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Defining Qualified Immunity

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DEFENDING QUALIFIED IMMUNITY

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I. INTRODUCTION

Civil actions seeking damages against public officials are often the only effective vehicle for challenging the constitutionality of governmental conduct. As the Supreme Court has recognized, in cases not amenable to

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injunctive relief,[1] "it is damages or nothing."[2] Damages actions against government entities themselves are often unavailing—the federal government enjoys sovereign immunity;[3] the Eleventh Amendment bars damages actions against state governments and their instrumentalities;[4] and although local governments are amenable to suit under Title 42 § 1983 of the United States Code, which allows for actions against those who, acting under color of law, deprive another of "any rights, privileges, or immunities secured by the Constitution and laws,"[5] local governmental entities can be held liable only for constitutional torts that are the result of their customs, policies, or practices.[6] Thus, it is no exaggeration that the availability of a damages remedy against an individual public official will often be the only way to vindicate constitutional rights.

Yet, confronting actions against public officials seeking damages for constitutional violations is the defense of qualified immunity, which bars damages awards against officials—whether state and local officials under § 1983 or federal officials in lawsuits brought directly under the Constitution as authorized by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny[7]—unless the defendant "violate[s] clearly

1. Federal courts do not have authority to issue injunctive relief based on a plaintiff's alleged injury absent an appropriate showing that the plaintiff is likely to experience similar injuries in the future. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (holding that plaintiff could not seek injunction against use of police chokeholds based on a prior incident absent showing that plaintiff "would have another encounter with the police" and "either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner"); O'Shea v. Littleton, 414 U.S. 488, 488, 495–99 (1974) (holding that the district court lacked jurisdiction to award injunctive relief on allegations of unconstitutional patterns and practices involving the setting of bond, discrimination in sentencing, and imposing fees for jury trials, absent a showing of a "real and immediate" threat that the plaintiffs faced injury from these practices).

2. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment); *accord, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." (citing Butz v. Economou, 438 U.S. 478, 506 (1978))).

3. *E.g.*, FDIC v. Meyer, 510 U.S. 471, 477 (1994) (citing Loeffler v. Frank, 486 U.S. 549, 554 (1988)).

4. *E.g.*, Alden v. Maine, 527 U.S. 706, 712–13, 728–29, 742 (1999).

5. 42 U.S.C. § 1983.

6. *E.g.*, Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690–91 (1978) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970)).

7. The Court first recognized a right to recover damages directly under the Constitution in *Bivens*. *See* 403 U.S. at 397 ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."

established statutory or constitutional rights of which a reasonable person would have known."[8] Moreover, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate."[9] The defense is justified, the Court has written, because of "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[10]

Qualified immunity has come under sustained academic attack.[11] One line of argument questions its lawfulness, noting that nothing in § 1983's text or the prevailing principles of the common law liability of public officials

(citation omitted)). For the Court's account of the course of its *Bivens* jurisprudence, see Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–58 (2017).

8. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Although actions against officials acting under color of state law are brought under § 1983 and *Bivens* actions are brought directly under the Constitution, the Court has "deem[ed] it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978); *accord* Wilson v. Layne, 526 U.S. 603, 609 (1999); Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986).

9. Reichle v. Howards, 566 U.S. 658, 664 (2012) (first brackets added) (citations omitted) (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

10. *Ziglar*, 137 S. Ct. at 1866 (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)); *accord* Filarsky v. Delia, 566 U.S. 377, 389–90 (2012); Richardson v. McKnight, 521 U.S. 399, 409–11 (1997). The Court has added that qualified immunity is intended to spare defendants the burden of defending litigation as well as the burden of paying damages awards. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' 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." (citation omitted) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("[Qualified immunity's protections] are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service . . . [E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (final alteration in original) (citation omitted) (quoting *Harlow*, 457 U.S. at 816–17)).

11. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797–1798, 1800 (2018).

extant at the time of its enactment supports the defense.[12] Another line of argument attacks § 1983's consequences, albeit from different directions. Some argue that the defense is so powerful that it renders damages actions ineffective as a check on governmental misconduct.[13] Joanna Schwartz, in contrast, has argued that qualified immunity is actually ineffective because, in her view, it too rarely protects public officials from the threat of litigation and liability to achieve its intended objective.[14] Conversely, while scholarly criticism of qualified immunity is frequent, scholarly defenses of the doctrine are rare and usually equivocal.[15] The critique of qualified immunity has been echoed by members of the Supreme Court, where there are indications of

12. *See, e.g.*, Baude, *supra* note 11, at 88 ("In suggesting that the doctrine of qualified immunity is unlawful, I do not mean to raise foundational questions about the American legal order or the basic notion of government under law. Rather, I mean the more modest point that the doctrine lacks legal justification, and the Court's justifications are unpersuasive." (footnote omitted)); Schwartz, *supra* note 11, at 1801 ("Despite the Court's repeated invocation of the common law, several scholars have shown that history does not support the Court's claims about qualified immunity's common-law foundations.").

13. For good examples of arguments along these lines, see Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244–50 (2015).

14. *See, e.g.*, Schwartz, *supra* note 11, at 1803–04 ("I have found, contrary to the Court's assertions, that qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments entered against them. I have additionally found that qualified immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed. Finally, available evidence suggests that the threat of being sued does not play a meaningful role in job application decisions or officers' decisions on the street."); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 71 (2017) ("Although the Supreme Court repeatedly describes qualified immunity doctrine as a means of shielding government officials from the costs and burdens of litigation, I have found officers are virtually always indemnified, and that qualified immunity is rarely the reason that Section 1983 cases end.").

15. *See, e.g.*, Richard H. Fallon Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 989–94 (2019) (defending qualified immunity for individual defendants but also advocating for enhanced entity liability and a less "draconian" formulation of the immunity defense); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. (forthcoming 2020) (manuscript at 31) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544897 [https://perma.cc/Q6U3-7JHP] ("To begin, we agree that just because qualified immunity has federalism implications does not necessarily mean it is worth retaining or that the Court's cases recognizing it were rightly decided. Congress may have determined that it makes sense to force states and local governments to be [sic] bear the full costs of the mistakes made by their officers, even if the officers made reasonable mistakes, or at least acted in a way that was not clearly lawful . . . .").

disquiet in the citadel.[16] Attacks on qualified immunity have entered the political realm as well, with the emergence of legislative proposals for its abolition.[17]

This Article is the first to offer a direct response to the emerging case against qualified immunity. After this introduction, Part II below defends the lawfulness of qualified immunity. While acknowledging that the conventional defenses of qualified immunity wither under scrutiny, Part II offers a novel justification: Congress's delegation of authority to the federal courts to develop common law rules for the administration of liability under the Civil Rights Act of 1866.

Part III begins by acknowledging that the conventional justification for qualified immunity—that it protects public employees against the chilling effects of personal liability for damages—is largely unpersuasive in light of the reality that public employees rarely face a credible threat of personal liability. Instead, they are almost always indemnified by their employers. Part III then offers an alternative justification for qualified immunity by examining its incentive effects in light of the ubiquity of indemnification. By shifting the financial burden of constitutional tort litigation from public employees to their employers, indemnification encourages public employers wishing to minimize costs to induce their employees to comply with settled legal rules. Qualified immunity permits damages liability for violation of such settled rules, while discouraging plaintiffs' lawyers from bringing a wide variety of novel damages claims of questionable merit, and it also minimizes the costs that would be incurred by innocent third parties if public officials faced unlimited liability. This last point is of special import. After all, the funds that public employers must devote to the defense of civil rights litigation and their payment of judgments and settlements comes either from raising taxes or, more likely, from cuts to public services that are likely to fall disproportionately on relatively powerless populations, such as the poor and disadvantaged. This is reason enough for those who are concerned about the government's ability to finance important public services to see virtue in defenses that limit the government's exposure to damages liability.

16. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). For a helpful discussion of the various criticisms of aspects of qualified immunity doctrine that have been articulated by members of the Court, see Schwartz, *supra* note 11, at 1798–800.

17. *See, e.g.*, H.R. 7120, 116th Cong. § 102 (2020) (amending § 1983 to abolish defenses based on a law enforcement officer's good faith and reasonable belief in the lawfulness of the officer's conduct or the lack of clearly established law).

II. THE LAWFULNESS OF QUALIFIED IMMUNITY

At first blush, the case against the lawfulness of qualified immunity seems compelling. Originally enacted as part of the Civil Rights Act of 1871,[18] § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[19]

It is unclear whether this statutory language leaves any room for an immunity defense. William Baude, for example, in the course of questioning the lawfulness of qualified immunity, observed that the statute nowhere "makes any reference to immunity."[20] He concluded that "the doctrine lacks legal justification, and the Court's justifications are unpersuasive."[21]

Professor Baude's critique destabilizes the basis for qualified immunity in *Bivens* actions no less than actions brought under § 1983. The Supreme Court has embraced the defense of qualified immunity in *Bivens* litigation on the view that federal officials should receive the same protection from liability for damages afforded to state and local officials sued under § 1983.[22] If qualified immunity is rejected in § 1983 litigation, accordingly, it presumably

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18. As originally enacted, the statute provided:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, Sess. I, 17 Stat. 13 (1871).

19. 42 U.S.C. § 1983.

20. Baude, *supra* note 11, at 50.

21. *Id.* at 88. For a similar argument, see Pierson v. Ray, 386 U.S. 547, 559–63 (1967) (Douglas, J., dissenting).

22. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Although this case involves suits under both § 1983 and Bivens, the qualified immunity analysis is identical under either cause of action."); Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

should be reassessed under *Bivens* as well. Indeed, some scholars have already made just this move.[23]

A. Problematic Defenses of Qualified Immunity

Professor Baude has a point; the legal justifications traditionally offered for qualified immunity wither under scrutiny.

1. History

The Supreme Court has frequently utilized the common law context in which § 1983 was enacted as a justification for qualified immunity.[24] Section 1983 was enacted, the Court has reasoned, against the backdrop of traditional immunity rules that Congress likely assumed would be applied to the statutory liability it was creating.[25]

At the outset, it is doubtful that the text of § 1983 accommodates the defense of qualified immunity as a kind of historical gloss. In unambiguous terms, the statute provides that "[e]very person" acting under color of state law who "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured . . ."[26] The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[27] The plain terms of § 1983 do not seem to leave any room to read in a historical gloss of common law defenses to liability inconsistent with the statute's text.

To this, one might respond that the Supreme Court's twenty-first century methodology for interpreting statutes should not be applied to a nineteenth-

23. *See, e.g.*, Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1417–20, 1448–60 (2019) (discussing the critiques of Professor Baude and others concerning the statutory basis for qualified immunity under § 1983 and concluding that there is no adequate non-statutory justification for qualified immunity as a defense to § 1983 or *Bivens* actions).

24. *See, e.g.*, Filarsky v. Delia, 566 U.S. 377, 389 (2012) (quoting Wyatt v. Cole, 504 U.S. 158, 167 (1992)).

25. *See, e.g.*, *id.* at 383–84 ("At common law, government actors were afforded certain protections from liability . . . . Our decisions have recognized similar immunities under § 1983, reasoning that common law protections '"well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of § 1983.'" (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))).

26. 42 U.S.C. § 1983 (emphasis added).

27. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (internal quotation marks omitted) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

century statute such as § 1983. There is, however, scant evidence that the interpretive methodology familiar to those who enacted § 1983 was dissimilar to contemporary thinking.[28] Moreover, there is little indication that the legislators who crafted § 1983 were concerned with preserving historically-recognized immunities. Scholars who have studied the matter have consistently concluded that the statute's legislative history, consistent with its text, reflects a predominant congressional concern with crafting a remedy more efficacious than the common law, which had not proven effective to protect constitutional rights.[29] The Supreme Court has, moreover, acknowledged: "Section 1983 'ha[s] no precise counterpart in state law . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.'"[30] Thus, it is far from clear that common law defenses unsupported by § 1983's text are properly read into a statute not crafted to track the common law.

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28. *See, e.g.*, Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 766 (1987) ("The legislative history of important Reconstruction Era statutes shows a number of legislators who were quite aware of interpretational methodology . . . . Some tied interpretation of provisions solely to their plain meaning. Others began with plain meaning, but accepted evidence of legislative intent as a method for resolving ambiguities in language. Others suggested that regardless of plain meaning or legislative statements, the legislation should be interpreted broadly because of its overall remedial purposes. Although there were not a great number of speakers who directly addressed proper interpretational methodology, there is absolutely no suggestion by anyone that congressional silence should be read to override either plain meaning or actual legislative statements." (footnotes omitted)).

29. *See, e.g.*, David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 523–24 (1992) ("The 42nd Congress was well aware that it was creating a new cause of action that protected constitutional rights by restricting the previously existing powers and privileges of state and local officials . . . . Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute which was primarily intended to prevent the abuse of those prerogatives."); Matasar, *supra* note 28, at 774–75 ("Although section 1983 was not the subject of much discussion or objection, its drafters and supporters clearly stated its broad remedial purpose. Moreover, at least some of the supporters of section 1983 believed that the only effective means to enforce federal rights would be by suits against state officers. A Congress concerned with effective legislation that intended to limit that legislation's scope would be unlikely to do so silently." (footnotes omitted)); Michael Wells, *Constitutional Remedies, Section 1983, and the Common Law*, 68 MISS. L.J. 157, 177–78 (1998) ("The legislative history of the Civil Rights Act of 1871 contains many indications that Congress intended to enact a sweeping remedy in order to deal with the serious problem that prompted the statute. That problem was Ku Klux Klan violence against the newly-freed blacks and their white supporters in the South . . . [F]ar from adopting the common law, Congress may have meant to ignore it in the event it got in the way of the statute's remedial aim. Common law limitations on recovery, such as the immunity doctrines, may actually be at odds with Congress' intent." (footnotes omitted)).

30. Rehberg v. Paulk, 566 U.S. 356, 366 (2012) (alteration in original) (quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985)).

Even if a deeply entrenched common law immunity rule could be read into § 1983, the historical record stops well short of reflecting anything like the defense of qualified immunity that the Supreme Court has recognized. Consider, for example, *Pierson v. Ray*, in which the Court first endeavored to place a historical gloss on § 1983, writing that the statute "should be read against the background of tort liability . . . Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[31] The Court, however, subsequently broadened this defense into a general doctrine of immunity for actions based on a good faith and reasonable belief that they comport with the law without claiming that the common law had ever recognized this type of defense outside of the context of false arrest.[32] Thus, as a number of scholars have concluded, history does not support the view that § 1983 was enacted against the backdrop of a general defense of qualified immunity.[33]

In any event, the Court abandoned the view that qualified immunity rests on historical standards in *Harlow v. Fitzgerald*.[34] In that case, the Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-

31. Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (citation omitted) (internal quotation marks omitted) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

32. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) ("[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."); Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("[A] qualified immunity is available to officers of the executive branch of government . . . . It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

33. *See, e.g.*, Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 502–06 (2009) (arguing that *Pierson* misapprehended immunity law existing when § 1983 was enacted); Baude, *supra* note 11, at 55–61 (discussing conflicting historical evidence casting doubt on the existence of a widely accepted immunity rule at the time of § 1983's enactment); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 432–70 (1986) (arguing that *Pierson* and subsequent immunity doctrine depart from nineteenth-century approaches to immunity). *But cf.* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714 [https://perma.cc/27JA-226A] ("[T]he Supreme Court's current officer immunity doctrines depart from the common law around 1871 in three main ways: (1) high-ranking executive officers had absolute immunity at common law, while today they have only qualified immunity (and vice versa for government prosecutors and legislative aides); (2) qualified immunity at common law could be overridden by showing an officer's subjective improper motive, while today the clearly-established-law test applies; and (3) qualified immunity at common law required the plaintiff to prove bad faith with clear evidence, while there is confusion today over whether the plaintiff or defendant has the burden of proof in qualified immunity cases.").

34. 457 U.S. 800 (1982).

reaching discovery."[35] Instead, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[36] Therefore, as the Court subsequently acknowledged, *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action."[37]

Accordingly, as currently formulated, qualified immunity is not anchored in any background legal principle extant at the time § 1983 was enacted. Indeed, in recent years, a number of the Court's members have complained that qualified immunity jurisprudence has departed from historical standards.[38] Given the disjunction between historical standards and contemporary doctrine, it is surely untenable to defend current qualified immunity doctrine on the ground that § 1983 implicitly imported the prevailing immunity defense when it was enacted.[39]

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35. *Id.* at 817–18.

36. *Id.* at 818 (internal quotation marks omitted).

37. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

38. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in judgment) ("In further elaborating the doctrine of qualified immunity for executive officials, . . . we have diverged from the historical inquiry mandated by the statute."); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, . . . we have diverged to a substantial degree from the historical standards.").

39. On at least one occasion, the Court has offered a different legal justification for qualified immunity rooted in conceptions of fair notice. *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."). There is, however, an important textual difference between § 1983 and the criminal provision referenced by the Court. Section 242 imposes criminal liability on "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," 18 U.S.C. § 242 (emphasis added), whereas § 1983 has no willfulness requirement. This textual difference undermines the view that the same standard for notice is imposed by both statutes, as Professor Baude has observed. *See* Baude, *supra* note 11, at 73–74. Indeed, while the criminal statute's willfulness requirement suggests that defendants cannot be held liable unless they knew that their conduct infringed constitutional rights, there is no such requirement in § 1983. Nor is there any rule requiring immunity from liability when the defendant merely fails to anticipate a new rule of constitutional law; for example, despite concerns about fair notice, the Court has insisted that new rules of constitutional law should be retroactively applied to all pending and future cases even in cases arising from events predating

2. Stare Decisis

In light of the weakness of a historically-based defense of qualified immunity, the few scholars willing to defend the doctrine have offered some alternative justifications. For example, Aaron Nielson and Christopher Walker have argued that "when it comes to nonconstitutional holdings, 'stare decisis carries enhanced force," and for that reason, "if the United States as a society does not want qualified immunity, Congress should enact new legislation."[40] On this view, qualified immunity doctrine may be a mistake, but it is one that only Congress can correct.

