officer or others to testify or participate in the litigation of the case.

CONCLUSION

The Court’s qualified immunity doctrine is intended to balance “the importance of a
damages remedy to protect the right of citizens” against “the need to protect officials who
are required to exercise their discretion and the related public interest in encouraging the
vigorous exercise of official authority.”\textsuperscript{134} The Court appears most concerned about
burdens associated with discovery and trial and burdens associated with financial liability.
But my research shows that qualified immunity is ill-suited and unnecessary to serve these
protective functions. Qualified immunity is rarely the death knell of plaintiffs’ Section
1983 claims against law enforcement, even as the defense is litigated in a significant
number of such cases brought against law enforcement. Moreover, qualified immunity
appears to increase the cost and delay associated with Section 1983 claims. The Court
should reconsider the balance struck by their qualified immunity doctrine. At a minimum,
the Court should return consideration of an official’s subjective intent to the qualified
immunity analysis. More broadly, the Court should consider whether the doctrine—long
criticized for having no historical foundation and now criticized for having limited
functional role—should continue to exist in any form.

\textsuperscript{134} Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).