

# Articles

## QUALIFIED IMMUNITY'S SELECTION EFFECTS

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**ABSTRACT**—The Supreme Court has described the “driving force” behind qualified immunity to be its power to dismiss “insubstantial” cases before discovery and trial. Yet in a prior study of 1,183 Section 1983 cases filed against law enforcement in five federal court districts around the country, I found that just seven (0.6%) were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. These findings undermine assumptions about the role qualified immunity plays in filed cases, but leave open the possibility that qualified immunity serves its intended role by screening out insubstantial cases before they are ever filed. Indeed, some have raised this possibility as reason to maintain the status quo.

This Article tests this alternative “screening” justification for qualified immunity. Drawing on my prior study of 1,183 Section 1983 cases, as well as qualitative data from ninety-four surveys and thirty-five interviews of attorneys who entered appearances on behalf of plaintiffs in those cases, I find that qualified immunity almost certainly increases the cost, risk, and complexity of constitutional litigation, but has a more equivocal effect on attorneys’ case-selection decisions. Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds. And when lawyers do decline cases because of qualified immunity, they do not appear to be screening out “insubstantial” cases under any plausible definition of the term. These empirical findings enrich our understanding of the role qualified immunity plays in civil rights cases, contribute to mounting evidence that qualified immunity doctrine fails to achieve its intended policy goals, and support growing calls to better align the doctrine with the realities of constitutional litigation.

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### INTRODUCTION

Available evidence suggests that only 1% of people who believe they have been wronged by the police ultimately sue.<sup>1</sup> This Article asks what role

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<sup>1</sup> MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 16–20 (2005) (finding that the police had used force against 664,458 people, 87.3% of whom believed that the police acted improperly, and just 7,416 (1.1%) of whom filed a lawsuit regarding the alleged misconduct). Note that this survey concerns only police uses of force. Each year, millions of people believe they are wrongfully stopped by the police while driving or walking. See ELIZABETH DAVIS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 4, 11, 14

qualified immunity plays in decisions to forgo litigation by the remaining 99%.<sup>2</sup>

The answer to this question is critically important for an informed understanding of the extent to which qualified immunity doctrine serves its intended policy goals. The Supreme Court has described the “‘driving force’ behind [the] creation of the qualified immunity doctrine” to be resolving “‘insubstantial claims’ against government officials . . . prior to discovery”<sup>3</sup> and at summary judgment.<sup>4</sup> But in a recent study of constitutional litigation against law enforcement officers and agencies in five federal districts across the country, I found that just seven (0.6%) of the 1,183 cases in my dataset were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds.<sup>5</sup> These findings undermine assumptions that qualified immunity causes most Section 1983 cases to be dismissed before discovery and trial,<sup>6</sup> but leave

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(2018). We do not know how often people sue who believe they have been mistreated by the police in ways that do not involve the use of force.

<sup>2</sup> Qualified immunity shields law enforcement officers and other executive officials from damages liability—even if they have violated the U.S. Constitution—so long as they have not violated “clearly established statutory or constitutional rights.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A law enforcement officer or executive official sued under 42 U.S.C. § 1983 for violating a plaintiff’s constitutional rights can raise qualified immunity—usually in a motion to dismiss or at summary judgment—and the Supreme Court has instructed lower courts that defendants should prevail unless the plaintiff can point to “controlling authority in their jurisdiction” or a “consensus of cases of persuasive authority” holding factually similar conduct to be unconstitutional. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). For an overview of qualified immunity, the ways in which it has shifted over the past fifty years, and criticisms of the doctrine, see generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against*]. For an overview of § 1983 litigation, see generally Martin A. Schwartz, *Section 1983 Litigation, Third Edition*, FED. JUD. CTR. (2014), <https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf> [<https://perma.cc/SC5K-VYG9>].

<sup>3</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

<sup>4</sup> *Harlow*, 457 U.S. at 818.

<sup>5</sup> See generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (reporting the results of a study of § 1983 filings against law enforcement officers and agencies in five federal districts over a two-year period and finding, contrary to conventional wisdom, that qualified immunity was rarely the formal reason cases were dismissed).

<sup>6</sup> See, e.g., John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (“The Supreme Court’s effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from *trial* as well as from *liability*—has been largely successful.”); Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (reporting that the Supreme Court’s qualified immunity jurisprudence has “created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights”); Martin A. Schwartz, *supra* note 2, at 143 (reporting that “courts decide

open the possibility that qualified immunity nonetheless serves its intended function by screening out insubstantial cases before they are ever filed.

Understanding the impact of qualified immunity on case selection is also key to better appreciating the role qualified immunity doctrine plays in civil rights litigation. Based on my previous finding that few cases are dismissed on qualified immunity grounds, one might assume that the doctrine plays an insignificant role in the litigation of constitutional claims. Yet drawing this conclusion would vastly overstate the implications of that research. Although my study showed that qualified immunity rarely is the formal reason that Section 1983 cases against law enforcement end before discovery and trial, it did not answer other important questions concerning the role qualified immunity plays in the decision to file a lawsuit, and the ways in which the doctrine influences pleading, litigation, and settlement decisions.<sup>7</sup> A complete understanding of the role qualified immunity plays in constitutional litigation requires taking account of these additional litigation effects.

Although understanding the impact of qualified immunity on case selection would enrich descriptive accounts of the doctrine and help answer whether qualified immunity serves its policy aims, measuring qualified immunity's selection effects is no easy feat. It is conventional wisdom that most grievances never become filed lawsuits.<sup>8</sup> 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.<sup>9</sup> Some studies have used filed

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a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity”).

<sup>7</sup> See Schwartz, *supra* note 5, at 48–51 (reporting findings regarding filed cases but observing that open questions remain regarding the role qualified immunity plays in case filing and litigation decisions).

<sup>8</sup> See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980) (describing many factors that influence whether incidents become grievances, claims, or legal disputes); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 52 (1980) (measuring the rate of grievances, claims, disputes, and court filings for tort, discrimination, and divorce claims). For filing rates in police misconduct cases, see *supra* note 1, which reports available evidence of filing rates in cases concerning police uses of force.