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the announcement of the new rule. *See, e.g.*, Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."). Moreover, in terms of constitutional concerns about fair notice, the Supreme Court has long taken the view that "the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactments" and "[t]he Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982). Even in the criminal context, concern for fair notice has not generated a general defense of qualified immunity, but instead a due process defense available when a "court's decision was 'unexpected and indefensible' such that it offended the due process principle of fair warning . . . ." Rogers v. Tennessee, 532 U.S. 451, 466 (2001) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). Qualified immunity doctrine, of course, provides far greater protection—granting immunity as long as there is no violation of clearly established law. Finally, when it comes to concerns about fair notice, § 1983 jurisprudence is inconsistent; the Court has refused to recognize a defense of qualified immunity for municipal defendants facing even unforeseeable liabilities. *See, e.g.*, Owen v. City of Indep., 445 U.S. 622, 655 (1980) ("[E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.").

40. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856 (2018). Nielson and Walker have endeavored to bolster their argument for the precedential force of current qualified immunity doctrine by contending that "a judicial decision invaliding qualified immunity would be extraordinarily disruptive to reliance interests" because "against a backdrop of decades of consistent cases from the U.S. Supreme Court [recognizing qualified immunity], state governments have created their own schemes for compensating officers, and . . . a key part of virtually all those schemes is indemnification." Nielson & Walker, *supra* note 15, at 66–67 (footnote omitted). Yet, in their own survey of state indemnification laws, they identify none that distinguish between liability for damages under § 1983 and liabilities imposed under other federal or state laws under which the defense of qualified immunity is not recognized. *Id.* at 40, 45–46, 50 (surveying state indemnification laws and identifying none that indemnify only for damages awarded under § 1983 and not for other types of legal costs for which qualified immunity is unavailable). They also acknowledge that "[s]ome States have . . . essentially eliminate[d] qualified immunity for

It is rather odd to defend qualified immunity doctrine based on the force of stare decisis when *Harlow* itself repudiated prior precedent and reformulated qualified immunity without precedential support.[41] To be sure, *Harlow* was itself a *Bivens* case not subject to § 1983,[42] but the Court applied its new rule to § 1983 litigation as well, even though Congress had not revised the statute.[43] Similarly, the Court promulgated and later retracted a rule requiring lower courts to decide in both § 1983 and *Bivens* litigation whether the plaintiff has established a violation of the Constitution before reaching a proffered qualified immunity defense.[44] And the Court's willingness to revise § 1983 precedent is not confined to qualified immunity. For example, the Court also repudiated its prior interpretation that the statute did not permit municipal liability despite the force of stare decisis.[45] Thus, there is more than a little force to Scott Michelman's conclusion: "The Court's history of taking

certain claims by creating overlapping state causes of action that are not subject to such a defense." *Id.* at 68; *see also* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. (forthcoming 2020) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565362 [https://perma.cc/Q6WL-DQ26] ("[S]tates' indemnification statutes concern liability for both Section 1983 claims and state tort claims—including assault, battery, negligence, and the like—where qualified immunity cannot shield government officials from liability. If states enacted their indemnification statutes in reliance on qualified immunity doctrine, they presumably would have focused indemnification to Section 1983 claims, where qualified immunity could provide the protection Nielson and Walker describe."). Accordingly, since indemnification is available on equal terms for § 1983 and other types of claims—even state law claims on which there is no qualified immunity—the claim that state and local indemnification practices are premised upon the federal law of qualified immunity seems dubious. Indeed, as we will see, there are powerful reasons for employers to offer employees indemnification regardless of the availability of qualified immunity. *See infra* text accompanying notes 114–115. In any event, Professors Nielson and Walker do not explain why revising state indemnification laws in the wake of the abolition of qualified immunity would pose special difficulties so serious as to warrant granting qualified immunity extraordinary precedential weight.

41. *See supra* text accompanying notes 34–37.

42. Harlow v. Fitzgerald, 457 U.S. 800, 802–06 (1982).

43. *Id.* at 818 n.30 ("This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" (quoting Butz v. Economou, 438 U.S. 478, 504 (1978))). Although this statement was technically dicta in *Harlow*, the Court soon squarely held the *Harlow* reformulation of qualified immunity was applicable to § 1983 litigation. *See* Davis v. Scherer, 468 U.S. 183, 190–91 (1984) (citing *Harlow*, 457 U.S. at 818).

44. *See* Pearson v. Callahan, 555 U.S. 223, 231–43 (2009) (first citing *Harlow*, 457 U.S. at 818; then citing Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987); then citing Saucier v. Katz, 533 U.S. 194, 201 (2001); then citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998); and then citing Payne v. Tennessee, 501 U.S. 808, 829–30 (1991)) (explaining the evolution of § 1983 jurisprudence on this point).

45. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 695–701 (1978) (explaining the evolution of § 1983 jurisprudence on this point).

ownership of this doctrine, together with the constitutional implications of the doctrine itself, should overcome the force of the special 'statutory stare decisis' rule."[46]

3. *Common Law Statute*

Perhaps the best defense of qualified immunity in the scholarly literature is that § 1983 should be regarded as a kind of "common law statute" that effectively delegates authority to the judiciary to promulgate doctrine, much like the Sherman Act gave birth to a complex law of antitrust hardly evident from the terms of that statute.[47]

By its own account, the Supreme Court "has treated the Sherman Act as a common-law statute . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."[48] Notably, the Sherman Act is crafted at a high level of generality, prohibiting "every contract, combination . . . or conspiracy in restraint of trade."[49] Since almost any economic arrangement involving competitors could be regarded as a "restraint of trade," the statute effectively

46. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2007 (2018). Relatedly, Justice Scalia once defended qualified immunity on the ground that the Court erred in holding that § 1983 reached those who abused their authority under state law in *Monroe v. Pape*, 365 U.S. 167, 191–92 (1961), *overruled in part by Monell*, 436 U.S. at 659, 663 n.7, thereby "chang[ing] a statute that had generated only twenty-one cases in the first fifty years of its existence into one that pours into the federal courts tens of thousands of suits each year," and consequently, in Justice Scalia's view, the Court was "engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote." Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting). As Professor Baude observed, however, this defense of qualified immunity is dubious, both because there are strong arguments in favor of *Monroe* and because qualified immunity doctrine is not tailored to remedy *Monroe*'s supposedly erroneous holding that § 1983 supplies a remedy in cases even in which state law provides plaintiffs with adequate remedies. *See* Baude, *supra* note 11, at 62–67.

47. *See, e.g.*, Fallon, *supra* note 15, at 991–94 (characterizing § 1983 as a common law statute); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 51–53 (2018) (same); Michelman, *supra* note 46, at 2002–06; *see also* Baude, *supra* note 11, at 78 ("Maybe Section 1983 could be reconceived as a common-law statute analogous to the Sherman Antitrust Act.").

48. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (alteration in original). To a similar effect, see, for example, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

49. 15 U.S.C. § 1.

forced courts to develop judicially-administrable rules without much in the way of statutory guidance, as scholars have long observed.[50]

Section 1983, in contrast, offers far less textual room for treatment as a common law statute. In unambiguous terms, § 1983 provides that "[e]very person" acting under color of state law who "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured . . . ."[51] Once a court finds that the defendant deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States, it is hard to see any textual room for creating a common law defense to liability, such as the qualified immunity defense.

B. The Statutory Basis for a Common Law of Qualified Immunity

A more promising basis for qualified immunity doctrine is hiding in plain sight. In the Civil Rights Act of 1866, Congress not only prohibited racial discrimination with respect to enumerated rights,[52] but also, in § 3, conferred authority on the courts to utilize common law or state law rules when federal statutes "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . ."[53] As subsequently amended, this

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50. *See, e.g.*, HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST 34 (2017) ("[T]he Sherman Act condemns 'every contract, combination . . . or conspiracy in restraint of trade,' without giving a clue about what those phrases mean."); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) ("Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.").

51. 42 U.S.C. § 1983 (emphasis added).

52. In pertinent part, the Civil Rights Act of 1866 provided:

> [Sec. 1] . . . [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

53. Section 3 provided, in pertinent part:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the

provision, now codified in Title 42 of the United States Code at § 1988(a), authorizes the courts to supplement various civil rights statutes, including § 1983:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights [which includes § 1983], and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the disposition of the cause*, and, if it is of a criminal nature, in the infliction of punishment on the guilty party.[54]

Section 1988(a), accordingly, is a gap-filling provision that permits federal courts to supplement § 1983's terms with state or common law doctrine.[55]

To be sure, the correct application of this provision is hardly self-evident.[56] Indeed, it has generated disagreement on the infrequent occasions in which scholarly literature has addressed it. Jennifer Coleman, stressing § 1988(a)'s textual command to apply state law, concluded that it requires that the law of the state in which the case is brought govern all questions not addressed by § 1983 itself—including questions of immunity—unless applicable state law is inconsistent with § 1983 jurisprudence.[57] In contrast,

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> State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Id. at § 3, 14 Stat. at 27.

54. 42 U.S.C. § 1988(a) (emphasis added).

55. *See, e.g.*, Moor v. Alameda Cnty., 411 U.S. 693, 705 (1973) (§ 1988(a) "explain[s] the source of law to be applied in actions brought to enforce the substantive provisions of the Act," including § 1983).

56. For a helpful overview of the difficulties in interpreting this statute, see Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 58–65 (1989).

57. *See* Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 722–32 (1986) (arguing that immunity is not addressed in § 1983 and therefore is governed by § 1988(a)).

Theodore Eisenberg concluded that § 1988 applies state law only to civil or criminal litigation asserting a state claim when removed from state to federal court under the terms of the 1866 Act; it does not apply to a claim based on federal rights under § 1983.[58] Seth Kreimer argued that § 1988(a)'s reference to "the common law" requires application of federal common law rules to matters not addressed by § 1983, although § 1988(a) does requires application of state statutes and constitutional provisions.[59]

Of these views, the least plausible is that of Professor Eisenberg. Even if, as Professor Eisenberg argued, the Civil Rights Act of 1866, when originally enacted, applied only to lawsuits based on state law that had been removed from state to federal court under the terms of that Act, the Civil Rights Act of 1871 subsequently made the provisions of the Civil Rights Act of 1866—including § 3—applicable to all actions brought under what is now § 1983.[60] Thus, the Civil Rights Act of 1871 rendered wholly untenable any effort to confine what would become § 1988(a) to actions that are based in state law and subsequently removed from state courts.[61] For this reason, it is no surprise that the Supreme Court has repeatedly held that § 1988(a) applies to actions for deprivations of federal rights under § 1983.[62]

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58. *See* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 525–41 (1980) (arguing that there is little indication that Congress intended to apply state law to lawsuits asserting federal rights when it enacted the Civil Rights Act of 1871).

59. *See* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 611–32 (1985) (arguing that when § 1983 was enacted, references to the common law were generally understood to refer to a general federal common law).

60. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, Sess. I, 17 Stat. 13 (1871) ("[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of [the Civil Rights Act of 1866] . . . .").

61. *See* Kreimer, *supra* note 59, at 621 n.94 ("Professor Eisenberg has argued at length that § 1988 was designed to apply only to cases initially brought under state law, usually those removed from state to federal court. As an interpretation of the 1866 predecessor, this position is plausible, although it rests on the assumption that the second sentence of § 3 of the 1866 Civil Rights Act refers to only half of the first sentence. As an interpretation of [§ 1988(a) as subsequently amended], however, it is at war with the text, for [§ 1988] applies by its terms to a variety of federal causes of action." (citations omitted)).

62. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 268–75 (1985) (relying on § 1988(a) to hold that state statutes of limitations for actions concerning a personal injury should apply to

Once it is agreed that, consistent with its plain language, § 1988(a) applies to civil actions brought under § 1983, it becomes impossible to claim that § 1983's text resolves all questions regarding the liability of those who, acting under color of state law, deprive others of constitutional rights. If it did, there would be no need for Congress, in 1871, to have made what is now § 1988(a) applicable to § 1983 litigation when that statute is "not adapted to the object, or . . . deficient in the provisions necessary to furnish suitable remedies . . . ."[63]

One might nonetheless attack the lawfulness of qualified immunity by taking the view that § 1988(a)'s reference to cases in which § 1983 is "not adapted to the object" or "deficient in the provisions necessary to furnish suitable remedies"[64] is simply meant to aid plaintiffs by authorizing courts to utilize remedies not expressly mentioned in § 1983's text. This view, however, ignores the possibility that there may be cases in which no remedy—or no damages remedy—is "suitable" within the meaning of § 1988(a).

This is indeed the path the Supreme Court has taken. The Court has held, for example, that § 1983 is "not adapted to the object" or "deficient in the provisions necessary to furnish suitable remedies" when it is entirely silent on a type of defense usually recognized in civil litigation. The Court has therefore held that, under § 1988(a), state law should determine whether a § 1983 claim survives the death of the plaintiff because § 1983 is silent on questions of survival.[65] The Court has also held that, by virtue of § 1988(a), federal courts should utilize state statutes of limitation in § 1983 litigation since it contains no such provision.[66] Thus, § 1988(a) can be used not only to avail plaintiffs of remedies not referenced in § 1983 but also to recognize defenses that bar any remedy.

One might also argue that § 1988(a) is triggered only with respect to complete defenses to liability on which § 1983 is entirely silent, such as survival or limitations defenses, but has no application to defenses, such as qualified immunity, which involve only the suitability of a particular remedy, such as an award of damages. Section 1988(a), however, states that it is applicable when § 1983 is regarded as "deficient in the provisions necessary to furnish suitable remedies . . . ."[67] This means that § 1988(a) should be

§ 1983 claims); Robertson v. Wegmann, 436 U.S. 584, 588–94 (1978) (relying on § 1988(a) to hold that state law governs survival of claims brought under § 1983).

63. 42 U.S.C. § 1988(a).

64. *Id.*

65. *See Robertson*, 436 U.S. at 593–94 (applying Louisiana's statute governing survival of actions to § 1983 claims by virtue of § 1988(a) and holding that plaintiff's action did not survive the injured party's death).

66. *See* Burnett v. Grattan, 468 U.S. 42, 48–50 (1984) (holding that § 1988(a) requires the use of state limitations periods in § 1983 litigation).

67. § 1988(a).

applied when considering both whether a complete defense bars any remedy and whether damages, in particular, are a "suitable" remedy.[68]

On the question of whether damages are a "suitable" remedy for a particular § 1983 violation, the statute itself is silent. It provides only that those who, under color of state law, deprive an individual of a constitutional right "shall be liable to the party injured . . . ."[69] Moreover, § 1983 addresses liability, as opposed to damages or other remedies, and it does not provide that damages must be awarded in all § 1983 cases. Indeed, in one of its early encounters with § 1988(a), the Court explained that when issues arise about whether damages are available under the civil rights statutes covered by § 1988(a), that provision governs, under which "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."[70]

Qualified immunity, moreover, is not a defense to or immunity from liability but is instead an immunity from a particular remedy—damages.[71] Qualified immunity, for example, does not bar actions for injunctive relief.[72] It may even permit actions for nominal damages; the Supreme Court has never decided the question, and there is a serious argument that actions for nominal damages do not present the chilling effects of exposure to substantial damages

68. *Cf.* Moor v. Cnty. of Alameda, 411 U.S. 693, 702–03 (1973) ("[Section] 1988 proceeds to authorize federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States.").

69. § 1983.

70. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 231, 235, 240 (1969) (discussing the availability of damages under 42 U.S.C. § 1982 for racial discrimination in public accommodations).

71. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well.").

72. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) ("Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as . . . § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages."); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[I]n a suit to enjoin future conduct . . . qualified immunity [would not] be available to block a determination of law."); Behrens v. Pelletier, 516 U.S. 299, 312 (1996) ("The *Harlow* right to immunity is a right to immunity *from certain claims*, not from litigation in general . . . . If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as . . . the complaint seeks injunctive relief (for which no 'clearly established' right need be alleged)."); *Wood*, 420 U.S. at 314 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief as well."). The Court has also held that judicial immunity does not bar claims for injunctive relief under § 1983. *See* Pulliam v. Allen, 466 U.S. 522, 541–42 (1984). Congress subsequently modified this rule by adding an exceptions clause to § 1983 in a manner that effectively acknowledged the absence of judicial immunity from actions seeking injunctive relief: "[I]n an action against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996).

liability that the Court has relied upon when fashioning qualified immunity doctrine.[73] Thus, § 1983's textual reference to liability does not address the question whether damages represent a "suitable" remedy for a § 1983 violation.[74] In the face of that silence, § 1988(a) authorizes courts to fashion a common law of remedies when considering whether damages are appropriately awarded under § 1983.

Moreover, if one concluded that § 1983 should be read to mean that damages are a suitable remedy in all cases—leaving no gap for § 1988(a) to fill—more than just qualified immunity doctrine would be in jeopardy. For example, the Supreme Court has recognized absolute immunity from damages liability under § 1983 for legislators,[75] judges and other adjudicative officials acting in a judicial capacity,[76] witnesses,[77] and prosecutors in their litigative capacity.[78] If § 1983 were understood to require damages awards whenever a defendant is held liable, all of these immunities would be indefensible.[79] Nor is there much of a justification for reading, at a minimum, prosecutorial or witness immunity into § 1983 as a kind of historical gloss on the statute. Importing common law defenses into § 1983 as a historical gloss on the statute is a fraught exercise, as we have seen,[80] but even if one could do so, the Supreme Court has acknowledged that absolute immunity was not recognized

73. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1622–28 (2011); Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 739–43 (2014).

74. *Cf.* Achtenberg, *supra* note 29, at 516 ("Immunity doctrines define the permissible remedies rather than the permissible defendants.").

75. *See, e.g.*, Lake Cnty. Ests. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 394, 403–06 (1979) (recognizing absolute immunity for members of interstate agency when acting in capacity comparable to members of a legislature); Tenney v. Brandhove, 341 U.S. 367, 377–79 (1951) (holding that legislators acting within scope of their duties are immune from civil liability when sued for allegedly improper investigation).

76. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 512–14 (1978) (recognizing immunity for administrative agency adjudicators); Stump v. Sparkman, 435 U.S. 349, 359–360 (1978) (recognizing immunity of judge sued for issuing a sterilization order).

77. *See, e.g.*, Rehberg v. Paulk, 566 U.S. 356, 369 (2012) (recognizing immunity of witnesses before a grand jury); Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (recognizing immunity of witnesses at trial).