<sup>9</sup> See, e.g., Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid*, 32 LAW & SOC. INQUIRY 233, 242 (2007) (“Despite the legal, social, and political importance of what happens at the bottom of the dispute pyramid, it is difficult to empirically study what happens there.”); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1224 (2013) (describing the ways in which studies of the impact of *Twombly* and *Iqbal*, two Supreme Court cases defining pleading standards, have struggled to account for selection effects); Felstiner et al., *supra* note 8, at 634–36 (describing the “conceptual and methodological difficulties” in measuring the transformation of disputes); Marc Galanter, *Reading the Landscape of*

cases and other objective data in combination with presumed models of attorney behavior to estimate selection effects.<sup>10</sup> Others have drawn conclusions from interviews with plaintiffs' attorneys about their filing decisions.<sup>11</sup>

In this Article, I combine these two approaches.<sup>12</sup> First, I examined an original docket dataset of 1,183 police misconduct cases filed in five federal districts to better understand the role played by qualified immunity in the litigation of these cases. I then surveyed ninety-four attorneys who entered appearances on behalf of plaintiffs in these 1,183 cases and conducted semi-structured interviews with thirty-five of these attorneys as a way of getting a "ground-level, gestalt sense"<sup>13</sup> of the role qualified immunity plays in constitutional litigation and in case-selection decisions. All empirical studies have methodological limitations, and this study is no exception.<sup>14</sup> But it offers the richest and most comprehensive evidence available with which to explore these important questions.

Based on my docket dataset, surveys, and interviews, I find that qualified immunity almost certainly increases the costs and risks of Section 1983 litigation. Although qualified immunity is rarely the reason that cases end, there remains a risk that cases will be dismissed on qualified immunity grounds—most likely after the parties have completed costly discovery. Litigating the defense is also costly—qualified immunity was raised in approximately one-third of the cases in my dataset and was sometimes raised by defendants multiple times. Each time defendants raise qualified immunity, plaintiffs' counsel must take the time to research and brief their motions in opposition.<sup>15</sup> Qualified immunity motions and interlocutory appeals of qualified immunity denials also result in delays—of months or years—while the motions are pending.<sup>16</sup> These delays can increase the cost of preparing for trial, and can weaken a plaintiff's case if witnesses'

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*Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 12 (1983) (describing disputes as "difficult to chart. They are not some elemental particles of social life that can be counted and measured. Disputes are not discrete events like births and deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them").

<sup>10</sup> See studies cited *infra* note 47.

<sup>11</sup> See studies cited *infra* note 48.

<sup>12</sup> For a detailed description of my methodology, see *infra* Part II.

<sup>13</sup> See Engstrom, *supra* note 9, at 1238.

<sup>14</sup> For discussion of the methodological limitations of this study, see *infra* notes 58–67 and accompanying text.

<sup>15</sup> See *infra* note 71 and accompanying text.

<sup>16</sup> See *infra* notes 86–89 and accompanying text.

recollections of the underlying facts get hazier over time.<sup>17</sup> Apart from the challenges of defeating qualified immunity motions in any given case, qualified immunity makes civil rights practice more challenging in general. Attorneys must learn about and keep abreast of changes in what is considered to be an extremely complex doctrine, and the specter of interlocutory appeal means that attorneys must be skilled in both trial and appellate advocacy.<sup>18</sup>

Prevailing models of attorney case selection suggest that these costs and risks would discourage plaintiffs' attorneys from filing any cases vulnerable to attack on qualified immunity grounds.<sup>19</sup> If so, and if such cases are in fact "insubstantial," the "driving force" behind qualified immunity would be achieved by the doctrine before plaintiffs ever open the courthouse door. Yet my dockets, surveys, and interviews offer two compelling reasons to conclude that qualified immunity poorly serves this screening function.

First, qualified immunity has a more equivocal effect on case-selection decisions than attorney case-selection models would suggest. More than two-thirds of the attorneys I interviewed reported that qualified immunity in and of itself rarely or never causes them to decline civil rights cases.<sup>20</sup> These attorneys agree that qualified immunity poses many challenges, but believe that those challenges replicate other case-selection considerations, are too unpredictable to influence filing decisions, can be mitigated by including claims that cannot be dismissed on qualified immunity grounds, or pose risks worth taking in order to advance important interests. For reasons I will explain, I believe that my data likely overrepresents attorneys who hold this view.<sup>21</sup> But their perspectives indicate that the costs and risks of qualified immunity do not reliably cause attorneys to decline cases.

Second, when attorneys do decline cases because of qualified immunity, they do not appear to be screening out "insubstantial" cases under any plausible definition of the term.<sup>22</sup> Attorneys I interviewed reported declining cases because the cost of litigating qualified immunity outweighed the likely financial rewards, and because the factual allegations had not

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<sup>17</sup> See *infra* notes 92–93 and accompanying text.

<sup>18</sup> See *infra* notes 81–85, 94 and accompanying text.

<sup>19</sup> See *infra* Part I.

<sup>20</sup> Of the thirty-five attorneys I interviewed, eleven reported that they consider qualified immunity at case selection, but that it rarely or never influences their selection decisions, and thirteen reported that they do not consider qualified immunity at case selection. For further description of these perspectives, see *infra* Section IV.B; Appendix Table 7.

<sup>21</sup> See *infra* notes 213–215 and accompanying text.

<sup>22</sup> For further discussion of these findings, see *infra* Section IV.C.

previously been ruled unconstitutional.<sup>23</sup> One attorney reported that he stopped bringing any Section 1983 cases because immunities pose an insurmountable barrier, and there is circumstantial evidence to suggest the challenges of civil rights litigation—including qualified immunity—may cause many more attorneys to reduce the number of civil rights cases they accept, or get out of the business of civil rights litigation altogether.<sup>24</sup> Attorneys' answers suggest that qualified immunity is decreasing the total number of cases filed, but that it is not screening out cases for lack of merit.

These findings could not come at a more important time. In recent years, the United States Supreme Court has issued a spate of decisions reversing lower court denials of qualified immunity—often in cases involving fatal force by law enforcement—and proclaiming the importance of qualified immunity to “society as a whole.”<sup>25</sup> At the same time, circuit and district judges around the country,<sup>26</sup> advocacy groups across the political

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<sup>23</sup> For further discussion of the Supreme Court's qualified immunity doctrine, which requires plaintiffs' counsel to identify a prior case holding similar conduct to be unconstitutional, see Schwartz, *The Case Against*, *supra* note 2, at 1814–16.