78. *See, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335, 346–49 (2009) (recognizing immunity when supervisory prosecutors sued for inadequate training and supervision of litigation); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (recognizing immunity for prosecutor's actions in bringing and presenting case).

79. These immunities, moreover, are, like qualified immunity, only immunities from damages liability and not complete defenses to liability. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 541–42 (1984) (concluding that judicial immunity does not bar actions for injunctive relief).

80. *See supra* Section II.A.1

when § 1983 was enacted for either prosecutors,[81] or witnesses.[82] It is therefore quite difficult to read these immunities into the statute on the basis of their supposed historical footing.

Thus, although the Court has rarely discussed § 1988(a) in its immunity jurisprudence, the best way to reconcile that jurisprudence with the terms of § 1983 is to conclude that the question of whether damages are a "suitable" remedy for a violation of § 1983 is not addressed by that statute. Instead, it is appropriately addressed under § 1988(a), which authorizes the courts to develop immunity doctrines when assessing whether damages are an appropriate remedy for a § 1983 violation.

Even if § 1988(a) authorizes courts to develop a law of immunity to assess whether damages are a "suitable" remedy, the statutory inquiry is not at an end. As the Supreme Court has observed, the text of § 1988(a) suggests a three-step process:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."[83]

Accordingly, if § 1983's failure to address whether and when damages constitute "suitable remedies" renders the statute "deficient" within the meaning of § 1988(a), § 1988(a)'s second step directs courts to apply "the

81. *See, e.g.*, *Rehberg*, 566 U.S. at 364 ("When § 1983's predecessor was enacted in 1871, it was common for criminal cases to be prosecuted by private parties. And private prosecutors, like private plaintiffs in civil suits, did not enjoy absolute immunity from suit. Instead, 'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution if the complainant acted with malice and without probable cause." (citations omitted)). On the prevalence of private prosecution in the nineteenth century, see Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1286 (Sanford M. Kadish et al. eds., 1983).

82. *See, e.g.*, *Rehberg*, 566 U.S. at 366–67 ("At common law, trial witnesses enjoyed a limited form of absolute immunity for statements made in the course of a judicial proceeding: They had complete immunity against slander and libel claims, even if it was alleged that the statements in question were maliciously false." (citing Kalina v. Fletcher 522 U.S. 118, 133 (1997) (Scalia, J. concurring)). For a helpful discussion of the history of witness immunity, see Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

83. Burnett v. Grattan, 468 U.S. 42, 47–48 (1984) (citations omitted).

common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held," followed by its third step, inquiring whether "the same is not inconsistent with the Constitution and laws of the United States . . . ."[84] It is to these inquiries that we now turn.

C. The Justification for a Federal Common Law of Qualified Immunity

When it comes to the second step of the § 1988(a) inquiry, Professors Coleman and Kreimer have argued that § 1988(a) generally requires that federal courts apply state immunity statutes to § 1983 litigation unless state law is inconsistent with applicable federal law and policy.[85] There are plenty of state immunity statutes to go around—forty-nine states and the District of Columbia recognize a wide variety of common law and statutory immunities from damages liability, such as immunity for discretionary functions; for injuries caused by reliance on statutes or other enactments; for injuries caused by the collection of a tax; for intentional torts; for the issuance, denial, or revocation of a license; for the failure to inspect or to make an adequate inspection of property; for the adoption or failure to adopt legislation or other legislative functions; or for acts or omissions in the execution or enforcement of the law, and most states also cap the damages recoverable from a governmental defendant or a public employee.[86]

Application of state law immunities, however, encounters a serious question under the third step—whether the use of state immunity statutes would be consistent with federal law. At the outset, there is a serious question about whether federal law requires a greater degree of uniformity in § 1983 jurisprudence than could be achieved by importing the bewildering variety of state immunity statutes. When deciding whether to borrow state law under § 1988(a), the Supreme Court has cautioned that "courts must look not only at particular federal statutes and constitutional provisions[] but also at 'the policies expressed in [them].'"[87] Moreover, the Court has recognized a federal

84. 42 U.S.C. § 1988(a).

85. *See* Coleman, *supra* note 57, at 731 (arguing that state law applies unless "the use of state law would substantially undermine the fundamental purposes of section 1983"); Kreimer, *supra* note 59, at 632 ("[W]hatever alterations state statutes make in the underlying federal rule must still be measured against the policies of federal legislation . . . . Application of state law must be contingent on the full availability of the federal remedy.").

86. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804–13 (2007).

87. Robertson v. Wegmann, 436 U.S. 584, 590 (1978) (second alteration in original) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969)).

policy to maintain a reasonably uniform body of § 1983 jurisprudence.[88] Since § 1988(a)'s third step requires a reasonable degree of uniformity in § 1983 jurisprudence, there is great doubt about whether federal law permits the use of a bewildering variety of state immunity rules.[89]

Beyond the federal interest in uniformity, however, the Supreme Court has consistently cautioned—in terms that echo § 1988(a)'s third step—that the use of state immunity law is inconsistent with federal law and policy in that it makes the availability of damages turn on state, rather than federal, policy judgments.

For example, in *Martinez v. California*,[90] a § 1983 action arising from a murder committed by a state parolee, the Court wrote that a state statute immunizing public officials from liability for injuries caused by paroling a prisoner "does not control this claim . . . ."[91] The Court reasoned: "A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."[92]

Subsequently, in *Felder v. Casey*,[93] the Supreme Court cautioned:

> Any assessment of the applicability of a state law to federal civil rights litigation[] . . . must be made in light of the purpose and nature of the federal right. This is so whether the question of state-law applicability arises in § 1983 litigation brought in state courts, which possess concurrent jurisdiction over such actions, or in federal-court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law. Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place

88. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 270 (1985) ("[T]he federal interest in uniformity and the interest in having 'firmly defined, easily applied rules,' support the conclusion that Congress intended the characterization of § 1983 to be measured by federal rather than state standards." (citation omitted)).

89. *Cf. id.* at 275–76 (deciding that when borrowing state statutes of limitations, federal law requires that all § 1983 claims be characterized as actions to recover for a personal injury to produce a uniform federal rule).

90. 444 U.S. 277 (1980).

91. *Id.* at 284.

92. *Id.* at 284 n.8. Later the same Term, in the course of holding that municipalities do not enjoy qualified immunity from damages liability under § 1983, the Court wrote: "Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, governed by federal law." Owen v. City of Independence, 445 U.S. 622, 647 n.30 (1980).

93. 487 U.S. 131 (1988).

> in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials.[94]

The Court then held that Wisconsin's requirement that a plaintiff file an administrative claim prior to filing suit could not be applied to § 1983 litigation because "it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability."[95]

Two years later, in *Howlett v. Rose*,[96] the Court held that state courts could not apply state sovereign immunity law barring suits against municipalities to a § 1983 action: "To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law."[97]

Finally, in *Haywood v. Drown*,[98] the Court held that a New York statute requiring that lawsuits against prison guards be filed in the state's court of claims—which may not award punitive damages, injunctive relief, or attorney's fees—could not be applied to § 1983 litigation because it is "a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)," adding that the state statute "is effectively an immunity statute cloaked in jurisdictional garb."[99]

These cases are not deeply theorized, and only *Felder* expressly mentions § 1988(a).[100] Nevertheless, § 1988, and in particular, the third step of the inquiry mandated by § 1988(a), offers what is likely the best explanation for the Court's jurisprudence.[101] After all, these cases reflect a federal common law judgment about the propriety of damages remedies and, in particular, holdings that the availability of damages remedies should be controlled by federal and not state law.

Moreover, under the third step of the § 1988(a) inquiry—which requires that state law not be applied to § 1983 litigation when it unduly circumscribes

94. *Id.* at 139 (citations omitted).
95. *Id.* at 134, 141.
96. 496 U.S. 356 (1990).
97. *Id.* at 365–66, 377–78.
98. 556 U.S. 729 (2009).
99. *Id.* at 742.
100. *See Felder*, 487 U.S. at 139 (citing and discussing § 1988).
101. *See* William H. Theis, Case Commentary, *Shaw v. Garrison - Some Observations on 42 U.S.C. § 1983 and Federal Common Law*, 36 LA. L. REV. 681, 685–86 (1976) (noting that qualified immunity doctrine seems to reflect federal common law under § 1988(a) although courts rarely rely on that provision); Burnett v. Grattan, 468 U.S. 42, 48 (1984) (detailing the third step).

federal rights—it becomes difficult to leave the matter to state law. State immunity statutes are enacted by state legislators who are politically accountable to the state taxpayers and voters. They are hardly impartial balancers of federal and state interests. It would surely be odd to leave the job of striking the balance between the interests of state and local taxpayers and the interests of those who have been harmed by a violation of federal law to state legislators.

The Supreme Court's qualified immunity jurisprudence, accordingly, fits far more comfortably within § 1988(a)'s delegation to the courts of authority to create a federal common law than within any of the conventional justifications that have been offered for qualified immunity. To be sure, the current formulation of qualified immunity dates to *Harlow*, which does not discuss § 1988(a), but that should be unsurprising. *Harlow* was brought under *Bivens*, to which § 1988(a) is not applicable. As an example of federal common law, however, *Harlow*'s formulation of qualified immunity fits comfortably within § 1988(a), which, as we have seen, permits federal courts to utilize common law rules of decision. As Professor Kreimer observed: "Note that section 1988[(a)] does not say 'the common law of the state' in question but 'the common law.'"[102] Thus, under § 1988(a), the Court properly imported the common law judgment it made in *Harlow* into § 1983 immunity jurisprudence.[103]

Accordingly, § 1988(a) authorizes the courts to utilize a federal common law of immunity. Section 1988(a) permits courts to supplement § 1983 with "the common law,"[104] and at the time § 1988(a) was enacted, references to the "common law" were generally understood to refer to the type of federal common law that the federal courts employed when hearing cases between citizens of different states under their diversity jurisdiction over lawsuits between citizens of different states.[105] Thus, the Congress that enacted the original formulation of § 1988(a) in 1866,[106] as well as the Congress that made

102. Kreimer, *supra* note 59, at 619.

103. *See supra* text accompanying notes 42–43.

104. 42 U.S.C. § 1988(a).

105. *See, e.g.*, Kreimer, *supra* note 59, at 618–19 (discussing the use of federal common law in diversity cases under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), prior to its repudiation in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and arguing that § 1988(a) is best read to incorporate this regime); Theis, *supra* note 101, at 684 ("[T]he statute [§ 1988(a)] seems to state the *Swift v. Tyson* rule: if no federal law (statute) governed, general common law applied unless a state constitutional or statutory provision conflicted with or modified the general common law. The requirement that state provisions not be inconsistent with the Constitution and laws of the United States states the obvious; namely, the supremacy clause of the Constitution would continue to play its role in the law selection process." (footnotes omitted)).

106. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

it applicable to § 1983 actions in 1871,[107] would have been well familiar with federal common law.

In short, § 1988(a) offers both a lawful basis and what is likely the best explanation for the course of the Supreme Court's immunity jurisprudence under § 1983. One can disagree with the common law judgment reflected in that jurisprudence, but once it is agreed that § 1983 is silent on questions of whether damages constitute a "suitable" remedy, § 1988(a) governs that question and authorizes the courts to make common law judgments about the availability of damages, including the decision that damages awards should sometimes be barred by a defense of qualified immunity.

III. THE FUNCTIONAL CASE FOR QUALIFIED IMMUNITY

Even if § 1988(a) supplies a lawful basis for a federal common law of immunity under § 1983, it does necessarily follow that existing immunity doctrine represents a sound common law judgment. This Part addresses that issue.

A. Is There Adequate Justification for Qualified Immunity?

As we have seen, the Supreme Court has justified qualified immunity on the theory that public officials will be inhibited in the performance of their duties if they face damages liability whenever they violate the plaintiff's rights.[108] At first blush, there seems to be a substantial basis to fear over-deterrence if public officials faced unlimited liability.

Police officers' compensation is generally not based on their arrests or the local crime rate; accordingly, officers internalize few, if any, of the benefits

107. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871).

108. *See supra* text accompanying note 10. John Jeffries has offered a different justification, arguing that qualified immunity limits the costs associated with the recognition of new constitutional rights by shielding officials from liability when new rights are recognized for their prior conduct. *See* John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 247 (2013) ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout."). This view, however, fails to account for the fact that municipalities and other units of local government are not entitled to qualified immunity, as Professor Jeffries acknowledges. *See id.* at 232–33. Professor Jeffries does not claim that this omission has inhibited constitutional innovation when it comes to claims against units of local government, which would be precisely the type of evidence required to support his hypothesis. *See id.*

of effective policing, which are instead externalized to the public at large.[109] The same is likely true for most public officials. Thus, if officials are forced to internalize the costs of their activities through damages liability, when they do not internalize the benefits, the likely result would be to encourage officials to avoid conduct that exposes them to liability, even if such conduct might also produce benefits to the public at large.[110] On this view, *Harlow* and its progeny sensibly offer immunity for officers who reasonably believe that their conduct is consistent with extant law;[111] otherwise, there would be a risk of over-deterrence. There are, however, powerful responses to this line of reasoning.

1. The Effects of Indemnification

The available empirical evidence suggests that the fears that damages liability will over-deter public employees are greatly exaggerated in light of the ubiquity of indemnification. Joanna Schwartz, for example, found: "In

109. *See, e.g.*, Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743, 763–64 (2010) ("Individual officers do not internalize either the benefits or the costs of Fourth Amendment activity. When the police apprehend an offender, they may improve their performance evaluations and gain prestige within the force. They do not, however, pocket what the community is willing to pay to prosecute and punish the offender."); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982) ("Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance.").

110. *See, e.g.*, John C. Jeffries Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 267 (2000) ("While negative outcomes can readily be translated into adverse legal claims, the benefits of good performance are hard to capture. These skewed incentives may bias discretionary choices . . . . The result is a bias toward inaction, defensiveness, and bureaucratic self-protection."); *cf.* Myron W. Orfield Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017, 1053 (1987) (detailing a survey of Chicago narcotics officers in which 95% believed that in response to a regime of damages liability replacing the exclusionary rule for search-and-seizure in violation of the Fourth Amendment, "police would be afraid to conduct the searches they should make"). For reviews of empirical evidence suggesting that police officers are sometimes subject to over-deterrence, see, for example, Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the "ACLU Effect" and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. 1581, 1585, 1649 (explaining that burdens imposed by consent decree reduced rates of stop-and-frisk in Chicago and produced increased homicide); Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 717 (2016) (discussing evidence of reduced policing and increased crime following events that led police to believe they are likely to be more closely scrutinized); Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 754, 765–66 (2017) (discussing evidence that federal consent decrees inhibit policing and produce increased crime).

111. *See supra* text accompanying notes 31–37.

stark contrast to assumptions underlying civil rights doctrine, law enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period."[112] This finding is consistent with the view of most scholars who have written on the prevalence of public-sector indemnification.[113]

Basic economic theory explains the ubiquity of indemnification. Indemnification is the most efficient vehicle available for employers to minimize the risk that their employees' exposure to liability will reduce productivity and inhibit the willingness of highly-qualified individuals to take these positions.[114] Qualified immunity, moreover, is not sufficient to solve the problem because it does not insulate public employees from all costs of litigation; for example, qualified immunity does not protect public employees from the costs of retaining counsel and defending litigation brought against them, even when litigation is likely to encounter a successful qualified immunity defense. If public employees were not indemnified for their legal costs, that alone could produce a substantial chilling effect on their willingness to undertake activities that might expose them to liability.[115]

Given the prevalence of indemnification, public employees generally do not experience financial consequences as a result of litigation arising from their activities. Nonetheless, the Supreme Court has refused to consider the effects of indemnification in its qualified immunity jurisprudence, taking the view that "[w]hatever contractual obligations [the public employer] may (or

112. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912 (2014). She added: "Although civil rights doctrine and most scholarship considering the question assume that individual officers are personally responsible for punitive damages, no officer in my study actually satisfied a punitive damages award entered against him." *Id.* at 917.

113. *See, e.g.*, Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 590 (2000); Rosenthal, *supra* note 86, at 812, 819–20; Nielson & Walker, *supra* note 15, at 36–37; Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1217–20 (2001).

114. For a helpful explication of the economics of employee indemnification, see Larry B. Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 272–76, 279.

115. To be sure, despite the availability of indemnification, public officials might be deterred by the threat of liability if they somehow overestimated the risk that they would be denied indemnification, although this possibility seems more theoretical than real. As Professor Schwartz observed, "[s]tudies have found that 'the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices.'" Schwartz, *supra* note 112, at 942. This should be unsurprising; for the same reason that employers have an incentive to offer indemnity, they are equally incentivized to assure their employees they will be indemnified to ensure that they perform their duties vigorously.

may not) have to represent and indemnify the officers are not our concern."[116] Since, however, the Court has justified qualified immunity in terms of the potential deterrent effect of the threat of personal liability on the willingness of public employees to perform their duties with vigor,[117] surely evidence suggesting that this threat is illusory bears on the soundness of the doctrine itself.

To address the manner in which indemnification undermines the ability of § 1983 liability to deter public employees from violating the Constitution, indemnification of law enforcement officials could be curbed or abolished, as some have proposed.[118] There is a potent rejoinder to such proposals, however; indemnification might undermine the deterrent objectives of § 1983, but it may also critically advance other statutory objectives, such as the compensation of plaintiffs.[119] After all, if only the assets of individual public employees were available to satisfy § 1983 judgments, potential plaintiffs and their counsel may have inadequate incentives to bring damages actions for fear that a substantial judgment could not be satisfied from the limited assets of the typical public official.[120]

Indemnification does not eliminate the deterrent effects of damages awards; instead, it shifts the costs of litigation to public employers. Accordingly, as many scholars have argued, indemnification gives public employers an incentive to train, monitor, and supervise their employees in a manner that reduces the likelihood they will act unlawfully and thereby

116. *See, e.g.*, City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015). *But cf.* Anderson v. Creighton, 483 U.S. 635, 641–42, 641 n.3 (1987) ("[E]ven assuming that conscientious officials care only about their personal liability and not the liability of the government they serve, the Creightons do not and could not reasonably contend that the programs to which they refer make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases.").