<sup>24</sup> For further discussion of these findings, see *infra* Section IV.D.

<sup>25</sup> *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (“Because of the importance of qualified immunity ‘to society as a whole,’ the Court often corrects lower courts when they wrongly subject individual officers to liability.”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). For other instances in which the Court described qualified immunity as important to “society as a whole,” see, for example, *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam).

<sup>26</sup> For recent circuit and district court decisions critical of qualified immunity, see, for example, *Horvath v. City of Leander*, No. 18-51011, 2020 WL 104345, at \*5–13 (5th Cir. Jan. 9, 2020) (Ho., J., concurring in judgment in part and dissenting in part) (explaining that he would “welcome a principled reevaluation of our precedents” related to qualified immunity); *Zadeh v. Robinson*, 902 F.3d 483, 499–500 (5th Cir. 2018) (Willett, J., concurring dubitante) (observing that he and “a growing, cross-ideological chorus of jurists and scholars” are calling for reconsideration of qualified immunity), *opinion withdrawn on reh'g*, 928 F.3d 457 (5th Cir. 2019); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 698 n.6 (E.D. Cal. 2019) (“[T]his judge joins with those who have endorsed a complete reexamination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases.”); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293–94 n.10 (D.N.M. 2018) (“The Court disagrees with the Supreme Court's approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy.”); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at \*18 n.174 (D. Kan. Aug. 7, 2018) (“[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment.”); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at \*7 (E.D.N.Y. June 26, 2018) (“The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope. The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights.”); *Wheatt v. City of East Cleveland*, No. 1:17-CV-377, 2017 WL 6031816, at \*1 n.7 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court for allowing interlocutory appeals of qualified immunity denials).

spectrum,<sup>27</sup> and several sitting Supreme Court Justices<sup>28</sup> have called on the Court to modify qualified immunity or do away with the defense. These critics argue that qualified immunity bears no resemblance to common law defenses in effect when Section 1983 became law, undermines government accountability, and is both unnecessary and ill-suited to shield government officials who have acted reasonably from financial liability and other burdens of litigation.<sup>29</sup>

One key empirical question left unanswered thus far in this debate is posed by this Article: Whether qualified immunity fulfills its policy goals by screening out insubstantial cases before they are filed. Indeed, some have raised this possibility as a reason to maintain the status quo.<sup>30</sup> My study has

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<sup>27</sup> Advocacy organizations also criticize qualified immunity. *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, at 6, *Almighty Supreme Born Allah v. Milling*, No. 17-8654, 2018 WL 3388317 (July 11, 2018) [hereinafter, Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah*] (describing a "cross-ideological consensus that this Court's qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands that statute and its common law backdrop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing"). This collection of organizations has filed briefs raising similar arguments in other cases. *See* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *appeal docketed*, No. 18-1287 (Apr. 10, 2019) [hereinafter, Brief of Cross-Ideological Groups for Official Accountability, *Baxter*]; Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, 139 S. Ct. 2616 (2019) (mem.); *see also, e.g.*, Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html> [<https://perma.cc/9F7Z-T8EZ>] (describing a petition for certiorari in a qualified immunity case joined by advocates across the political spectrum); Nicolas Sonnenburg, *Unlikely Bedfellows in the Fight Against Qualified Immunity*, L.A. DAILY J. (Sept. 21, 2018) (describing criticisms of qualified immunity by Justices Thomas and Sotomayor, as well as the Cato Institute, ACLU, and other groups).

<sup>28</sup> *See* *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (expressing concern that the Court's decision "sends an alarming signal to law enforcement officers . . . that they can shoot first and think later"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (recommending that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence"); *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (criticizing the Court's qualified immunity doctrine for "sanctioning a 'shoot first, think later' approach to policing").

<sup>29</sup> *See* sources cited *supra* notes 26–28; *see also* sources cited *infra* note 222 (describing these arguments against qualified immunity).

<sup>30</sup> *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019) (expressing concerns about "frivolous and distracting litigation" in a world without qualified immunity); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018) ("[Q]ualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all . . .").



the best available evidence with which to answer this question and offers compelling reasons to conclude that qualified immunity cannot be defended on these grounds. My study also reveals that qualified immunity undermines government accountability in underappreciated ways: by discouraging lawyers from filing cases involving novel claims, making it more difficult for lawyers to make a living bringing civil rights cases, and causing lawyers to abandon this line of work.<sup>31</sup> As the Supreme Court considers growing calls to modify or do away with qualified immunity, it should heed this additional evidence of the doctrine's failures.

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

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

The Supreme Court has described qualified immunity as a shield from the burdens of discovery and trial in insubstantial cases.<sup>32</sup> Although the Court's decisions have always suggested that qualified immunity would achieve this goal through the dismissal of filed cases, qualified immunity could also conceivably achieve this goal by screening out insubstantial cases before they are filed.<sup>33</sup>

How might qualified immunity serve this prefiling screening function? Scholars generally expect that a plaintiff will file a case if the likelihood of prevailing and their expected monetary gain is greater than or equal to their anticipated costs.<sup>34</sup> In this model, the expected recovery equals the amount

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<sup>31</sup> See *infra* notes 237–247 and accompanying text (describing these findings).

<sup>32</sup> See, e.g., *supra* notes 3–4 and accompanying text.

<sup>33</sup> See *supra* note 30.

<sup>34</sup> For a foundational account of this model, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982), which imagines rational economic calculations regarding filing, settlement, and trial depending on the system for allocating litigation costs. See also, e.g., SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 22 (2010) (describing models of litigant behavior drawn from law and economics literature that assume “both parties are guided in their decisions at each stage [of litigation] by the expected monetary gain or loss should the case be tried” but also

awarded if the plaintiff prevails ( $J$ ), discounted by the probability that they will prevail ( $p$ ). The costs ( $C$ ) are the plaintiff's expected litigation costs. So, a plaintiff will file suit if:

$$pJ \geq C$$

This model needs some tweaking to reflect attorneys' typical fee arrangements in the types of cases in which qualified immunity is raised.<sup>35</sup> Attorneys generally accept civil rights cases on contingency, with a provision entitling them to seek their reasonable attorneys' fees from the defendant if the plaintiff prevails.<sup>36</sup> As William Hubbard has observed, attorneys considering whether to accept a case on contingency should assess the probability of success ( $p$ ), the size of a judgment ( $J$ ), and the percentage of the judgment they will recover under the terms of their fee agreement ( $f$ ), against the cost of litigation ( $C$ ).<sup>37</sup> So, presumably, a plaintiff's attorney will agree to file a suit on contingency if:

$$pfJ \geq C$$

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recognizing that "the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money"); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 742 (1988) (expecting that plaintiffs in constitutional tort cases "will file suit if the expected recovery from the suit outweighs the expected costs").