117. *See supra* text accompanying note 10.

118. For proposals along these lines, see, for example, Emery & Maazel, *supra* note 113, at 596–600; Schwartz, *supra* note 112, at 953–54.

119. *See* Schwartz, *supra* note 112, at 891.

120. *Id.* at 952 ("Widespread indemnification facilitates § 1983's goal of compensating plaintiffs after a settlement or judgment in their favor. If officers were not indemnified, they would be personally responsible for satisfying six- and seven-figure settlements and judgments from their relatively modest annual salaries. Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated. Indemnification ensures that judgments and settlements will be satisfied from governments' deep pockets."). *See generally* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1565 (2020) ("The City of East Cleveland . . . does not have the resources to pay settlements and judgments entered against it and its officers. East Cleveland is self-insured, so lawsuit payments come from its general funds. And the city is reportedly on the verge of bankruptcy. As a result, attorneys who regularly bring civil rights cases against Cleveland are unwilling to sue the East Cleveland Police Department and its officers." (footnotes omitted)).

impose costs on the employer.[121] Placing the responsibility to secure compliance with constitutional law on the public employer, moreover, has the virtue of practicability. After all, police officers could scarcely be expected to scour case law and reach their own conclusions about what is "clearly established law." Surely the sensible regime is to have public employers develop policies that are binding on all employees and that comply with constitutional norms—policies on which their employees can then rely. The Supreme Court itself has occasionally acknowledged that qualified immunity is appropriate when public employees reasonably rely on the policies of their employers.[122]

Whether the threat of damages liability incentivizes the government to comply with the law, however, is contested. Daryl Levinson, for example, observed that the "government responds to political, not market incentives . . . [and] cares not about dollars, only about votes"[123] and thus "cannot be expected to respond to forced financial outflows in any socially desirable, or even predictable, way."[124] The likelihood that the government will undertake to reduce potential liability is particularly low, he added, when it comes to activities that are likely to pay political dividends in the eyes of voters.[125]

Professor Levinson's argument seems overstated. If state and local policy makers were indifferent to damages liability, they would presumably not bother to seek state laws that confer immunity from damages liability, but

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121. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 100–21 (1983) (contending public employers should be liable for constitutional violations committed by their employees within the scope of employment to deter constitutional violations); Harold S. Lewis & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 821, 829–38 (1992) (same).

122. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 617 (1999) ("[I]mportant to our conclusion [to grant qualified immunity] was the reliance by the United States marshals in this case on a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff's Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes. Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." (footnote omitted) (citation omitted)).

123. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 420 (2000).

124. *Id.* at 348.

125. *See id.* at 370 ("So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.").

such state-law immunities are ubiquitous, as we have seen.[126] The reason why state and local policy makers seem to like immunity—and are able to convince state legislators to enact immunity statutes—is not difficult to explain. Damages liability imposes political costs on the government by diverting scarce public resources from what policy makers are likely to regard as their politically optimal uses to the payment of litigation-related costs.[127] These costs are not insubstantial; in her study, Professor Schwartz found "forty-four jurisdictions paid an estimated $735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011."[128]

Some units of government obtain insurance to cover the costs of settlements and judgments through risk pools or commercially-provided insurance, though the largest units of government often self-insure.[129] Insurance, however, does not insulate governments from litigation costs; in the most comprehensive study of the subject to date, Professor John Rappaport found that insurers create financial incentives for the governments they insure to minimize liability through "underwriting and rating—the processes by which insurers evaluate a risk to decide what coverage, if any, to offer or renew[] and for what price."[130] Indeed, insurers have a potent incentive to charge their insureds—including units of government—rates that reflect their exposure to liability, if only to protect the insurers' bottom lines.[131] Thus, insurance does not eliminate the financial effects of litigation costs on state and local governments.[132]

Litigation also imposes political costs on the government when it brings governmental misconduct to the public's attention and affixes fault for that

126. *See supra* note 86 and accompanying text.

127. For a more elaborate argument along these lines, see Rosenthal, *supra* note 86, at 831–41.

128. Schwartz, *supra* note 112, at 913.

129. *See, e.g.*, John Rappaport, *How Private Insurers Regulate Police*, 130 HARV. L. REV. 1539, 1559 (2017) ("[S]mall municipalities—under, say, 100,000 residents—tend to join pools. Midsized entities are divided, with the majority—some estimate 70%—in pools and the rest insured by commercial carriers. The pooling figure is higher for cities than for counties. And the largest municipalities—the big cities and counties, certainly those with over 500,000 or 750,000 residents, and some well below that point—*self-insure.*" (footnotes omitted)).

130. *See id.* at 1587. Moreover, Professor Rappaport found that through denials of coverage, differentiated premiums, deductibles and self-insured retentions, and limits on coverage, insurers impose costs on governments that are not taking what the insurers regard as "adequate efforts" to limit liabilities. *Id.* at 1588–91. He also found that reinsurers use similar financial incentives to encourage primary insurers to take measures that limit liability risks. *Id.* at 1591–93.

131. *See id.* at 1543–55.

132. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1172–73, 1190, 1195 (2016) (discussing indirect financial effects of litigation on state and local governments).

misconduct.[133] Indeed, the potential political costs of controversial litigation, or the political benefits of putting a controversial episode of alleged official misconduct to rest, may mean that settling some § 1983 litigation provides political benefits that offset the political costs of paying judgments or settlements.[134] Still, while state and local governments may be willing to pay handsome settlements to make politically problematic cases go away, it would be extraordinary if state and local governments were indifferent to the overall costs of litigation, even if, on occasion, settling certain types of litigation would prove politically preferable to defending it. I spent more than a decade in a rather senior position in municipal government, and my superiors made it quite plain that they were deeply concerned with litigation costs.

Some have nevertheless questioned whether governments are sufficiently sensitive to costs arising from § 1983 litigation. Damages awards arising from police misconduct, for example, are generally not paid out of police budgets but rather out of the larger pool of funds available to meet the general expenses of the indemnifying unit of government.[135] Moreover, while Professor Schwartz found that some jurisdictions require police budgets to absorb at least some of the cost of litigation payouts, even then, it is common to budget in ways that limit the financial impact of litigation costs on police operations.[136]

This pattern should be unsurprising. Regardless of the budgeting scheme utilized, it is likely politically unacceptable to deny police departments the

133. *See, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–63 (2001) (discussing this point).

134. *See, e.g.*, Rosenthal, *supra* note 86, at 829 ("If civil litigation is uniquely valuable at ferreting out governmental misconduct because of the financial incentive that the civil plaintiff has to pursue such allegations, then elected officials would presumably pay premiums—beyond the amount necessary to compensate the plaintiff—in order to settle litigation that might otherwise cause embarrassment."); *see also* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775–77 (2004) (noting the prevalence of settlements of police misconduct litigation with confidentiality provisions that keep settlements secret). For examples in which public employers settled controversial litigation that could well have been defensible, see Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 650–51, 657–58.

135. *See, e.g.*, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 279 (Wesley Skogan & Kathleen Frydl eds., 2004); Miller & Wright, *supra* note 134, at 781–82; Schwartz, *supra* note 112, at 956–57; Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 494–95 (2009).

136. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1166, 1172–73, 1195 (2010) (finding that approximately half of jurisdictions surveyed required some contribution to the payment of judgments from police budgets, but budgetary arrangements rarely produced meaningful budgetary pressure on police departments).

resources that police executives contend are essential to protect the public. This does not mean, however, that governments are insensitive to litigation costs. If those costs do not come out of the police budget, they must come from someplace else—in the form of either higher taxes, reductions in other government services, or both.[137] In this fashion, litigation expenses exact a political cost as policy makers must expend political capital either by increasing taxes or by reducing other governmental services that could otherwise build political support for incumbents.

Accordingly, because indemnification shifts litigation costs from state and local employees to their employers, the question whether qualified immunity is justified turns on whether damages liability would have undesirable effects on state and local government policy absent some form of immunity.

When it comes to the question whether liability risks shape government policy, the available evidence is mixed. Professor Schwartz's study of twenty-six police departments that had been subjected to external review by court-appointed monitors or external auditors found that most departments rarely, if ever, use information derived from lawsuits to make personnel and policy decisions.[138] In a subsequent study of five large departments that analyzed information generated from litigation, however, she found that although "it is difficult to pinpoint the role of lawsuits in department decisions" and equally "difficult to measure the effect of department decisions on line officer behavior," nevertheless, "lawsuit data has helped identify problems and craft

137. *Cf.* George C. Thomas III, *Judges Are Not Economists and Other Reasons To Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 55 (2001) ("The legislature could 'squeeze' the budget of departments that get hit with many damage awards, but the incentives there are mostly perverse. If the legislature cuts salaries, then the quality of policing suffers, probably causing more rather than fewer violations, and less effective policing as well. If the department cuts positions, then policing obviously becomes less effective and, with less time to investigate cases, perhaps creates more Fourth Amendment violations in the bargain. Departments could insure against the risk of paying damages, but insurance simply shifts the costs among departments, depending on how often they violate the Fourth Amendment; the total cost would be the same plus, of course, a profit for the insurance company. So it seems pretty clear that something approaching 100% of the cost of the damage awards would be borne by the taxpayer.").

138. *See* Schwartz, *supra* note 136, at 1041–42, 1066–67. Professor Schwartz focused on jurisdictions that have been subject to external review since those jurisdictions had made available more information about their policies and practices than most police departments. She supplemented the information disclosed by those departments with interviews and correspondence "with knowledgeable practitioners and experts, including court-appointed monitors of settlement agreements, police auditors, former and current police officials, attorneys who defend the city and its officers in civil suits, other city officials, and plaintiffs' attorneys and advocates." *Id.* at 1042–44 (footnotes omitted).

interventions in these instances."[139] In his study, Professor Rappaport found that "[t]o the extent that researchers have identified successful strategies for combating police misconduct, insurers have been reasonably effective at inducing police agencies to use them."[140] And, Christopher Slobogin has observed that "[t]he single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force, which happens to be one of the few domains where the police are successfully sued for large sums of money."[141]

Given the uncertain state of empirical evidence, one should be slow to embrace the counterintuitive conclusion that state and local policy makers are indifferent to the cost of damages liability, even if they may not always take effective action to reduce their exposure to liability in light of the complex and often conflicting political incentives they face. After all, interventions that reduce potential liability by deterring police from aggressive crimefighting might produce what are regarded as politically unacceptable costs. The threat of liability is likely to put some pressure on state and local governments to avoid liability-creating behavior, even if that pressure may sometimes be offset when liability-creating behavior is likely to produce political benefits.[142]

There are, moreover, additional and likely more powerful reasons to be wary of the effects of governmental damages liability.

2. *The Problematics of Government Damages Liability*

As we have seen, damages liability has different effects on those who seek to maximize profits or revenues than on the government.[143] Accordingly, the case for awarding constitutional tort damages against the government encounters a variety of difficulties not present when assessing tort liability in the private sector.

Justificatory theories for tort liability can be bifurcated into instrumental and deontic accounts. The instrumental account justifies tort liability as

139. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 860, 861 (2012).

140. Rappaport, *supra* note 129, at 1596.

141. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 396. Charles Epp has made a related point in which he focuses more on norms than economics. He contends that judicial decisions, by articulating legal constraints on the use of force, have shaped police behavior. They do so by articulating the legal norms that law enforcement agencies—given their concern about compliance with legal norms—come to internalize. *See* CHARLES A. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 59–113 (2009).

142. *See* Rosenthal, *supra* note 86, at 842–43 (discussing political calculation governments must make to determine whether liability-creating behavior is worthwhile).

143. *See supra* notes 123–142 and accompanying text; Rosenthal, *supra* note 86, at 847.

creating an economic incentive to make efficient investments in safety to reduce exposure to liability.[144] When it comes to the liability of an employer for the torts of an employee acting within the scope of employment in particular, on the instrumental view, vicarious liability is justified so that employers have an incentive both to supervise their employees in a manner that will reduce losses and to minimize the risk that employees with insufficient assets to satisfy judgments will have inadequate incentives to exercise due care.[145] The deontic account focuses on the asserted moral obligation of those who have injured another to compensate the injured party.[146] With respect to employer liability in particular, on this view, an employer is appropriately held liable for the torts of an employee acting within the scope of employment because the employer bears moral responsibility for the actions of those working on its behalf.[147] These justificatory theories, however, have limited application to the public sector.

As for the instrumental account, while a private employer has an economic incentive to maximize revenues or profits and therefore to make cost-justified investments in safety, as we have seen, because the public does not expect the government to maximize revenues or profits, the deterrent effects of tort liability are more uncertain in the public sector, where the political costs associated with diverting funds to investments in loss prevention or with the payment of litigation costs may not always exceed the political benefits of liability-creating behavior, such as aggressive policing in the face of rising crime rates. Damages awarded against the government are therefore unlikely to have the kind of predictable deterrent effect of damages from private entities that are incentivized to maximize revenues or profits.

To be sure, as we have also seen, there is a political cost when scarce public resources are diverted to litigation costs and cannot be allocated by

144. *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135–73 (1970) (exploring prevention of accidents by imposing liability on the cheapest cost avoider); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 58–77 (1987) (discussing the incentive tort liability creates to invest in loss prevention); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 8–14 (1987) (same).

145. *See, e.g.*, LANDES & POSNER, *supra* note 144, at 120–21; SHAVELL, *supra* note 144, at 172–74; Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569, 608 (1988).

146. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 303 (1992) (arguing that tort liability represents a moral conception of corrective justice); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 48–69 (Gerald Postema ed., 1999) (arguing that those who expose others to unreasonable risks have a moral duty to compensate injured parties); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 145–70 (1995) (arguing that tort law is an example of corrective justice).

147. *See, e.g.*, WEINRIB, *supra* note 146, at 185–87.

elected officials in what they regard as a politically optimal fashion.[148] Moreover, when funds to pay judgments and settlements must be raised either by increasing taxes or by reducing services provided to the public, politically accountable officials are likely to pay a political cost. Accordingly, while the government is unlikely to be indifferent to liability, one cannot confidently predict that the threat of liability will necessarily incentivize cost-justified investments in loss prevention. The government will allocate funds to loss prevention when the political benefits of that allocation exceed its costs, and this balance may be struck differently as local conditions—and politics—change. It is this uncertainty that presumably explains why Professor Schwartz found no consistent pattern by which the government seeks to learn from litigation in order to reduce future liabilities.

Beyond that, a complete accounting of the costs and benefits resulting from government damages liability must also consider the costs to third parties, such as the taxpayers who must fund litigation costs or the members of the public dependent on the government's ability to fund public services. Although voters might be expected to punish incumbent officials who make inadequate efforts to reduce tort liability, it is doubtful whether the political process is adequate to incentivize anything approaching optimal liability-reducing governmental policies. While the owners of a business or shareholders of a corporation have a straightforward incentive to demand that management maximize profits, voters' expectations of the government are far more wide-ranging. Reducing exposure to liability is unlikely to be a leading concern of the electorate.

Even worse, if we reasonably assume that the government will usually be unwilling to incur the political cost of raising taxes in order to pay litigation costs, the funds necessary to pay these costs are likely to come from reductions in other government services. And, in the intense political competition for scarce public resources, the programs most likely to suffer when resources are diverted to the payment of litigation are those serving those with the least political influence—most likely the poor and disadvantaged.[149] Indeed, as we have seen, Professor Schwartz found that litigation costs arising from police misconduct litigation rarely come out of or otherwise reduce police budgets.[150] The political cost of denying the police the resources that they claim are necessary to protect the public is likely to be unacceptably high; instead, the funds to pay litigation costs are likely to come out of the hides of those with less political sway and relatively little ability to influence government policy. Unlike the owners, managers, or shareholders of a private

148. *See supra* note 127 and accompanying text.

149. For a more elaborate argument along these lines, Rosenthal, *supra* note 86, at 845–47.

150. *See supra* notes 135–136 and accompanying text.

enterprise who can be fairly held accountable when that enterprise fails to make efficient investments in loss-prevention because of their likely ability to influence the enterprise's policies (or else divest their stakes in the enterprise), those most dependent on government services are likely to bear disproportionate costs resulting from government damages liability, while having relatively little ability to influence the government policies that produce those liabilities.

Similarly, while the costs of tort litigation may raise the price of goods and services paid by the public, this is the consequence of requiring those who purchase goods and services to internalize the full costs of their distribution—including the costs of tortious losses flowing from their distribution. In contrast, when government funding of health care for the poor, for example, is reduced in order to pay the costs of litigation against the police, rather than spreading the costs of litigation to the entire population that benefits from police services, costs are concentrated on a discrete population in a manner likely disproportionate to the benefits they receive. In this fashion, the poor and disadvantaged are likely to be the collateral damage of governmental damages liability.

It may be the case that litigation costs are frequently a small proportion of state and local budgets, but it may be equally true that often a small proportion of state and local budgets are likely to be allocated to the needs of their most disadvantaged and politically powerless constituents. Litigation costs could therefore have a significant impact on the ability of state and local governments to aid their most disadvantaged residents. Thus, governmental liability for damages, even if it imposes some political costs on incumbent officeholders, is likely to impose significant costs on innocent third parties as well.[151] One may decry this state of affairs, but it represents a political reality not likely to change.

Thus, the instrumental case for governmental tort liability is fraught. There is a case for governmental damages liability but also a case to mitigate the hardships that unlimited liability may produce, especially when they involve costs imposed on innocent third parties.

As for the deontic account, given indemnification, the cost of judgments against public employees come not from the supervisors or policy makers who have control over the conduct of public employees but rather, as Professor Levinson wrote, "from the pockets of taxpayers," thereby "attenuat[ing] the

151. *Cf.* John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 104–05 (1999) ("In itself, the reduction in constitutional violations is an unqualified good, and it is precisely this benefit that the advocates of strict enterprise liability for constitutional torts seek to gain. Of course, one would still have to weigh the value of increased constitutional compliance against the costs of decreased activity levels for the legitimate business of government." (footnotes omitted)).

connection between moral responsibility and the burden of rectification."[152] To be sure, those who voted for incumbent officeholders that have exercised insufficient oversight over public employees could be fairly taxed with a duty to compensate injured parties, but government damages liability must be funded by all taxpayers, including those who did not vote for incumbents. Moreover, while residents have the option of voting with their feet by leaving jurisdictions that face excessive liabilities, this form of exit involves significant costs as well, which will be especially difficult for poor and disadvantaged residents to incur.[153] Moreover, because damages may be awarded many years after the underlying conduct that produced liability, current officeholders—as well as current taxpayers and residents of the jurisdiction—may experience the consequences of their predecessors' actions in a manner that undermines both political and moral accountability.[154]

The deontic case for imposing liability costs on the government is, accordingly, no less fraught with complication than the instrumental justification for government damages liability.[155] Perhaps, however, one can make a more straightforward case for damages liability by focusing solely on compensation. One could argue, for example, that the government must compensate those injured by its violations of the Constitution, representing as it does a kind of fundamental obligation to the governed.[156] The Constitution, however, does not articulate such an obligation; it requires the payment of compensation to injured parties only in cases involving the taking of private property for a public purpose under the Fifth Amendment.[157] In light of this

152. Levinson, *supra* note 123, at 408.

153. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420 (1990) ("Interjurisdictional movement is not cost-free. It is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones. First, there are the out-of-pocket costs of relocation—of picking up, selling a home or otherwise disinvesting from one's original locality, searching for a new place to live, transporting one's self and family and finding and paying for a new home. Second, most people can only reside where they have access to work. Thus, corporate investment decisions and local zoning regulations that determine the location of jobs, the education and skills requirements that determine who will be eligible for those jobs and the costs of commuting from home to workplace all limit ease of movement. Poorer, less educated potential movers will have fewer options and will be forced to bear more costs if they attempt to move." (footnotes omitted)).

154. *Cf.* John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 384–90 (observing that insurers have limited effect on government policies with respect to "high dollar-long tail" liability risks such as liability for wrongful convictions).

155. *See* Levinson, *supra* note 123, at 408–10.

156. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) ("The insight at the heart of *Bivens* is that the judiciary has a duty to enforce the Constitution. To discharge this duty, the Court must ensure that each individual before it receives an adequate remedy for the violation of constitutional rights. If the remedy is not forthcoming from the political branches, the Court must provide it." (footnote omitted)).

157. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

textual limitation on the constitutional obligation of compensation, perhaps unsurprisingly, the Supreme Court has never recognized an invariable constitutional duty to pay compensation outside of the Takings Clause. Although, in *Bivens*, the Court held that the victims of an unreasonable search or seizure within the meaning of the Fourth Amendment have a right to recover damages from the federal agents responsible for the violation, despite the absence of any statute conferring such a right, the Court cautioned that "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress."[158] Subsequently, the Court stressed that it would not recognize a right to recover damages "when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress," or "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[159] Beyond that, the Court has repeatedly declined to recognize a right to recover damages for constitutional violations under *Bivens* in a variety of contexts.[160] And the Court has held that sovereign immunity bars actions for damages against the federal government, its agencies, and its instrumentalities resulting from a constitutional violation.[161]

Accordingly, it is difficult to argue that the Constitution embodies an obligation to pay damages to the victims of constitutional torts. On this point, aside from Takings Clause, the Constitution is silent. The matter instead appears to be left to the domain of legislative and common law judgment.[162]

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158. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392, 396–97 (1971).

159. Carlson v. Green, 446 U.S. 14, 18–19 (1980) (first quoting *Bivens*, 403 U.S at 396–97; and then citing Davis v. Passman, 422 U.S. 228, 245–47 (1979)); *accord* Wilkie v. Robins, 551 U.S. 537, 550 (2007) (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

160. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 743–50 (2020) (claims involving cross-border shooting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1858–65 (2017) (claims involving detention policy adopted by senior officials after a terrorist attack); *Wilkie*, 551 U.S. at 554–62 (claim of retaliation against federal officials for plaintiff's exercise of rights as a property owner); Schweiker v. Chilicky, 487 U.S. 412, 421–29 (1988) (claim for wrongful termination of disability benefits); Chappell v. Wallace, 462 U.S. 296, 298–304 (1983) (claims by enlisted military personnel); *see also Ziglar*, 137 S. Ct. at 1857 ("[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.'" (first quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009); and then quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001))).

161. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 475 (1994) (first citing Loeffler v. Frank, 486 U.S. 549, 554 (1988); and then citing Fed. Hous. Admin. v. Burr, 309 U.S. 242, 244 (1940)).

162. *Cf.* Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786–87 (1991) ("[T]he settled law about the necessary availability of constitutional remedies invites a charge of contradiction. On the

As a policy matter, there may be a justification for what amounts to publicly funded constitutional tort insurance. Of all the demands on the government, however, it is unclear that constitutional tort insurance should be at the top of the list. If a requirement that the government fund tort insurance reduces its ability to fund health care for indigent children, for example, it is far from clear that social welfare of the government's moral standing would be improved. At most, it seems that the type of policy question regarding funding priorities is best left to the political process.[163]

3. *The Case for Qualified Immunity*

Because both the instrumental and deontic accounts of governmental tort liability are problematic, there is a case for some form of immunity. The virtue of qualified immunity, in light of the practical necessity of indemnification, is that it mitigates the problems that inhere in governmental liability on both the instrumental and deontic accounts. Qualified immunity permits damages awards only when officials could not have reasonably believed their conduct was lawful.[164] Accordingly, qualified immunity effectively requires public

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one hand stands a line of cases mandating constitutional remedies and often implying that there must be an effective remedy for all constitutional violations. On the other hand, cases upholding sovereign and official immunity reflect the competing view that claims to effective remedies must sometimes yield to concerns of sovereign necessity and convenience." (footnotes omitted)).

163. *Cf.* Evan J. Mandery, Commentary, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL., no. 4, May–June 2005, at 7 ("Insurance theory suggests that in the open market consumers would not choose to purchase 'constitutional tort insurance.' Generally speaking, people choose to buy insurance against losses that reduce wealth, but do not insure against intangible harms, such as emotional distress or affronts to dignitary [interests], that have no direct or indirect effect on wealth. Since most constitutional torts cause intangible damages, insurance theory argues that requiring citizens to purchase insurance against these kinds of injuries reduces their net welfare."); John C. Jeffries Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93 (1989) ("Why spread only losses caused by constitutional violations? Why not spread all losses, or at least all losses caused by government? Even if one accepts the (admittedly unprovable) premise that loss spreading decreases total pain, and even if one discounts the (probably decisive) impact of transaction costs, it is still not clear how loss spreading justifies compensation for some losses but not others. Simply put, there is no obvious link between the general rationale of loss spreading and the specific issue of compensation for injuries resulting from constitutional violations.").

164. *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) ("The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" (citation omitted) (first quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009); and then quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("Our cases have

employers to minimize the costs of indemnifying their employees by training and supervising them to comply with existing legal obligations if they wish to avoid the political costs of diverting scarce resources to the payment of judgments. Thus, qualified immunity doctrine incentivizes public employers to restrain abusive or overzealous officials.

At the same time, qualified immunity protects both public employers and employees to the extent their legal obligations are uncertain.[165] If liability were imposed merely because public employees and their supervisors failed to anticipate future legal developments, state and local governments could minimize liability only by directing their employees to resolve every debatable judgment in favor of avoiding liability-creating conduct. Requiring the government to avoid all liability risks would be problematic.[166] Encouraging timidity of this type might deter public employees from providing important public services. As one scholar put it, when considering the conduct of police officers on patrol in words that likely echo the views of many elected officials:

> [W]e don't want police officers to be extremely cautious in stopping or arresting someone: we want police officers to intervene on the street and investigate as soon as they have "reasonable suspicion" and we want them to make an arrest just as soon as they have probable cause. This is especially true when the crime is serious.[167]

Indeed, because it would be politically risky to require that public employees exercise this degree of caution, politically accountable officials would be unlikely to adopt such policies even in the face of liability risk.[168] Damages

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accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

165. *Cf.* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

166. *Cf. Anderson*, 483 U.S. at 638 (explaining that the fear of personal liability and potential litigation will inhibit officials in the discharge of their duties (citing *Harlow*, 457 U.S. at 814)).

167. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 33–34 (1999).

168. *Cf.* Richard H. Fallon Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 496–97 (2011) ("If government entities routinely indemnify their officials, they would certainly have an incentive to provide those officials with training regarding applicable law, including court decisions. But just as we cannot confidently claim

awards in such cases, accordingly, would be unlikely to alter government behavior and would impose serious costs on innocent third parties, such as taxpayers and those dependent on government services.

Thus, the Supreme Court is onto something when it writes that "the most important special government immunity-producing concern" is "protecting the public from unwarranted timidity on the part of public officials."[169] A regime of damages liability that incentivizes public officials to train, supervise, and discipline public employees to avoid all liability risks would breed timidity, the costs of which would accordingly be externalized to the members of the public that often depend on public employees to discharge their duties in a vigorous fashion.[170]

Beyond that, it is surely a harsh outcome to impose liability merely because an official follows what is reasonably taken to be existing law, failing to anticipate its subsequent constitutional rulings, or makes a reasonable effort to apply existing law to the particular facts that he confronts. By granting immunity in such cases, qualified immunity, as John Jeffries has argued, embraces the hardly radical view that damages liability should be premised on culpable wrongdoing or fault.[171]

In this regard, consider the facts of *Davis v. United States*.[172] After a routine traffic stop, police officers arrested the driver for driving while

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to know how widely indemnification occurs, we might doubt how well we understand how the availability of indemnification would affect the incentives of high level officials to implement continuing education programs for lower level employees." (footnote omitted)).

169. Richardson v. McKnight, 521 U.S. 399, 408 (1997) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

170. *Cf.* John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–74 (1998) ("[I]magine a supervisor instructing police officers (as all police are instructed these days) on the law of the Fourth Amendment. Under the regime of qualified immunity, the instructor would explain the rules of search and seizure and enjoin adherence to them, but would also tell the officers that reasonable mistakes would not be held against them. Now imagine the same situation under a regime of strict liability. The supervisor would instruct her charges not only to be careful about probable cause but also, and more importantly, not to search in any doubtful case. Under strict liability, the supervisor would require a kind of super-probable cause, steering well clear of the constitutional standard in order to avoid liability for inevitable mistakes. In consequence, there would be fewer searches." (footnote omitted)).

171. *See, e.g.*, Jeffries, *supra* note 163, at 102–03 ("[E]mphasis on fault is entirely consistent with the argument from corrective justice. It rightly identifies the defendant's state of mind, not as some extraneous intrusion into the workings of a compensatory regime, but as an essential feature of the normative basis for imposing liability in the first place . . . [I]mmunity claims sometimes evoke a hostility born of the suspicion that any limitation on damages liability for unconstitutional acts is in principle undesirable. This intuition is error. Investigation into the defendant's fault is entirely appropriate. At least in the absence of an argument based on incentive effects, the inquiry into fault is essential to the case for awarding money damages for constitutional violations." (footnote omitted)).

172. 564 U.S. 229 (2011).

intoxicated and the passenger, Davis, for giving a false name to police and then conducted a search of the vehicle's interior, consistent with then-binding precedent permitting such searches incident to an arrest, and recovered a firearm from Davis's jacket, leading to his prosecution for being a convicted felon unlawfully in possession of a firearm.[173] In a different case, the Supreme Court subsequently held that the interior of a vehicle may not be searched incident to the arrest of a recent occupant absent reason to believe that the vehicle contained evidence of the offense for which the arrest was made, and accordingly, under the new precedent, the search of Davis's vehicle violated the Fourth Amendment.[174] In *Davis*, while acknowledging that the search of Davis's jacket violated his Fourth Amendment rights, the Court refused to exclude the evidence obtained as a result of the search, reasoning: "The police acted in strict compliance with binding precedent, and their behavior was not wrongful."[175]

There is no more reason to award Davis damages for the search of his jacket than to bar the use of the jacket as evidence; the search was consistent with then-existing constitutional doctrine, and the officer therefore complied with extant law.[176] To award damages because public officials failed to anticipate that the law would change would be harsh medicine indeed.[177]

When, however, the government's constitutional obligations are clear, neither individual officials nor those who supervise them are given room by the Constitution to breach those obligations.[178] Accordingly, those who violate such constitutional commands should be required to pay the economic and political costs attendant to the payment of damages awards. In such cases,

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173. *Id.* at 235–36.

174. *Id.* at 239 (discussing Arizona v. Gant, 556 U.S. 332, 351 (2009)).

175. *Id.* at 240.

176. *Cf.* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 710–15 (2011) (observing that the Supreme Court increasingly requires evidence of systemic or intentional violations in order to justify exclusion of evidence obtained in violation of the Fourth Amendment or to sustain a policy claim against a municipality in ways that track the qualified immunity defense available to damages claims); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1492–97 (2018) (same).

177. For a similar example, see Fred O. Smith Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2108 (2018) ("Imagine a county clerk in 2014 who, because it is against state law, does not award marriage licenses to same-sex couples . . . Our imaginary county clerk, let us add, is gay and believes deeply in marriage equality. Now imagine that after the United States Supreme Court *does* find that same sex-couples have a right to marry in 2015, couples who were denied this right in 2014 sue . . . for money damages. They contend that even though the right for same-sex couples to marry was not clearly established in 2014, it does not matter." (footnote omitted)).

178. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that officials are generally shielded from liability for damages insofar as the conduct does not violate a clearly established constitutional right).

the argument for forcing the government to pay the price of damages liability has its greatest force.

Qualified immunity doctrine accordingly represents a middle ground solution that endeavors to accommodate the prerogatives of state and local governments without permitting them to be heedless of their constitutional obligations.[179] Qualified immunity doctrine protects public employees and, to the extent they are indemnified, their employers, as long as they undertake reasonable efforts to comport with their existing legal obligations. When the government's constitutional obligations are clear, however, it can legitimately be faulted for failing to undertake whatever training, supervision, or discipline is necessary to ensure that public employees understand and comply with those obligations. On both the instrumental and deontic accounts, the government should be compelled to pay when it permits public employees to breach reasonably clear constitutional obligations. When such clarity is lacking, however, both the instrumental and deontic cases for imposing costs on the government are far less potent.

As a common law approach to balancing plaintiffs' interests in compensation, the prerogatives of public employees to resolve legal uncertainty in a reasonable fashion, and the interests of the taxpayers and those dependent on the ability of state and local governments to finance public services, qualified immunity doctrine may not be unassailable, but it surely seems to be an eminently plausible effort to resolve the tension between these conflicting and undeniably important interests.

Professor Jeffries has nevertheless complained that "qualified immunity as currently defined and administered goes well beyond shielding reasonable error" because "while mere negligence suffices to negate qualified immunity when there is a factually similar precedent on point, something more is required when there is not," producing "an overly legalistic and therefore overly protective shield against liability for constitutional torts."[180] He has therefore argued that qualified immunity doctrine, rather than focusing on whether the defendant violated a "clearly established" right, should instead be reframed to focus on whether the defendant's conduct was "clearly unconstitutional," an approach "less tied to precedent and less technical . . . . Conduct would be clearly unconstitutional if it contravened

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179. *Cf. id.* at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.").

180. Jeffries, *supra* note 110, at 258. He added:

> [Q]ualified immunity should hew closely to notice as a proxy for fault. It may be in some sense unfair to impose liability for conduct that an officer could reasonably have thought lawful, but it is certainly not unfair to impose liability for conduct that the officer knew or should have known was wrong. Notice as a proxy for fault does not require a precedent precisely on point.

Id. at 259 (footnotes omitted).

factually specific precedent . . . or if it clearly and unambiguously contravened constitutional principles."[181] If, however, on the view advanced above, qualified immunity is best justified in terms of its effect on the manner in which public employees are trained and supervised, Professor Jeffries's reformulation is problematic. Rather than requiring that public employees be trained to follow extant rules of constitutional law, his approach demands that they become adept at applying "constitutional principles."[182] Training public employees to apply "principles" instead of "rules" may be no easy feat.

Sometimes constitutional law is stated in terms of relatively abstract standards, rather than concrete rules that require public officials to act in specific ways in the face of given facts.[183] There is, indeed, a longstanding debate between those who advocate a jurisprudence of rules, which mandate or prohibit particular conduct on given facts, and those who advocate a jurisprudence of standards, which are bottomed on background legal principles and therefore necessarily leave greater discretion to the actor called on to apply them.[184] When constitutional law is stated in terms of standards

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181. John C. Jeffries Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 867–68 (2010) (emphasis omitted). For similar proposals focusing on the manner in which lawyers and judges would assess a legal claim, see Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1544 (2019) ("[A] court might favor plaintiffs' interests in being made whole and deny qualified immunity whenever the court is certain that the plaintiffs have suffered a legal wrong. The court might then grant qualified immunity only if it is at least significantly unsure of the correct answer."); Michael L. Wells, *Qualified Immunity After* Ziglar V. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 434 (2018) ("The Supreme Court could . . . adopt[] a rule that immunity should not be awarded when there is a factual distinction but the distinction does not reflect a legally significant difference.").

182. Jeffries, *supra* note 181, at 868.

183. *Cf. id.* at 854 ("[T]he fact-specific, on-the-ground approach does not mesh with the rhetoric of constitutional law . . . .").

184. For present purposes, Kathleen Sullivan's distinction between "rules" and "standards" will do nicely:

> *(a) Rules.* - A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.
>
> *(b) Standards.* - A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's

rather than rules, however, it will be more difficult to expect government officials, frequently untrained in legal niceties, to conform their conduct to relatively abstract standards.

For example, employing a relatively abstract standard, the Fourth Amendment prohibits "unreasonable searches and seizures,"[185] and tracking this textual formulation, the Court has observed that "reasonableness is always the touchstone of the Fourth Amendment analysis."[186] Nevertheless, the Court has acknowledged:

> [A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[187]

Thus, whatever the virtues of standards or, to use Professor Jeffries formulation, "constitutional principles,"[188] when applicable law is stated at a relatively high level of generality, it may be far more difficult to expect those who train and supervise public employees to provide the kind of concrete guidance that facilitates the kind of supervision that promotes compliance

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> hand in the next case less than does a rule - the more facts one may take into account, the more likely that some of them will be different the next time.

Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (footnotes omitted). For an explication of the debate between members of the Court who have advocated the use of rules and those who advocate the use of principles, see *id.* at 56–69.

185. U.S. CONST. amend. IV.

186. Cnty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017) (alteration omitted) (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016)).

187. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citation omitted). To a similar effect, see Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 338 (2012) ("Officers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules.'" (quoting *Atwater*, 532 U.S. at 347)); Virginia v. Moore, 553 U.S. 164, 175 (2008) ("In determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.'" (quoting *Atwater*, 532 U.S. at 347)).

188. Jeffries, *supra* note 181, at 868.

with the law without producing undesirable over-deterrence.[189] Accordingly, when the law is stated at a relatively high level of generality, the manner in which such a standard is applied may be so fact-sensitive that only precedents involving a great deal of factual similarity will offer sufficient clarity to justify a denial of qualified immunity.[190] Moreover, it asks too much to expect public employees to apply standard-like "constitutional principles" rather than more rule-like commands; Professor Jeffries's proposed reform in qualified immunity doctrine may do little to improve compliance with the Constitution, while at the same time imposing significant costs on the taxpayers and those dependent on the ability of the government to finance public services. Professor Jeffries offers no data to explain how frequently public employees are currently granted immunity for failing to grasp "constitutional principles,"[191] but to the extent that the difference between "principles" and "rules" is meaningful, that difference could well prove difficult for public employees to grasp and apply.

In any event, if tinkering with qualified immunity doctrine is warranted, the account advanced here suggests that, in light of the reality of indemnification, the critical inquiry is whether a public employer could have been reasonably expected to impose a system of training, supervision, and discipline sufficient to incentivize employees to avoid a particular liability risk without undue risk of over-deterrence. It is unrealistic to expect public employees to know and be able to apply every bit of settled constitutional doctrine; as Professor Schwartz has observed: "There could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law."[192] But, if constitutional doctrine becomes so hopelessly complex that public officials could never be expected to grasp and comply with it, then constitutional law would cease to have any real impact on the behavior of public officials. In such a world, the most we could achieve is a form of publicly funded constitutional tort insurance. Surely we should aspire to a constitutional jurisprudence with greater impact on what happens in the real world; constitutional doctrine

189. For a valuable discussion of the case for courts to develop administrable "decision rules" in constitutional law rather than relying on more general principles frequently embodied in constitutional text, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 88–100 (2004).

190. *Cf.* Ornelas v. United States, 517 U.S. 690, 695–96 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible . . . . They are . . . fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." (citing Illinois v. Gates, 462 U.S. 213, 232 (1983))).

191. *See* Jeffries, *supra* note 181, at 867–69.

192. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. (forthcoming 2021) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540 [https://perma.cc/WF3M-5J5F].

should be sufficiently comprehensible and rule-like so that public officials can be realistically expected to learn and comply with it.

To be sure, in especially egregious cases where the illegality of official conduct is plain, qualified immunity should likely be denied even in the absence of a breach of a previously announced rule-like formulation of constitutional law—a point that the Supreme Court has made in its qualified immunity jurisprudence.[193] In the vast majority of cases, however, a focus on clearly established rights asks the right question—at least if we are to focus on facilitating effective training, supervision, and discipline of public employees.[194] It will be much easier for public employers to expect that their employees comply with extant rules of constitutional law than to demand that they also hew to more amorphous, standard-like principles of constitutional law.

B. Does Qualified Immunity Offer Meaningful Protection?

Even if there is a theoretical justification for qualified immunity along the lines sketched out above, the question remains whether, in practice, qualified immunity provides an appropriate middle ground solution to the problems posed by governmental damages liability. Qualified immunity is often attacked as constituting a nearly insuperable obstacle to the vindication of constitutional rights.[195] The empirical evidence, however, suggests that its

193. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances . . . . Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."). *Hope* involved an Eighth Amendment challenge to Alabama's practice of chaining prisoners to hitching posts for extended periods with limited water and bathroom breaks as a disciplinary measure. *Id.* at 733–36. Although Professor Jeffries approved of *Hope*, he argued that a number of factors limited its importance:

> First, the very extremity of the misconduct in *Hope*—the Court called it "antithetical to human dignity"—distanced that decision from application to less flamboyant misbehavior. Second, there were in fact prior decisions very nearly on point, including one that outlawed handcuffing inmates to fences and bars for long periods. Thus, even under a demanding standard of factual similarity, the conduct in *Hope* stood condemned. Finally, the Court's subsequent decisions veered back toward requiring precedential specificity.

Jeffries, *supra* note 110, at 256–57 (footnotes omitted). More recently, however, the Court has stressed that on egregious facts, qualified immunity should be denied regardless whether there are factually similar precedents. *See* Taylor v. Riojas, No. 19-1261, 2020 WL 6385693, at *2 (U.S. Nov. 2, 2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." (footnote omitted)).

194. *See supra* text accompanying notes 165–171.

195. *See supra* text accompanying note 13.

protections may be much weaker than these critics claim—perhaps even too weak to accomplish much of anything.

1. *The Effect of Qualified Immunity on Litigation*

In her study, Nancy Leong reviewed a random sample of 100 district court and 100 appellate court opinions involving qualified immunity from three time periods—the two years preceding the Supreme Court's admonition in *Siegert v. Gilley* that lower courts should ordinarily consider the merits of a constitutional claim before deciding whether it is barred by qualified immunity,[196] the two years preceding the Court's subsequent and seemingly mandatory admonition in *Saucier v. Katz* that lower courts must decide the merits before reaching qualified immunity,[197] and the two most recent years for which data was then available (2006–2007).[198] The data showed the following:

Table 1[199]

	Immunity Granted; No Ruling on Merits	Violation Found and Immunity Granted	No Violation Found	Violation Found and Immunity Denied
Pre-*Siegert* (District Courts)	18.6%	3.7%	42.2%	32.3%
Pre-*Siegert* (Courts of Appeal)	35.4%	4.2%	34.0%	25.0%
Pre-*Saucier* (District Courts)	13.3%	4.9%	46.0%	32.7%
Pre-*Saucier* (Courts of Appeal)	22.2%	1.4%	52.8%	20.1%
2006–2007 (District Courts)	5.1%	3.6%	61.4%	14.4%
2006–2007 (Courts of Appeal)	4.5%	6.5%	61.9%	26.5%

196. *See* 500 U.S. 226, 232–33 (1991) (explaining that courts should not assume, without deciding, that a constitutional right has been violated before proceeding to examine the qualified immunity claim).

197. 533 U.S. 194, 200 (2001).

198. For a more complete description of the study's methodology, see Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 680–88 (2009).

199. This table is derived from *id.* at 711 tbls.3–4.

The most interesting data come from 2006 and 2007 when, under *Saucier*, lower courts were required to decide both whether a constitutional claim was meritorious and whether it was barred by qualified immunity, so that the effect of qualified immunity could be considered separately from the merits of a constitutional claim.[200] During that period, in only 3.6% of cases did a district court find that a claim had merit but was barred by qualified immunity, and in only 6.5% of cases did a court of appeals find that a claim had merit but was barred by qualified immunity.[201] This suggests that qualified immunity bars only a small fraction of cases.[202] In the earlier periods as well, only a small fraction of cases were resolved on immunity grounds,[203] although the data from these periods are confounded by the fact that courts often found a claim was barred by qualified immunity without deciding whether it was meritorious.

This result is consistent with other studies.[204] For example, Paul Hughes examined all published decisions of courts of appeals involving qualified immunity in 2005 (during the *Saucier* regime) and found that 42.17% found no constitutional violation, 10.24% found a constitutional violation for which damages were barred by qualified immunity, 46.39% found a meritorious claim not barred by immunity, and 1.2% found immunity without reaching the merits.[205] Greg Sobolski and Matt Steinberg examined a random sample of 750 published court of appeals decisions involving qualified immunity and found that during the *Saucier* regime, 35.3% of cases found no constitutional violation, 36.5% of cases found a constitutional violation not barred by qualified immunity, 13.9% found a constitutional violation for which damages were barred by qualified immunity, 8.3% found no constitutional violation

200. *See id.* at 674–75 (explaining that the legal landscape changed when *Saucier* required that the first inquiry be whether a constitutional right had been violated and the second inquiry be whether the right was clearly established and thus not barred by qualified immunity).

201. *Id.* at 711 tbls.3–4.

202. Professor Leong suggested this pattern is attributable to cognitive dissonance, which could make judges reluctant to acknowledge that a claim has merit but nevertheless is barred by an immunity defense. *Id.* at 702–04. It is unclear, however, why judges would experience cognitive dissonance when awarding immunity, as opposed to grasping the rationale for immunity in cases in which the Constitution has been violated but, at the time of the underlying conduct, the defendant reasonably believed the conduct at issue was lawful. Arguably, awarding damages without finding the defendant knowingly, recklessly, or at least negligently violated the law could itself produce cognitive dissonance; perhaps an award of damages without fault could strike a judge as unwarranted.

203. *See id.* at 711 tbls.3–4.

204. *But cf.* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 136 n.65, 145 n.106 (1999) (reviewing qualified immunity decisions over a two-year period after *Siegert* and before *Saucier* and finding only twenty percent denied immunity but disregarding decisions in which immunity was denied because of disputed issues of fact).

205. *See* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 418–22, 422 tbl.1 (2009).

with an alternative holding barred by qualified immunity, and 5.9% of cases found qualified immunity without reaching the merits.[206] Collin Rolfs examined 100 randomly selected district and court of appeals cases involving qualified immunity and found that during the *Saucier* regime, only 8.8% of appellate cases and 4.5% of district court cases found a constitutional violation but granted qualified immunity.[207] In a review of *Bivens* litigation in five selected judicial districts from 2001 to 2003 (mostly following *Siegert*), Alexander Reinart found that qualified immunity was the basis for dismissal in only five of the 244 complaints studied.[208]

Eight years after *Saucier*, in *Pearson v. Callahan*, the Court changed course and held that the lower courts were no longer required to reach the merits if they could dispose of a case by granting qualified immunity.[209] Because *Pearson* permitted lower courts to grant qualified immunity without reaching the merits,[210] cases decided after *Pearson* are less useful in isolating the effects of qualified immunity than cases decided under the *Siegert* regime, but the post-*Pearson* data nevertheless suggest that qualified immunity has limited effects.[211]

For example, Ted Sampsell-Jones and Jenna Yauch, examining all published post-*Pearson* appellate cases involving qualified immunity defenses between 2009 and 2010, found that a constitutional violation was found but damages were barred by qualified immunity in only 7.9% of published court of appeals cases, while the court found qualified immunity without reaching the merits in 19.5% of cases.[212] Professors Nielson and Walker examined all court of appeals decisions from 2009 through 2012 that involved qualified immunity and cited *Pearson* and found that while courts found a claim was barred by qualified immunity without reaching the merits

206. *See* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and the Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 540–42, 545 tbl.1 (2010).

207. *See* Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 489, 496 tbl.1, 497 tbl.2 (2011).

208. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813, 835, 843, 845 tbl.4 (2010).

209. *See* Pearson v. Callahan, 555 U.S. 223, 235–36 (2009) (explaining that the two-step protocol under *Saucier* is no longer mandatory).

210. *See id.* at 236 (holding that lower courts should be permitted to exercise their discretion in deciding which of the two prongs should be addressed first).

211. *See, e.g.*, Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 627–28, 628 tbl.1 (2011); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 30, 33–34, 37 (2015).

212. Sampsell-Jones & Yauch, *supra* note 211, at 627–28, 628 tbl.1.

in 26.7% of cases, courts found a constitutional violation for which damages were barred by qualified immunity in only 3.6% of cases.[213]

One might be concerned that studies of judicial opinions—especially appellate opinions—are infected by a form of selection bias. Perhaps cases that result in written opinions or that are appealed are not typical of most civil rights litigation.[214] That problem is avoided by Professor Schwartz's study.[215] She reviewed the dockets of § 1983 cases filed against police officers and other law enforcement officials in five judicial districts in 2011 and 2012,[216] and found that qualified immunity was raised in only 37.6% of all § 1983 cases in which that defense was available.[217] The vast majority of these efforts to claim qualified immunity were unsuccessful:

213. Nielson & Walker, *supra* note 211, at 30, 34, 37.

214. *See, e.g.*, Theodore Eisenburg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 674 fig.5, 676 fig.7, 677 fig.8 (2004).

215. *See* Schwartz, *supra* note 11, at 20–21 (reviewing court dockets rather than published opinions in order to study how often the defense of qualified immunity is raised, how motions raising qualified immunity are decided, and how qualified immunity impacts case dispositions).

216. For a description of the study's methodology, see *id.* at 19–25.

217. *Id.* at 29 tbl.2. There was considerable variation among the five districts studied, with qualified immunity raised in 54.7% of cases in the Southern District of Texas but only 23.9% of cases in the Eastern District of Pennsylvania. *Id.*

Table 2[218]

Qualified Immunity Denied	31.6%
Qualified Immunity Granted in Part	5.9%
Qualified Immunity Granted in Full	12.0%
No Constitutional Violation Established	11.4%
Motion Granted Without Discussing Qualified Immunity	14.1%
Motion Granted—Reasoning Unclear	2.0%
Motion Granted Without Mentioning Qualified Immunity or Mentioning It in the Alternative	5.9%
Motion Not Decided	17.0%

Based on the low rate at which § 1983 defendants obtain the protection of qualified immunity, Professor Schwartz concluded that qualified immunity "is ill suited to dispose of many cases before trial" and "unnecessary to shield defendants from discovery and trial."[219]

One could, to be sure, question Professor Schwartz's methodology and conclusions. For example, as Professors Nielson and Walker observed, "she only counted cases dismissed on the grounds of qualified immunity if the entire case has been dismissed as a result of the motion," and added, "if you consider all of the decisions that granted qualified immunity in full or in part or in the alternative, it totals 29.3% of the qualified immunity motions filed," while "ignor[ing] settlements, voluntary dismissals, and all other means of dismissal."[220]

218. Table 2 is derived from *id.* at 36–37, 37 tbl.6. There was substantial variation among districts, with qualified immunity faring best in the Southern District of Texas, where it was denied in 21.7% of motions and granted in part or full in 33.3% of motions, while the Eastern District of Pennsylvania granted qualified immunity motions in whole or part in only 6.1% of cases. *Id.* at 37. In another study that examined dockets rather than judicial opinions, Alexander Reinert found that in cases where qualified immunity was raised and went to trial before a jury, no jury instruction or special interrogatory on qualified immunity was proposed by the parties in 70.3% of those cases. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2081 n.88, 2082–83, 2083 tbl.1 (2018).

219. Schwartz, *supra* note 14, at 52–53, 56.

220. Nielson & Walker, *supra* note 40, at 1879–80 (footnotes and internal quotations omitted). For a more elaborate discussion of the effects of qualified immunity on settlements, see *id.* at 1880–82.

An even more fundamental problem with assessing the effects of qualified immunity in terms of judicial rulings—or even cases filed—is that these datasets are skewed by the selection effects of qualified immunity. In what is likely the leading treatment of the subject, George Priest and Benjamin Klein demonstrated that litigated disputes "will constitute neither a random nor a representative sample of the set of all disputes."[221] Assuming that a potential litigant makes decisions "based on his individual knowledge of the facts of the dispute and his prediction of how those facts will be interpreted by a court or jury[,]"[222] they concluded that "the likelihood that the dispute will be litigated increases" under circumstances in which "the difference in the parties' probability estimates of the outcome is likely to increase."[223] This insight has important implications for qualified immunity.

2. *The Selection Effects of Qualified Immunity*

If we assume plaintiffs and their attorneys make rational economic decisions, they can be expected to file suit when their estimate of the expected recovery exceeds the costs of bringing suit.[224] The analysis that plaintiffs' attorneys are likely to undertake suggests that the defense of qualified immunity will have important effects on which § 1983 cases they choose to file.

Under the Civil Rights Attorney's Fees Awards Act of 1976, in § 1983 litigation, a "prevailing party" may recover its attorney's fees as part of the recoverable costs of litigation.[225] The Supreme Court has interpreted the statute to mean that a prevailing plaintiff "'should ordinarily recover an attorney's fee' from the defendant," but it only "authorizes a district court to award attorney's fees to a defendant 'upon a finding that the plaintiff's action

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221. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984). As one more recent treatment put it:

> Although there exist many alternative models of settlement, the Priest—Klein model offers elegance and simplicity, and remains a canonical model of the selection of cases for trial. Indeed the model has been cited in the legal and economic literature more than 500 times, making it the third-most cited paper in the history of *The Journal of Legal Studies*.

Marc Poitras & Ralph Frasca, *A Unified Model of Settlement and Trial Expenditures: The Priest—Klein Model Extended*, 31 INT'L REV. L. & ECON. 188, 188 (2011).

222. Priest & Klein, *supra* note 221, at 9.

223. *Id.* at 16.

224. For a more elaborate explication of the point, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56–62 (1982).

225. 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .") (codifying as amended Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976)).

was frivolous, unreasonable, or without foundation.'"[226] Such asymmetrical fee-shifting, by reducing the plaintiff's costs of litigation, should both increase the rate at which litigation is filed and decrease the rate of settlement by reducing a plaintiff's incentive to settle.[227] Nonetheless, the available empirical evidence, while sparse, does not reflect dramatic increases in filing rates associated with the advent of asymmetrical fee-shifting in 1976.[228]

Of course, even with asymmetrical fee-shifting, plaintiffs' attorneys, who recover fees only if they prevail, have an incentive to bring only cases likely to have sufficient merit to generate revenue. After all, if we reasonably assume that most potential plaintiffs cannot afford to front both the costs of litigation and attorney's fees, then even with the benefit of asymmetrical fee-shifting, plaintiffs' attorneys assume the risk their work will go uncompensated when they file a case—only if the plaintiff recovers attorney's fees through a judgment or settlement will the plaintiff's attorney obtain compensation.[229]

The risks assumed by a plaintiff's attorney in civil rights litigation are therefore likely to drive decisions about whether to file a case.[230] The

226. Fox v. Vice, 563 U.S. 826, 833 (2011) (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416, 421 (1978)).

227. For a more elaborate explanation of the point, see generally Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 745–49 (1988).