<sup>35</sup> I focused on plaintiffs' attorneys in my interviews and surveys—instead of uncounseled people with grievances against the police—because I assume that qualified immunity plays a limited role in pro se plaintiffs' decisions to file suits. See *infra* notes 51–53 and accompanying text.

<sup>36</sup> See, e.g., Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. COLLOQUY 182, 184 (2007) (explaining that most civil rights litigation is brought "by individual lawyers who are trying to make a living"); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756–57 (1993) (asserting that "most suits are taken on a contingency basis"); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 3–5 (2008) (describing typical fee arrangements in § 1983 cases); Schwab & Eisenberg, *supra* note 34, at 768 ("[M]ost civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity."). More than 72% of the ninety-four attorneys I surveyed for this study reported that they always or usually (70%–99% of the time) enter into contingency fee arrangements with plaintiffs in § 1983 cases. Another 4% always take cases on contingency, supplemented with a limited retainer. Twelve percent take cases pro bono, with the ability to seek fees pursuant to Section 1988. Another almost 10% rely on some combination of contingency, contingency with retainer, and pro bono arrangements. Just two of the ninety-four lawyers who responded to my survey always require their clients to pay them by the hour. See Joanna C. Schwartz, *Police Misconduct Attorney Survey Results* (on file with journal).

<sup>37</sup> See William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 707 (2016). For an in-depth exploration of contingency fee attorneys' calculations of risk and reward in case selection, see HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 67–88 (2004).

As Hubbard recognized, this calculation is dynamic and complex. Costs will increase over the course of litigation.<sup>38</sup> The probability of prevailing and the size of an expected judgment may also shift, depending on which judge is assigned to the case, the information unearthed during discovery, and the results of motions to dismiss or motions for summary judgment. Moreover, if the plaintiff prevails after trial, or the attorney is otherwise authorized to seek fees pursuant to Section 1988, the attorney may be able to recover their reasonable fees from the defendant instead of taking a percentage of the plaintiff's award.<sup>39</sup> An attorney who accepts a Section 1983 case on contingency must conclude that the expected recovery at some stage of the litigation—taking account of all of these contingencies—will outweigh their expected costs at that stage.

Although the civil rights bar that brings damages actions appears to be dominated by private attorneys,<sup>40</sup> there are also pro bono and nonprofit lawyers bringing civil rights cases who do not rely on a contingency fee. To the extent that pro bono and nonprofit lawyers bring civil rights damages actions, they are not expected to have the same financially driven calculations of risk and reward.<sup>41</sup> But pro bono and nonprofit attorneys are not immune to the financial implications of bringing these cases. Even if pro bono attorneys and nonprofits do not bring cases on contingency, they can still recover fees if the plaintiff prevails, and that money would likely be welcomed by an attorney or organization with limited funds. Moreover, because pro bono attorneys and nonprofits have limited time and resources, they will want to select cases most likely to achieve their intended goals and may be disinclined to take a case that will be particularly expensive or time-consuming to litigate.<sup>42</sup> In other words, whether or not attorneys rely on fees from civil rights cases to pay their bills, cases likely become less attractive as the cost of litigation increases and the likelihood of success decreases.

If the prevailing model accurately reflects attorneys' case-selection process, qualified immunity could discourage attorneys from accepting cases

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<sup>38</sup> Hubbard, *supra* note 37.

<sup>39</sup> See 42 U.S.C. § 1988(b) (2012) (allowing reasonable attorneys' fees for prevailing parties in § 1983 cases); see also Mark R. Brown, *A Primer on the Law of Attorney's Fees Under § 1988*, 37 URB. LAW. 663 (2005) (describing various ways attorneys can seek fees under § 1988).

<sup>40</sup> See *supra* note 36.

<sup>41</sup> See Hubbard, *supra* note 37, at 713; see also *infra* note 188 (contrasting the financial incentives of nonprofit and private attorneys).

<sup>42</sup> See Hubbard, *supra* note 37, at 713 ("To the extent that attorneys working on a pro bono basis and legal aid providers are oversubscribed—and they usually are—one should again expect these attorneys to screen cases on plausible merit before filing. Whether an attorney's motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both), the incentive will be to select those cases with higher merit."); see also Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. (forthcoming 2020) (describing the incentives of pro bono and nonprofit attorneys when selecting cases).

by shifting their calculation of risk and reward. Qualified immunity might do so in several different ways. It could increase the risk that a case would be dismissed, thereby decreasing the probability of success ( $p$ ). Qualified immunity could also increase the risk that the plaintiff's case will be dismissed in part, thereby reducing the size of any possible judgment ( $J$ ). Or qualified immunity could increase the costs of litigation ( $C$ ). If qualified immunity decreases the probability of success, decreases the likely 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.

The Supreme Court's stated hope is not that qualified immunity will shield government officials from the burdens of discovery and trial in *all* cases, but that it will protect government officials from these burdens in "insubstantial" cases.<sup>43</sup> The Court has not defined what constitutes an insubstantial case, however. In some decisions, the Court has suggested that insubstantial claims are "baseless" and "frivolous," brought against "innocent" government officials.<sup>44</sup> In other decisions, the Court has written that qualified immunity should protect "all but the plainly incompetent or

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<sup>43</sup> See *supra* notes 3–4 and accompanying text.

<sup>44</sup> See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998) (explaining that *Harlow*'s "reformulation of the qualified immunity defense" to eliminate consideration of officers' subjective intent was justified by two considerations: "First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been used to shield *baseless* lawsuits from summary judgment") (emphasis added); *Mitchell v. Forsyth*, 472 U.S. 511, 553–54 (1985) (Brennan, J., concurring in part and dissenting in part) ("I have no doubt that trial judges employing [*Harlow*'s] standard will have little difficulty in achieving *Harlow*'s goal of early dismissal of *frivolous* or insubstantial lawsuits.") (emphasis added); *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982) ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees . . . . At the same time, however, it cannot be disputed seriously that claims frequently run against the *innocent* as well as the guilty—at a cost not only to the defendant officials, but to society as a whole.") (emphasis added); *Butz v. Economou*, 438 U.S. 478, 507–08 (1978) (noting that qualified immunity is a workable standard for executive officers because "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading . . . . Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by *frivolous* lawsuits") (emphasis added and citation omitted).

those who knowingly violate the law”<sup>45</sup>—suggesting that qualified immunity’s protections should have a broader reach. Putting aside for the moment whether the Court intends qualified immunity to shield only the innocent, or also the incompetent and reckless,<sup>46</sup> if qualified immunity functions as the Supreme Court intends, it should increase the predicted cost of litigation, and/or reduce the predicted size of judgment in insubstantial cases—such that it discourages attorneys from filing these types of cases—without simultaneously discouraging the filing of “substantial” cases.

## II. METHODOLOGY

Several studies have attempted to measure the effects of various doctrines on case-filing decisions. Some have used filed cases and other objective data in combination with presumed models of attorney behavior.<sup>47</sup> Others have drawn conclusions from interviews with plaintiffs’ attorneys about their filing decisions.<sup>48</sup> In this Article, I combine these two approaches.

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<sup>45</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Roberts Court has repeatedly cited with approval the notion that qualified immunity should protect “all but the plainly incompetent or those who knowingly violate the law.” See *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

<sup>46</sup> For further discussion of what constitutes an “insubstantial” claim, see *infra* notes 230–235 and accompanying text.

<sup>47</sup> See, e.g., Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (measuring the effects of *Twombly* and *Iqbal* on filing and settlement decisions); Schwab & Eisenberg, *supra* note 34, at 745–47 (examining the effects of § 1988 fee shifting on the decision to file cases).

<sup>48</sup> See, e.g., THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 1–2, 25–27 (2010) (interviewing thirty-six attorneys about their litigation practice); Julie Davies, *Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997) (interviewing thirty-five plaintiffs’ attorneys to understand how Supreme Court decisions interpreting the Civil Rights Attorney’s Fees Awards Act of 1976 impacted filing and litigation decisions); Daniel Nazer, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 GEO. J. LEGAL ETHICS 499 (2004) (reporting results of interviews with public interest attorneys about the effects of *Evans* on filing and litigation decisions). Alexander Reinert used this approach to examine the impact of qualified immunity on plaintiffs’ attorneys’ decisions to file *Bivens* cases. See Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011). “*Bivens* cases” refer to cases asserting a cause of action—similar to a § 1983 claim—against federal government actors. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). For a discussion of the ways in which this study reaches findings similar to and distinct from Reinert’s, see *infra* notes 155, 161, 214, 245 and accompanying text.

First, I examined my dataset of all Section 1983 actions filed against law enforcement defendants<sup>49</sup> in 2011–2012 in five federal districts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Northern District of California, and the Eastern District of Pennsylvania. I chose these five districts because a high volume of Section 1983 cases are brought there, they have a range of different sized law enforcement agencies and agencies of comparable sizes, and I expected judges in these districts would vary in their approach to qualified immunity.<sup>50</sup> I hand-coded each case, taking note of when motions to dismiss and motions for summary judgment on qualified immunity and other grounds were made by defendants, granted by courts, and dispositive. I also tracked the timing and disposition of interlocutory and final appeals of qualified immunity decisions. And I compared these results in cases where plaintiffs represented themselves—referred to here as *pro se* cases—and cases where plaintiffs were represented by legal counsel.

Next, I surveyed and interviewed plaintiffs’ attorneys who entered appearances in the 1,183 cases in my docket dataset to gather insights about the role qualified immunity plays in their case-selection decisions.<sup>51</sup> I focused on plaintiffs’ attorneys in my interviews and surveys—instead of uncounseled plaintiffs with grievances against the police—because I assumed that qualified immunity plays a limited role in *pro se* plaintiffs’ decisions to file suits. Many people who believe they have been wronged by

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<sup>49</sup> I focused on lawsuits against law enforcement defendants both because the Supreme Court’s qualified immunity decisions have often involved cases brought against law enforcement, and because limiting my study to cases against one type of defendant creates some substantive consistency across cases and allows for more direct comparison of filing and litigation decisions across districts. For further discussion of my rationale for focusing on lawsuits against law enforcement defendants, see *infra* note 61 and accompanying text; see also Schwartz, *supra* note 5, at 22.

<sup>50</sup> The expectation about judicial variation is based in part on a commonly-held view that courts in these circuits vary in their approach to qualified immunity. See, e.g., *Ashcroft*, 563 U.S. at 742 (“We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” (citation omitted)); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 39–42 (2015) (describing variation between the Fifth, Sixth, and Ninth Circuits regarding whether courts rule on the merits of constitutional claims in their qualified immunity decisions and the frequency with which they recognize new rights in those decisions); Charles R. Wilson, “Location, Location, Location”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2000) (describing circuit variation in courts’ interpretations of “clearly established law,” with the First, Third, Fourth, and Eighth Circuits defining the standard in a manner friendlier to plaintiffs than the Eleventh Circuit). For further discussion of my rationale for choosing these five federal districts, see Schwartz, *supra* note 5, at 19–20.