228. For a detailed review of the evidence supporting this conclusion, see Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 805–09 (2011).

229. *Cf.* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 35 (2002) (observing that in environmental litigation, "[a]lthough attorneys' and expert witnesses' fees potentially are available to successful citizen suit plaintiffs, paying the up-front costs can be so prohibitive that only well-funded groups can afford to bring citizen suits").

230. This discussion, of course, has limited application to pro se plaintiffs, who may be less willing or able to make judgments about whether litigation they wish to undertake is likely to be cost-justified. Nonetheless, governmental defendants have more reason to be concerned about counseled than uncounseled plaintiffs since the limited empirical evidence available suggests that pro se plaintiffs are more likely to have their cases dismissed prior to trial, and pro se plaintiffs may have less ability to select cases likely to have merit. *See, e.g.*, Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 134 (2012) (documenting higher rates of dismissal of complaints in pro se cases and suggesting that the selection effects of legal rules favoring defendants are more pronounced in cases brought by counsel); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 204–10 (2014) (documenting higher rates of pretrial adjudication in pro se cases and suggesting that the selection effects of legal rules favoring defendants are more pronounced in cases brought by counsel); Patricia Hatamyar Moore, *An Updated Quantitative Study on Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 609–22 (2012) (documenting higher rates of dismissal of complaints in pro se cases); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2143–51 (2015) (same); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1130 & nn.121, 123 (2020) (finding in the five jurisdictions studied that 16.1% of cases brought by pro se plaintiffs resulted in settlement, voluntary dismissal, or a plaintiff verdict, while 71%

economic calculation facing a plaintiff's attorney aiming to maximize compensation is straightforward: if C is the attorney's expected compensation, P is the probability of obtaining that compensation, and OC is the opportunity cost of selecting the plaintiff's case rather than taking on other work, a plaintiff's attorney interested in maximizing compensation will bring a case only when the expected compensation exceeds the opportunity cost—when $C(P) \geq OC$.[231]

It follows that, all other things being equal, we should expect plaintiffs' attorneys to allocate their time and resources to cases in which the likelihood of prevailing is relatively higher, since this will increase their expected compensation.[232] This suggests that plaintiffs' counsel will be reluctant to take cases facing a powerful defense, such as qualified immunity.[233] Indeed, one of the few studies of the subject—a survey of Wisconsin practitioners who work on a contingency fee basis—found that "lack of liability and inadequate damages (singly or together) are the dominant reasons for declining cases, accounting for about 80 percent."[234]

To be sure, some plaintiffs' attorneys may litigate for ideological rather than economic reasons, but even ideologically-motivated lawyers have reason to prefer bringing cases that are more likely to produce success than failure and that are more likely to enhance their reputation, impact, and financial ability to fund future litigation.[235] It is reasonable to assume that most lawyers

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of counseled plaintiffs obtained one of these outcomes, even though only 3.6% of counseled cases and 1.5% of pro se cases were dismissed on qualified immunity).

231. *Cf.* John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.35 (1986) ("In principle, attorneys should continue to litigate a case so long as they are covering their opportunity costs.").

232. *See, e.g.*, William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 707 (2016) ("[I]f the decisionmaker is the plaintiffs' attorney working on a contingency basis, the attorney must weigh the expected fees earned through litigation against the costs of bringing the suit. Indeed, given a limited budget of time and credit (for litigation expenses) that he can extend to his clients, an attorney working on contingency must concentrate his efforts on cases with the highest settlement value.").

233. *See, e.g.*, Lawrence G. Albrecht, *Confronting Governmental Impunity and Immunity "From Below,"* 53 VAL. L. REV. 47, 60–61 (2018) ("Fearing qualified immunity may preclude any judicial analysis that incorporates their clients' perspective 'from below,' civil rights attorneys are often loathe to file cases seeking to expand substantive legal principles and damages remedies."); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 235 (2010) ("Attorneys may discourage plaintiffs likely to lose a summary judgment based on immunity.").

234. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 47, 84 (2004).

235. *See, e.g.*, Schwab & Eisenberg, *supra* note 227, at 744–45 ("[L]ess concern for money does not necessarily translate into a less successful litigation record. Even publicly spirited

prefer to be compensated for their work, and there is little reason to believe that civil rights plaintiffs' lawyers are so wealthy that they are indifferent to the likelihood that their work will be compensated.[236]

Of course, there are limits to the ability of plaintiffs' attorneys to accurately assess the likelihood of prevailing at the outset of litigation.[237] Prior to discovery and trial, plaintiffs' attorneys will sometimes have insufficient information to reliably assess the likelihood of prevailing when, for example, there is important evidence within the exclusive control of the defendants.[238] To use one example, a client's claim that she was subjected to excessive force by arresting officers may be difficult to assess until counsel has been able to obtain all pertinent evidence through discovery, including the facts and circumstances that were known to the arresting officers but that may have been unknown to the arrestee.[239] This type of uncertainty breeds litigation; as we have seen, when the parties' estimates of the likely outcome differ, litigation—rather than settlement—becomes more likely.[240]

When it comes to qualified immunity, however, there is reason to believe that attorneys will be able to assess the strength of this defense at higher rates than many other types of litigation risks.[241] As we have seen, qualified

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counsel or public interest law firms, who may have less concern with short-term victories than with long-term goals, have a strong preference for winning. Indeed, achieving the long-term victories, to a certain extent, requires short-term victories. Moreover, few entities have their reputations enhanced, or their budgets increased, by consistently losing."); *cf.* Catherine A. Albiston & Laura Beth Neilsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1120–31 (2007) (reporting the results of a survey of public interest organizations finding their efforts were impaired by a Supreme Court decision limiting the availability of attorney's fees).

236. *Cf.* Kathryn A. Sabbeth, *What's Money Got to Do With It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 489 (2014) ("Small, for-profit firms are the main individual enforcers of civil rights laws, and they too cannot afford to pursue public interest lawyering for free." (footnote omitted)).

237. *See, e.g.*, Priest & Klein, *supra* note 221, at 9 ("Prior to trial, neither litigant can know with certainty which party will subsequently prevail.").

238. *See, e.g.*, *id.* ("Some of the facts or circumstances of the dispute may be unavailable before trial, or may be developed in an unexpected manner . . . ."). For one effort to consider the problem of asymmetrical access to information and its effect on litigation, see generally Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 494–97 (1996).

239. *Cf.* Graham v. Connor, 490 U.S. 386, 395–96 (1989) ("[Claims of constitutionally excessive force under § 1983] require[] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . . . . The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (citation omitted)).

240. *See supra* text accompanying notes 221–234.

241. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 493–94 (2011).

immunity turns on an objective assessment of whether the defendant violated clearly established law.[242] Accordingly, as the Supreme Court has explained, this involves an assessment of "an 'abstract issu[e] of law' relating to qualified immunity, typically, the issue of whether the federal right allegedly infringed was 'clearly established.'"[243] Qualified immunity will therefore provide protection in close cases; for example, the Supreme Court has observed that even when police officers make an arrest unsupported by probable cause in violation of the Fourth Amendment, "the officers are entitled to qualified immunity [when] they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'"[244]

The question whether the evidence available to plaintiff's counsel at the outset of the litigation, if believed, establishes a violation of clearly established law involves a purely legal analysis, rather than guesswork about how the evidence will develop through discovery and trial.[245] To be sure, when they first decide to file a case, plaintiffs' lawyers will be unable to make judgments about the strength of a potential qualified immunity defense with perfect accuracy—the data in Tables 1 and 2 suggest that qualified immunity is awarded in roughly one-fifth of cases, and Professor Schwartz's study indicates that in the majority of these cases, qualified immunity was granted at the summary judgment stage, most likely because of evidence adduced in discovery rather than a mistaken judgment about qualified immunity made by plaintiff's counsel at the outset of the litigation.[246] In the clear majority of

242. *See supra* Section II.A.1.

243. Behrens v. Pelletier, 516 U.S. 299, 313 (1996) (first alteration in original) (citation omitted) (quoting Johnson v. Jones, 515 U.S. 304, 317 (1995)); *accord* Elder v. Holloway, 510 U.S. 510, 516 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'"); Mitchell v. Forsyth, 472 U.S. 511, 528 (1985) ("[Qualified immunity involves] a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . .").

244. District of Columbia v. Wesby, 138 S. Ct. 577, 591 (2018) (second and third alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)).

245. *See Elder*, 510 U.S. at 516 ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'").

246. In her study, Professor Schwartz separately considered motions raising qualified immunity on the pleadings and at summary judgment, and she found that at the pleadings, qualified immunity motions were granted in full in only 9.1% of cases and granted in part in only 4.5% of case, while, at the summary judgment stage, qualified immunity motions were granted in full in 13.8% of cases and granted in part in 6.7% of cases. Schwartz, *supra* note 215, at 38 tbl.7, 39 tbl.8. Although qualified immunity motions made at the pleading stage consider only the facts alleged by the plaintiff, at the summary judgment stage, courts must consider the evidence adduced by the parties. *See, e.g.*, *Behrens*, 516 U.S. at 309 ("[T]he legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant's conduct *as* alleged in the

cases, however, it appears that plaintiffs' counsel were able to make a correct assessment about the likelihood that a case they chose to file would be barred by qualified immunity. If anything, given the powerful financial incentives of plaintiffs' attorneys to refrain from filing cases likely to confront a potent qualified immunity defense, the fact that nearly one-fifth of filed cases encounter a successful assertion of that defense suggests that it retains considerable power even in light of plaintiffs' attorneys incentives to screen out cases facing a strong qualified immunity defense.

More important, data reflecting cases actually filed ignores the screening effects of qualified immunity.[247] The data in Tables 1 and 2 above ignore the possibility that qualified immunity may have dramatic effects in terms of preventing large numbers of cases from being filed[248]—thereby saving substantial funds that might otherwise be expended on litigation costs and the payment of judgments and settlements.

Of course, it is difficult to identify the number and potential costs associated with cases that are never filed because of a potential qualified immunity defense. The only available empirical evidence involves interviews with plaintiffs' attorneys, but that evidence suggests qualified immunity has important screening effects.

For example, when interviewing civil rights attorneys in the San Francisco area about whether to bring litigation, Julie Davies found the following:

> [P]laintiffs' attorneys interviewed mentioned changes in substantive law as a factor that has made practicing civil rights law more difficult . . . . Several attorneys conducting police misconduct litigation focused on qualified immunity as a substantial obstacle,

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complaint that is scrutinized for 'objective legal reasonableness.' On summary judgment, however, the plaintiff can no longer rest on the pleadings, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." (citation omitted)). Thus, at least some cases where qualified immunity is granted at the summary judgment stage likely involve unexpected evidence that emerged during discovery and that strengthened the immunity defense.

247. *See* Schwartz, *supra* note 230, at 1104 ("It is also conventional wisdom that it is exceedingly difficult to measure which grievances are never pursued in court, or to measure the impact of particular doctrines or other considerations on the case-selection process.").

248. *See id.* at 1112 ("If qualified immunity decreases the probability of success, decreases the size of a judgment, and/or increases the costs of litigation, then under prevailing models of attorney case-selection decisions, attorneys will be less willing to accept cases in which qualified immunity is likely to be raised—and especially unwilling to accept cases where the defense is likely to be successful.").

> although those practicing in the Ninth Circuit acknowledged the issue was easier to win there than elsewhere.[249]

Similarly, Alexander Reinart interviewed attorneys representing plaintiffs in *Bivens* litigation and found, "Nearly every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage."[250]

Professor Schwartz reached a somewhat different conclusion. She interviewed thirty-five plaintiffs' attorneys handling police misconduct cases in the five judicial districts that she studied,[251] and in that survey, "[t]hirteen lawyers . . . report[ed] that they do not take qualified immunity into account when selecting cases, and another eleven report[ed] rarely declining cases because of qualified immunity."[252] This finding is hedged, however, since the attorneys who reported they rarely or never considered qualified immunity at the screening stage identified "other concerns [that] duplicate and thereby minimize qualified immunity concerns," such as "select[ing] cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds."[253] Other lawyers reported screening out "federal claims that cannot be dismissed on qualified immunity grounds—including claims for injunctive relief and claims against municipalities—when they think qualified immunity could be an issue."[254]

Professor Schwartz's interviews provide, at best, highly equivocal evidence about the selection effects of qualified immunity.[255] The majority of the lawyers she interviewed (twenty-two of thirty-five) considered potential qualified immunity defenses at the screening stage to some extent, and lawyers who focus on the egregiousness of a violation may have no need to consider qualified immunity given that egregious fact patterns are likely to

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249. Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 243–44 (1997) (footnotes omitted).

250. Reinert, *supra* note 241, at 492.

251. For a description of her methodology, see Schwartz, *supra* note 230, at 1114–19. In particular, of the 1,022 attorneys who appeared in the cases in her dataset, ninety-four responded to an online survey and twenty-five of those agreed to be interviewed. Professor Schwartz solicited interviews from an additional twenty-five attorneys based on their reputation for being involved in police misconduct litigation, and ten of these agreed to be interviewed. *Id.* at 1115–16. It is unclear whether the somewhat self-selected thirty-five interviewed attorneys were a fair cross-section of plaintiffs' attorneys, although Professor Schwartz found no evidence that they were unusual in terms of the volume of cases they handled or their practice settings. *See id.* at 1118–19. Still, one wonders whether attorneys who volunteer to be interviewed about their case selection methods are in some respects atypical.

252. *Id.* at 1131.

253. *Id.* at 1138.

254. *Id.* at 1140.

255. *See id.* at 1117–18.

overcome qualified immunity.[256] Surely more compelling evidence should be required to embrace the surprising view that plaintiffs' attorneys are willing to bring cases that are likely to be losers, both legally and financially.[257]

At a minimum, it is likely that damages claims based on novel or uncertain legal theories or based on evidence of a constitutional violation that is close would become considerably more attractive to plaintiffs' lawyers in the absence of qualified immunity, especially in light of the incentive to sue created by asymmetrical fee-shifting. For that reason, it seems unwarranted to conclude that qualified immunity offers no meaningful protections to the public fisc in protecting governmental defendants from the costs of litigating a substantial volume of cases.

C. Does Qualified Immunity Inhibit Development of the Law?

In *Pearson*, the Supreme Court held that lower courts are free to reach a qualified immunity defense without deciding whether the plaintiff has established a constitutional violation.[258] The Court reasoned that ruling on the merits of a claim before deciding whether it is barred by qualified immunity "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case," and therefore "wastes the parties' resources."[259] The Court added that there will sometimes be little value in deciding whether the plaintiff has established a constitutional violation in a case barred by qualified immunity, such as when "the constitutional question is so factbound that the decision provides little guidance for future cases," when "the question will soon be decided by a higher court," when the case involves "[a] constitutional decision resting on an uncertain interpretation of state law," "[w]hen qualified immunity is asserted at the pleading stage, [when] the precise factual basis for the plaintiff's claim or claims may be hard to identify," or when "the briefing of constitutional questions is woefully inadequate."[260]

256. *Cf.* Brosseau v. Haugen, 543 U.S. 194, 198–99 (2004) (per curiam) (observing that, even without factually similar precedents, qualified immunity can be denied "in an obvious case"); Hope v. Pelzer, 536 U.S. 730, 740–41 (2002) ("Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution.").

257. *Cf.* Fallon, *supra* note 15, at 976 ("[W]hatever the current situation, screening effects will likely increase over time as experience instructs repeat players on the potency of the qualified immunity defense.").

258. *See* Pearson v. Callahan, 555 U.S. 223, 235–36 (2009).

259. *Id.* at 236–37.

260. *Id.* at 237, 238–39. Beyond that, "there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all,"

Because *Pearson* permits courts to award qualified immunity without deciding whether the plaintiff has established a constitutional violation, a number of commentators have argued that qualified immunity inhibits the development of constitutional law by inviting courts to reject novel claims on qualified immunity grounds without deciding the merits.[261]

To be sure, as the Court observed in *Pearson*, constitutional law can be articulated in cases in which qualified immunity is not a defense, "such as 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."[262] Nevertheless, as we have seen, this is not a complete answer; injunctive relief is frequently unavailable, and § 1983 suits for alleged constitutional violations cannot be brought against the federal and state governments.[263] Claims barred by qualified immunity can also be barred by other doctrines, including those that limit the exclusion of unconstitutionally-obtained evidence in criminal cases as a remedy for a constitutional violation and those that limit the § 1983 claims that can be advanced against municipal defendants for constitutional violations committed by their officials.[264]

The question whether qualified immunity has inhibited the development of constitutional law is ultimately an empirical question that should therefore be answered by considering empirical evidence.

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creating "a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue." *Id.* at 239. The Court added that requiring a court to reach the merits of a constitutional claim despite the availability of a potentially dispositive qualified immunity defense "departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 241 (internal quotation marks omitted) (quoting Scott v. Harris, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)).

261. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1893–905 (2018); Nielson & Walker, *supra* note 15, at 20; Pfander, *supra* note 73, at 1605, 1617–18; Schwartz, *supra* note 11, at 1815–18. *But cf.* Leong, *supra* note 198, at 670–71 (arguing on the basis of case analysis and psychological research that judges who award qualified immunity are more prone to reject claims on their merits to avoid acknowledging an unremedied violation of rights and, therefore, requiring courts to reach the merits before considering qualified immunity is more likely to reduce the extent to which the law is developed in a way that aids defendants than to expand rights).

262. *Pearson*, 555 U.S. at 242.

263. *See supra* text accompanying notes 1–5.

264. *See, e.g.*, Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 722–23, 724, 734–38 (2011) (observing that policy claims are barred against state and local governments, that policy claims against municipal defendants are often difficult to prove, that injunctive relief is frequently unavailable, that qualified immunity frequently bars damages claims, and that exclusion of unconstitutionally obtained evidence is increasingly unavailable when the illegality of a search is not clearly established).

1. Empirical Evidence of Stagnation

As we have seen, a number of studies have examined lower court opinions involving qualified immunity and have determined how many of these decisions rest on immunity and how many reach the merits, during the period of time when *Saucier* required lower courts to decide the merits before reaching qualified immunity and when *Pearson* granted lower courts discretion about whether to reach the merits.[265] Table 3 summarizes the results of the various studies (although, because the various studies spanned different time periods, none of them include data for all of the relevant time periods—that is, pre-*Saucier* litigation, post-*Saucier* litigation, and post-*Callahan* litigation):

265. *See supra* Section III.B.1.