<sup>51</sup> I received Institutional Review Board approval from UCLA (IRB#16-000470) for this survey and the subsequent interviews.

government officials never sue for a whole host of reasons.<sup>52</sup> People who file lawsuits without legal assistance may be aware that Section 1983 cases are difficult to bring, but I assume for the purposes of this discussion that they will be unaware of the precise doctrinal challenges associated with these claims and unfamiliar with the contours of qualified immunity—except to the extent that an attorney who has declined to take their case has described these challenges to them.<sup>53</sup>

A total of 1,022 plaintiffs' attorneys entered appearances in these 1,183 cases—138 attorneys in the Southern District of Texas, 184 in the Middle District of Florida, 174 in the Northern District of Ohio, 266 in the Northern District of California, and 260 in the Eastern District of Pennsylvania. I sent an online survey to each of the 1,022 attorneys whose email address(es) I could find from court records.<sup>54</sup> The anonymous survey has twenty multiple choice and open-ended questions regarding the frequency with which the respondents file police misconduct suits, the percentage of their practice dedicated to these types of cases, the effects of various doctrines on their practice, and what they consider to be the most significant barriers to relief in police misconduct cases. Of the 976 survey requests I sent out, seventy-one emails failed to deliver, and ninety-four attorneys filled out surveys.<sup>55</sup>

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<sup>52</sup> Available evidence suggests that just 1% of people who believe they have been wronged by the police actually sue. See DUROSE, *supra* note 1. For some theories about why people do not sue law enforcement see, for example, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988), which explains that people might not sue for a number of different reasons, including “ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration.” For possible reasons that various types of grievances may never become filed lawsuits see, for example, Galanter, *supra* note 9, at 13–18, which describes several studies measuring behaviors and decisions at the bottom of the dispute pyramid.

<sup>53</sup> See Theodore Eisenberg & Kevin M. Clermont, Essay, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 206 (2014) (studying the effects of *Twombly* and *Iqbal* pleading requirements on case filing decisions and finding that pro se plaintiffs are “comparatively immune to selection effect, because those plaintiffs more slowly adjust by ceasing to pursue some of the cases that could not surmount the new barrier”).

<sup>54</sup> Although I sent the online survey to a total of 976 email addresses, I do not know for certain how many attorneys I reached with those emails. Some lawyers reported no email address in court records; some attorneys included multiple email addresses; and, in some cases, multiple attorneys in a firm appeared to share the same email address.

<sup>55</sup> Attorneys filled out the survey responses between April 17, 2017 and May 11, 2017. Of the 905 survey requests that presumably reached their intended targets, I had a response rate of at least 10.4%. For some context regarding this response rate, see Scott Keeter et al., *What Low Response Rates Mean for Telephone Surveys*, PEW RES. CTR. (May 15, 2017), <https://www.pewresearch.org/wp-content/uploads/2017/05/RDD-Non-response-Full-Report.pdf> [https://perma.cc/A2YN-RYJJ], where Keeler notes that Pew Research telephone surveys have a response rate of 9% and citing research suggesting “response rate is an unreliable indicator of bias.” See also Geon Lee et al., *Survey Research in Public Administration: Assessing Mainstream Journals with a Total Survey Error Framework*, 72 PUB.

The final question in my online survey asked attorneys to send me their email address if they wished to be contacted for a follow-up interview. Fifty-seven attorneys did so. I emailed each of these attorneys, and twenty-five responded and agreed to be interviewed. I then reached out to twenty-five additional attorneys across the five districts, requesting interviews. I chose these attorneys because they had filed three or more cases in their district during the study period and/or because I knew the attorneys' reputations for bringing such cases. Ten of those attorneys agreed to be interviewed.<sup>56</sup> In total, I interviewed thirty-five attorneys—seven attorneys from each of the five districts in my docket dataset.

During these interviews, I asked attorneys about their case-selection decisions, the role qualified immunity doctrine plays in their filing decisions, the litigation of claims against law enforcement more generally, and their views about the challenges and rewards of civil rights litigation. I used a semi-structured format and explored additional topics as they arose. As a result, some interviews covered topics that were not addressed in other interviews, and interviews varied in the depth with which they explored certain topics. These interviews lasted between eighteen and eighty-five minutes. All but one was recorded and transcribed.<sup>57</sup> I promised these attorneys confidentiality, although several made clear that they were happy for me to use their names.

This mixed-methods approach presents a more complete and nuanced portrait of qualified immunity's role in litigation and case-selection decisions than would any single method alone. The docket dataset offers valuable information about the ways in which qualified immunity is raised and decided across the five districts in my study. The surveys and interviews provide insight into how attorneys perceive qualified immunity's costs and risks—key to understanding what role the doctrine plays in attorneys' case-selection decisions. Yet all empirical studies have methodological limitations, and this study is no exception.

First, the study focuses on practices in five federal districts. I chose these five districts in part because I believed the judges in these districts and

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ADMIN. REV. 87, 91 (2011) (reporting that articles are published with survey response rates ranging from 10%–90%+ in public administration).

<sup>56</sup> These ten attorneys did not take the online survey, but I did add to their interview protocol the questions that were posed in the online survey.

<sup>57</sup> This interview was not recorded because of a technological error; I and the interviewee both expected the interview would be recorded and transcribed. Once I realized the interview was not being recorded, I transcribed what I could of the interview in real time. Additionally, the transcription service used for all thirty-five interviews produced transcripts with several grammatical errors. For ease of reading, I have corrected those errors and have not indicated deviations from transcripts in-line.



in the corresponding circuits would vary in their approach to qualified immunity and other aspects of Section 1983 litigation.<sup>58</sup> But, each year, in ninety-four federal districts and in state courts around the country, thousands of lawyers file thousands of Section 1983 cases against law enforcement defendants.<sup>59</sup> I cannot be certain that the ways in which Section 1983 cases are litigated in the five districts in my study are consistent with litigation practices in these federal and state courts, or that the lawyers litigating in these five districts share the views of lawyers litigating these cases around the country.<sup>60</sup>

Second, this study focuses on Section 1983 cases against state and local law enforcement. I focused on lawsuits against law enforcement defendants both because the Court's qualified immunity jurisprudence—particularly in recent years—has largely developed in these types of cases, and because it creates some substantive consistency across the cases in the dataset.<sup>61</sup> I do not know for certain whether these findings about the costs and risks of qualified immunity or the role qualified immunity plays in case-selection decisions are equally applicable to other types of civil rights claims. But the attorneys I surveyed and interviewed who brought other types of civil rights claims did not indicate that their litigation or case-selection processes are different when they bring Section 1983 claims against other types of government defendants.

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

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<sup>58</sup> See *supra* note 50 and accompanying text.

<sup>59</sup> Available data indicates that 37,802 “civil rights” cases were filed in federal court in 2017, which includes voting, employment, housing and education cases, among others. See *U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2016 and 2017*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/fjcs\\_c2\\_0331.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf) [<https://perma.cc/D9NJ-KNJ4>]. Section 1983 cases against law enforcement would likely be included in a subcategory of “civil rights” cases called “other civil rights” cases. There were 14,941 “other civil rights” cases filed in federal court in 2017. See *id.*

<sup>60</sup> For further discussion of this methodological limitation, see Schwartz, *supra* note 5, at 23–24.

<sup>61</sup> See *supra* note 49 and accompanying text.

attorneys' verifiable observations—about the frequency with which qualified immunity resulted in case dismissals, for example—were consistent with data from the docket dataset, which should inspire confidence in the accuracy of their other observations.

Finally, I do not know whether the thirty-five attorneys I surveyed and interviewed hold views representative of the 1,022 attorneys who entered appearances in the 1,183 cases in my docket dataset. Attorneys willing to take the time to fill out surveys and be interviewed might, for example, be especially frustrated about the costs and challenges of Section 1983 litigation, or they might be motivated to bring Section 1983 litigation for different reasons than the lawyers who did not respond to my requests. The attorneys I surveyed and interviewed are clearly unrepresentative in one way—they filed more police misconduct cases, on average, than other attorneys who entered appearances in the cases in my dataset.<sup>62</sup> Attorneys who file fewer police misconduct cases may have different views about the costs and risks associated with qualified immunity—or the impact of those costs and risks on filing decisions—than those who file more.

Despite the overrepresentation in my study of attorneys with a more active civil rights docket, the attorneys in my study vary in many ways regarding their civil rights litigation practices.<sup>63</sup> Some have brought hundreds of police misconduct cases, and others have brought only a few.<sup>64</sup> Some spend virtually all of their time litigating police misconduct suits, and others devote only a small percentage of their time to these cases.<sup>65</sup> Some primarily represent plaintiffs bringing the highest damages cases—those involving wrongful convictions and deadly force. Others usually represent plaintiffs in cases concerning what one attorney referred to as the “smaller indignities” of police stops and frisks.<sup>66</sup> The attorneys I interviewed and surveyed include

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<sup>62</sup> See Appendix Tables 1–3, which reflect the total number of appearances by all of the 1,022 attorneys who entered appearances during the two-year study period in my docket dataset (Appendix Table 1); the appearances of attorneys I interviewed during the two-year period in my docket dataset (Appendix Table 2); and the appearances surveyed attorneys reported over a five-year period in police misconduct cases (Appendix Table 3).

<sup>63</sup> See Appendix Table 7 for information about the attorneys I interviewed, including the percentage of time they spend on civil rights cases, the other types of work they take on, their fee arrangements with clients, and their practice setting.

<sup>64</sup> See Appendix Table 7.

<sup>65</sup> See Appendix Table 7.

<sup>66</sup> N.D. Cal. Attorney E; *see also* N.D. Cal. Attorney D (reporting that he does not bring shooting cases but, instead, brings cases concerning “all the little incremental violations—the false arrest stuff, the kick in your door and trashing the house stuff; you know, the traffic stop unreported toss your car stuff. You know, rough you up a little bit stuff; you know, lie about what you said; stuff that needs addressing and that people don’t make any money on.”); N.D. Cal. Attorney G (explaining that he does not take

partners at midsize and small firms, solo practitioners, and employees of nonprofits.<sup>67</sup> And the attorneys have, combined, several centuries-worth of experience bringing thousands of police misconduct cases on behalf of plaintiffs. Accordingly, these attorneys' varied perspectives and experiences can offer valuable insights into the role qualified immunity doctrine plays in litigation and case selection.

### III. THE COSTS AND RISKS OF QUALIFIED IMMUNITY

Standard models of case selection assume that an attorney will only agree to represent a plaintiff if she believes that the likelihood of prevailing and her expected monetary gain equals or is greater than her anticipated costs.<sup>68</sup> Accordingly, assuming these models are accurate, to appreciate the effects of qualified immunity on case selection, one must first understand how attorneys believe qualified immunity doctrine affects the cost of litigation (C), the probability of success ( $p$ ), and the size of judgments (J).

In this Part, drawing on my surveys and interviews of attorneys who entered appearances in the police misconduct cases in my docket dataset, I report attorneys' perceptions that qualified immunity increases cost and delay, decreases the size of judgments, and raises the risk of dismissal. The docket dataset reveals litigation patterns and practices consistent with attorneys' perceptions. Then, in Part IV, I describe attorneys' observations about the ways in which these costs and risks influence their case-selection decisions.

#### A. *How Qualified Immunity Affects the Cost of Litigation*

The dockets, surveys, and interviews all suggest that qualified immunity doctrine increases the cost, time, and complexity of litigating police misconduct cases. Defendants raised qualified immunity in 368 (31.1%) of the 1,183 cases in my docket dataset.<sup>69</sup> In sixty of these 368 cases,

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"death cases" that other firms in the area take. "I'm a sole practitioner and I want to just kind of lay in the weeds and jump out of the bushes at the right time."); M.D. Fla. Attorney C (describing himself as a "bottom feeder" who has "fought a lot of battles on principle for very small amounts").

<sup>67</sup> There are relatively few nonprofit attorneys represented in my surveys and interviews: Just one of the attorneys I interviewed and four attorneys I surveyed are employed by nonprofits. But this may well reflect the limited role nonprofits play in the civil rights plaintiffs' bar that brings damages actions. See *supra* note 40 and accompanying text.

<sup>68</sup> See *supra* notes 36–37 and accompanying text.

<sup>69</sup> Schwartz, *supra* note 5, at 29. Qualified immunity could not be raised in 204 of the cases in my dataset either because the cases were brought against municipalities or sought solely injunctive or declaratory relief (ninety-nine cases), or because the cases were brought against individuals, seeking

defendants brought qualified immunity motions two or more times over the course of litigation.<sup>70</sup> For plaintiffs to respond effectively to a qualified immunity motion, they must find factually similar cases—either from their circuit or from multiple other circuits—holding defendants’ conduct unconstitutional, and then must brief and argue their oppositions to the motions.<sup>71</sup>

Defendants are also entitled to immediately appeal qualified immunity denials that turn on questions of law,<sup>72</sup> and in my docket dataset, defendants brought interlocutory appeals of forty-one (21.7%) of the 189 qualified immunity motions that were denied in whole or in part.<sup>73</sup> Plaintiff’s counsel will likely have done much of the relevant qualified immunity research in the district court. But the style of briefing and argument will likely be different in the court of appeals.<sup>74</sup> Plaintiffs’ attorneys may also move to dismiss the interlocutory appeal and/or ask the district court not to stay trial proceedings on the ground that the appeal is frivolous—which necessitates additional rounds of briefing.<sup>75</sup>

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damages, but were dismissed by the district court before defendants had the opportunity to respond (105 cases). *Id.* at 27–28. Defendants declined to raise qualified immunity in the other 611 cases. *Id.* at 29.