Table 3[266]

		Leong	Sobolski-Steinberg	Hughes	Rolfs	Jones-Rauch	Nielson-Walker
Qualified Immunity Denied	Pre-*Saucier*	20.1%	28.6%	25.8%			
	Post-*Saucier*	26.5%	36.5%	46.4%			
	Post-*Pearson*				22.6%	37.9%	27.7%
Qualified Immunity Granted	Pre-*Saucier*	22.2%	28.1%	25.8%			
	Post-*Saucier*	4.5%	5.9%	1.2%			
	Post-*Pearson*				18.9%	19.5%	26.7%
No Violation	Pre-*Saucier*	52.8%	37.7%	45.7%			
	Post-*Saucier*	61.9%	43.6%	42.2%			
	Post-*Pearson*				55.3%	34.7%	41.9%
Violation/ Qualified Immunity Granted	Pre-*Saucier*	1.4%	5.5%	2.7%			
	Post-*Saucier*	6.5%	13.9%	10.2%			
	Post-*Pearson*				2.5%	7.9%	3.6%

266. Table 3 is derived from Nielson & Walker, *supra* note 211, at 37 tbl.1.

Although differences between the datasets and time-periods covered in each study pose apples-and-oranges problems, some patterns emerge. All of the studies found that the rate at which qualified immunity was granted without reaching the merits rose after *Pearson*. This should be unsurprising; under *Saucier*, lower courts were generally required to decide whether the plaintiff had established a constitutional violation before considering qualified immunity, whereas *Pearson* returned to a regime in which lower courts had discretion to grant qualified immunity without reaching the merits.[267]

Thus, as Table 3 illustrates, the three studies of cases decided during the *Saucier* regime found that courts awarded qualified immunity without reaching the merits in only 4.5%, 5.9%, and 1.2% of cases, while, after *Pearson*, three studies found that courts failed to reach the merits in 18.9%, 19.5%, and 26.7% of cases, respectively. Accordingly, the post-*Pearson* rates at which courts failed to reach the merits of a constitutional claim approach those reflected in the three studies of pre-*Saucier* cases (22.2%, 28.1%, and 25.8%).

Some scholars have argued that this pattern reflects constitutional stagnation; Professors Nielson and Walker, for example, argue that because "the finding of constitutional violations (when granting qualified immunity) . . . has decreased," this pattern "provide[s] at least some support for the post-*Pearson* constitutional stagnation theory . . ."[268] Still, the evidence of stagnation is equivocal.[269] Even after *Pearson*, courts reach the merits in the overwhelming majority of qualified immunity cases (81.1%, 80.5%, and 73.3% of cases in the three studies).[270] *Pearson* has hardly prevented the courts from articulating constitutional doctrine.[271]

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267. *See* Saucier v. Katz, 553 U.S. 194, 200 (2001); Pearson v. Callahan 555 U.S. 223, 236 (2009).

268. Nielson & Walker, *supra* note 211, at 38.

269. *See id.* at 6, 34–38.

270. *See supra* Table 3 (calculated by subtracting the percentage of when qualified immunity was granted from 100%).

271. Indeed, the Supreme Court has treated statements of lower courts recognizing novel claims as authoritative statements of law. In *Camreta v. Greene*, 563 U.S. 692 (2011), the Court explained that courts of appeals' conclusions that a defendant has violated the Constitution, even when damages are barred by qualified immunity, "are not mere dicta or statements in opinions." 563 U.S. at 704 (internal quotation marks omitted) (quoting California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam)). Instead, the Court observed:

> They are rulings that have a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong. And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity—and observance—of constitutional rules.

Because the development of constitutional law is ultimately entrusted to the Supreme Court,[272] it is perhaps more illuminating to examine its decisions, rather than those of the lower courts. The data from the Court provides less support to those who fear that *Pearson* has produced constitutional stagnation. In the decade following *Pearson*, the Supreme Court decided twenty-four cases in which a qualified immunity defense was pressed, and the Court either reached the merits or directed the lower courts to reach the merits in half of them.[273] And this calculation ignores cases that involved unresolved questions

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Id. at 700, 704–05 (citations omitted) (quoting California v. Rooney, 483 U.S. 307, 311 (1987)). In light of the legal significance of such rulings, the Court accordingly held that a court of appeals' ruling recognizing a constitutional violation but refusing to award damages on grounds of qualified immunity "is reviewable in this Court at the behest of an immunized official." *Id.* at 700, 708.

272. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

273. For the twelve cases in which the Court reached only questions of qualified immunity, see Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (per curiam) (excessive force claim against police officers); Kisela v. Hughes, 138 S. Ct. 1148, 1152–55 (2018) (per curiam) (same); White v. Pauly, 137 S. Ct. 548, 550–53 (2017) (per curiam) (same); Mullenix v. Luna, 136 S. Ct. 305, 308–12 (2015) (per curiam) (same); Taylor v. Barkes, 135 S. Ct. 2042, 2044–45 (2015) (per curiam) (claim based on failure to prevent prisoner's suicide); City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774–75 (2015) (claim based on arrest of mentally disabled individual); Carroll v. Carmen, 574 U.S. 13, 15–20 (2014) (claim based on warrantless entry onto plaintiffs' property); Wood v. Moss, 572 U.S. 744, 747, 757–64 (2014) (claim based on actions of Secret Service responding to perceived threat); Stanton v. Sims, 571 U.S. 3, 5–10 (2013) (per curiam) (considering qualified immunity in claim based on warrantless entry onto plaintiff's property); Reichle v. Howards, 566 U.S. 658, 663–70 (2012) (retaliatory arrest claim); Messerschmidt v. Millender, 565 U.S. 535, 546–56 (2012) (claim based on execution of warrant); Ryburn v. Huff, 565 U.S. 469, 472–77 (2012) (claim based on warrantless entry into home). For the twelve cases in which the Court reached the merits or directed the lower courts to do so despite the availability of a qualified immunity defense, see Sause v. Bauer, 138 S. Ct. 2561, 2562–63 (2018) (per curiam) (ordering lower courts to address the plaintiff's free exercise of religion based on alleged interference with plaintiff's prayer before considering qualified immunity); Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1951–55 (2018) (limiting the grant of certiorari to the merits in First Amendment retaliatory arrest claim); District of Columbia v. Wesby, 138 S. Ct. 577, 85–93 (2018) (resolving on the merits arrests challenged as unsupported by probable cause and granting qualified immunity in the alternative); Hernandez v. Mesa, 137 S. Ct. 2003, 2006–08 (2017) (reversing an award of qualified immunity to federal agents on an excessive force claim, remanding, and directing lower courts to consider the merits); Ziglar v. Abbasi, 137 S. Ct. 1843, 1851, 1863–69 (2017) (directing lower courts to consider merits of Bivens claims arising from detention of noncitizens in counterterrorism investigations and granting qualified immunity on civil conspiracy claim); City of Los Angeles v. Mendez, 137 S. Ct. 1539, 1549 (2017) (reaching merits of knock-and-announce Fourth Amendment claim); Lane v. Franks, 573 U.S. 228, 238–47 (2014) (reaching merits of First Amendment retaliation claim and granting qualified immunity); Plumhoff v. Rickard, 572 U.S. 765, 774–81 (2014) (reaching the merits of excessive force claim and granting qualified

of constitutional law in which the qualified immunity defense dropped out of the case prior to it reaching the Supreme Court.[274]

In any event, while the rate at which lower courts find a constitutional violation yet award qualified immunity has declined since *Pearson*, this reveals very little about whether the result is fairly characterized as constitutional stagnation. Whether constitutional law has stagnated, after all, requires a normative judgment. Any judgment about the "correct" rate at which constitutional law evolves is difficult to make absent preexisting normative commitments about the character of constitutional law. Those who believe, for example, that the Constitution should be applied in light of its original meaning might conclude that the pace of constitutional change should be slow, since the legal meaning of the Constitution was fixed at the time of its framing.[275] Non-originalists, in contrast, are likely to regard innovation in constitutional law as more natural and desirable.[276] Given these fundamental disagreements about adjudicative methodology in constitutional law, it is difficult to arrive at anything like an objective assessment as to whether

immunity in the alternative); Tolan v. Cotton, 572 U.S. 650, 657–60 (2014) (reversing award of qualified immunity to officers and directing lower courts to reach merits); Ashcroft v. al-Kidd, 563 U.S. 731, 734–44 (2011) (reaching merits and granting qualified immunity in the alternative on claims arising from the use of material-witness warrants in counterterrorism investigation); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370–79 (2009) (finding constitutional violation based on search of student but granting qualified immunity); Ashcroft v. Iqbal, 556 U.S. 662, 677–87 (2009) (finding plaintiff had failed to adequately allege a constitutional violation).

274. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 393–402 (2015) (holding that claims alleging the use of excessive force against pretrial detainees do not require the plaintiff to prove intentional or reckless indifference to the plaintiff's rights despite a split in the lower courts on the point—plaintiff-petitioner did not seek review on qualified immunity defense originally proffered).

275. *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818–19 (2015) ("To an originalist, what's true of old statutes is also true of our old Constitution, and indeed of our old law generally. Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way. Preserving the meaning of the Founders' words is important, but it's not an end in itself. It's just a means to preserving the content of the Founders' law.").

276. *See, e.g.*, William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.").

qualified immunity doctrine has produced anything fairly characterized as constitutional stagnation.[277]

2. *Addressing the Potential for Stagnation*

Although the available data does not permit confident conclusions about whether qualified immunity doctrine has produced undesirable stagnation in constitutional law, there is reason for concern. The Supreme Court itself has cautioned that when it comes to "a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages . . . . [q]ualified immunity . . . may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior."[278] There is, moreover, evidence that the various courts of appeal reach the merits at different rates, suggesting that courts may not be using their discretion under *Pearson* in a uniform manner.[279]

The potential that qualified immunity presents for constitutional stagnation does not, however, require wholesale abandonment of this doctrine. Instead, a number of commentators have observed that the problem could be addressed if the lower courts were required to articulate their rationale for whether to reach the merits despite a potentially meritorious qualified immunity defense.[280]

Pearson itself surveys the factors that counsel against a decision on the merits when the case can be resolved by the qualified immunity defense—when "the constitutional question is so factbound that the decision provides little guidance for future cases"; when "the question will soon be decided by

277. *See, e.g.*, Fallon & Meltzer, *supra* note 162, at 1804 ("[U]nder a Constitution designed to endure for the ages, it is implausible that there is a uniquely correct pace of constitutional change.").

278. Camreta v. Greene, 563 U.S. 692, 706 (2011) (quoting Pearson v. Callahan, 555 U.S. 223, 237 (2009)).

279. *See* Nielson & Walker, *supra* note 211, at 40–42 (finding substantial disparities among the circuits in the rate at which novel claims are sustained before reaching an immunity defense and suggesting *Pearson* is not being implemented in a uniform manner); *see also* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 100–10 (2016) (assembling data suggesting that *Pearson* creates the potential for strategic judicial behavior in which judges' decisions about whether to reach the merits are influenced by whether they favor the likely outcome on the merits rather than considerations related to the need to clarify the pertinent law).

280. *See, e.g.*, Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 175–78 (advocating a presumption that courts should reach merits unless it identifies a factor counseling against doing so); John C. Jeffries Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131–37 (arguing that courts should be required to reach the merits in areas of constitutional law in which damages claims are the only effective vehicle for articulating constitutional law); Nielson & Walker, *supra* note 211, at 52–65 (arguing that courts be required to articulate reasons for a decision not to reach the merits).

a higher court"; when the case involves "[a] constitutional decision resting on an uncertain interpretation of state law"; when "the precise factual basis for the plaintiff's claim or claims may be hard to identify"; when "the briefing of constitutional questions is woefully inadequate";[281] or when the immunity defense is so easily resolved, and the merits are so difficult, that there is "a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue."[282] If courts were required to weigh the interest in developing constitutional precedent against these countervailing considerations, the likelihood that qualified immunity doctrine would produce constitutional calcification would surely be reduced.[283]

281. *Pearson*, 555 U.S. at 237–39.

282. *Id.* at 239.

283. One scholar has suggested solving the problem by permitting plaintiffs to seek nominal damages without facing an immunity bar. *See* Pfander, *supra* note 73, at 1622–31. As previously noted, the question of whether qualified immunity bars nominal damages is unresolved. *See supra* note 73 and accompanying text. Although this proposal spares defendants exposure to substantial damages, it nevertheless undermines one aspect of qualified immunity's protections by forcing defendants to bear the cost of defending litigation. This might be reason enough to reject the proposal. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 525–30, 555–56 (1985) (Brennan, J., concurring in part and dissenting in part) (permitting defendants to appeal interlocutory rulings denying qualified immunity to spare them the burdens of litigating claims barred by immunity); Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (rejecting requirement that defendants establish good faith to receive immunity because it frequently prevents the termination of otherwise insubstantial claims prior to trial). In any event, this proposal does not address the problem of incentive to litigate; nominal damages provide little of substance to the client and will ordinarily not support an award of attorneys' fees. *See* Farrar v. Hobby, 506 U.S. 103, 115 (1992) ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." (citation omitted)). Michael Wells contends that attorneys' fees should be available for the same reason that fees can be awarded for cases achieving only injunctive relief: "In both cases the official is not required to pay compensatory damages, yet the official's conduct is constrained going forward by the ruling on the merits." Wells, *supra* note 73, at 751. When defendants consent to the entry of judgment for nominal damages in a district court, however, that judgment would have no prospective binding effect because decisions of district courts are not considered binding precedents. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011). Thus, a district court's judgment awarding nominal damages would have no prospective effect, and therefore would not justify an award of attorneys' fees, even on Professor Wells's view. It is equally unclear why the defendant would agree to bear the substantial costs of litigating claims for nominal damages—perhaps even through an appeal—instead of merely agreeing to the entry of judgment for nominal damages, thereby reducing litigation costs that must be borne by the public. Professor Pfander believes that it would be politically unacceptable for governmental defendants to take this course of action, *see* Pfander, *supra* note 73, at 1636, but there is empirical evidence that governmental defendants are willing to settle even quite serious claims, *see* Miller & Wright, *supra* note 134, at 766–75. Thus, defendants have little to lose by refusing to defend cases seeking only nominal damages and much to lose by spending time and money litigating such cases to the appellate level.

IV. CONCLUSION

In light of § 1988(a)'s authorization for a federal common law of remedies under § 1983, there is a lawful basis for a defense of qualified immunity in § 1983 jurisprudence as a common law judgment reflecting a balance of the competing interests. There is, however, no easy answer to the question whether qualified immunity jurisprudence has struck the right balance.

There are difficult trade-offs required in any regime of constitutional tort liability.[284] Invariably, imposing liability on public officials—even when they reasonably believe their conduct comported with the Constitution—risks over-deterrence while simultaneously offering plaintiffs no guarantee that the limited assets of those officials will be sufficient to satisfy judgments against them. Indemnification shifts the financial burden of liability to the taxpayers and those dependent on the ability of the government to finance public service, but the resulting transfer of resources to plaintiffs from those in need of publicly financed governmental services—most likely the poorest and politically powerless among us—is problematic as well.

In the face of such competing priorities, some sort of middle ground solution commends itself, even if fully satisfying no one. Qualified immunity is such a middle ground. Public employers are expected to train and supervise their employees to respect settled constitutional law, but they need not instruct subordinates to resolve every close call in a way that minimizes liability risk. Accordingly, public employers need not anticipate the future course of constitutional law but must concern themselves with its present. The control of politically accountable officials over the public workforce is thereby respected, except when those officials can meaningfully be held at fault for failing to direct public employees to respect existing constitutional norms. When the law must struggle to accommodate competing interests of this character, it will frequently be the case that a middle ground solution will be the outcome.[285]

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284. *Cf.* Gilles, *supra* note 133, at 853 ("[T]he basic idea here is this: we seek to identify police conduct that may be socially useful and, even if that conduct is (non-egregiously) unconstitutional, we accord it immunity from suit. At the same time, we identify conduct that we are not worried about overdeterring—conduct that is lacking in social utility, or shocking and egregious—and we label it 'over the line' and expose it to liability.").

285. *Cf.* Fallon, *supra* note 15, at 971 ("There would be a severe threat to the rule of law if officials could violate rights with impunity and reduce some nominal rights to practical nullities. But there can be a middle ground in which a legal system, such as ours, falls short of affording individually effective remediation for every official deviation from constitutional norms but nevertheless furnishes sufficient remedies—linked to a defensibly generous scheme of individual rights—to maintain a practically defensible rule-of-law regime.").

Qualified immunity therefore places a burden on courts to articulate constitutional norms in a way that can be readily reflected in the manner by which public employees are trained and supervised. As we have seen, qualified immunity is more likely to be granted when courts produce broad standards rather than specific rules capable of ready application, the application to which concrete fact patterns can be fairly debated.[286] This may be a defect for those who believe constitutional law is best reflected in standards rather than rules. But, from the standpoint of those who wish constitutional law to have teeth in the real world, this consequence of the qualified immunity doctrine is likely a virtue.

It may well ask too much of the government to expect it to correctly anticipate the resolution of constitutional debates on which careful lawyers and judges can reasonably disagree, especially with costs of incorrect predictions externalized to the taxpayers or, more likely, to those dependent on government services that must be cut when funds are diverted to the payment of judgments and other costs of litigation. Whatever the virtue of standards, it may be unrealistic to expect public employees to apply them in the field without a significant error rate. It may be equally unrealistic—if not undesirable—to expect them to avoid any conduct that might trigger liability under the broadest conception of an abstract standard. Police officers instructed to avoid anything that might strike a judge as an "unreasonable" search and seizure might find themselves paralyzed.

If courts expect that constitutional norms are to be respected in the real world, they must be able to articulate constitutional law in a manner comprehensible to officers on the street. If they fail to do so, a grant of qualified immunity may say more about the failings of the judiciary than the failings of public employees.

286. *See supra* Section III.A.3.