<sup>70</sup> *See id.* at 33.

<sup>71</sup> *See* *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (explaining that defendants violate “clearly established law” only when “[t]he contours of [a] right [are] sufficiently clear” that every “reasonable official would [have understood] that what he is doing violates that right”) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (requiring that plaintiffs point to “controlling authority in their jurisdiction” or a “consensus of cases of persuasive authority” to defeat qualified immunity). There is circuit variation regarding who bears the burden of proving entitlement to qualified immunity. *See* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071–72 (2018). Nevertheless, plaintiffs generally bear the burden of finding cases where factually similar conduct was ruled unconstitutional—even in circuits that place the burden of pleading and proving entitlement to qualified immunity on the defendant.

<sup>72</sup> *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905–17 (describing the standards for interlocutory appeals of qualified immunity denials and criticizing the practice because it increases cost, delay, and complexity).

<sup>73</sup> Schwartz, *supra* note 5, at 40.

<sup>74</sup> *See* N.D. Cal. Attorney B (describing her dislike of interlocutory appeals because she prefers trial court practice).

<sup>75</sup> *See* E.D. Pa. Attorney A (“I’m particularly irked when frivolous qualified immunity claims which are shut down by the district court on summary judgement end up being the subject of interlocutory appeal. So you’ve got to spend another six to twelve months or longer dealing with that. I’ve been disappointed in those cases that the circuits haven’t come down stronger on attorneys that bring frivolous interlocutory appeals where the findings by the district court make it clear that there are factual disputes that render the grant of summary judgement simply inapt.”); N.D. Ohio Attorney E (describing a motion opposing defendants’ motion for a stay while their interlocutory appeal was pending); N.D. Cal. Attorney F (explaining that, at the time of the interview, he was writing a motion opposing defendants’ motion for a stay while their interlocutory appeal was pending on the ground that the appeal was frivolous).

Attorneys I interviewed reported that qualified immunity motions are “burdensome”<sup>76</sup> and that the doctrine requires plaintiffs to “litigate everything to the nth degree.”<sup>77</sup> Attorneys also observed that defense counsel may use qualified immunity motions and interlocutory appeals strategically to “wear . . . out”<sup>78</sup> and “beat down the plaintiff’s counsel,”<sup>79</sup> and make their lives “somewhat miserable.”<sup>80</sup>

Apart from the cost of researching and briefing individual qualified immunity motions, learning about and staying abreast of changes in qualified immunity doctrine is time-consuming. Courts and commentators have long observed that qualified immunity is exceedingly complex.<sup>81</sup> Attorneys I interviewed reported that mastering this complexity requires a significant amount of time and commitment.<sup>82</sup> As one attorney explained, “qualified immunity is not easily understandable. You have to read a lot of cases and do a lot of research.”<sup>83</sup> Another attorney described qualified immunity as a “morass” that attorneys entering into this practice area need to “sort through.”<sup>84</sup> He continued: “[I]t takes an enormous amount of dedication to do these cases properly. I think it takes an enormous amount of experience to do them properly. And there’s a huge learning curve.”<sup>85</sup>

Qualified immunity motion practice and interlocutory appeals additionally increase the time associated with litigating these cases.<sup>86</sup> In my

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<sup>76</sup> N.D. Cal. Attorney B.

<sup>77</sup> M.D. Fla. Attorney B; *see also* N.D. Ohio Attorney G (predicting that his fees would “go down” if qualified immunity were eliminated).

<sup>78</sup> M.D. Fla. Attorney B.

<sup>79</sup> E.D. Pa. Attorney A.

<sup>80</sup> *Id.*

<sup>81</sup> *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (“One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves.” (footnote omitted)); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (describing qualified immunity as “a mare’s nest of complexity and confusion”).

<sup>82</sup> *See, e.g.*, M.D. Fla. Attorney F (explaining that lawyers who “don’t regularly” bring civil rights cases get “caught on qualified immunity”); N.D. Ohio Attorney C (explaining that civil rights cases “require a huge amount of work, investment of time by the attorney and you better know your stuff like qualified immunity for example”); S.D. Tex. Attorney C (“I went through a three-year learning curve to get up to grasp—up to speed on [civil rights doctrines], and it’s a lot of information.”); *see also infra* notes 83–85 and accompanying text.

<sup>83</sup> S.D. Tex. Attorney F.

<sup>84</sup> M.D. Fla. Attorney C.

<sup>85</sup> *Id.*

<sup>86</sup> *Accord* Reinert, *supra* note 71, at 2082 (finding that the median time from filing to trial was longer in cases in which qualified immunity was raised, which he found “unsurprising, because one would assume that cases involving qualified immunity would take longer to resolve, given the opportunity for motion practice and interlocutory appeal”).

docket dataset, the interlocutory appeals that were decided on the merits took, on average, 441 days from filing to resolution.<sup>87</sup> In almost 6% of the cases in which defendants brought motions to dismiss on qualified immunity grounds, defendants sought and received formal stays of discovery while the motions were pending.<sup>88</sup> Discovery was stayed in these cases for more than 150 days, on average.<sup>89</sup>

Several attorneys observed that qualified immunity increased the time it takes to litigate civil rights cases.<sup>90</sup> Attorneys were clearly frustrated by these delays in and of themselves,<sup>91</sup> but additionally reported that these delays add to the cost necessary to litigate these cases and can, in some cases, weaken the cases on the merits. One attorney described the uncomfortable choice of either continuing to prepare for an uncertain trial while the case is on interlocutory appeal, or growing unfamiliar with the case in the year or more that it is on appeal and relearning its details again later in preparation for trial.<sup>92</sup> Witnesses' recollections of critical facts may fade over the months

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<sup>87</sup> Of the forty-one interlocutory appeals I tracked in my docket dataset, one was dismissed for lack of jurisdiction, and sixteen were withdrawn.

<sup>88</sup> Discovery stays were formally granted in eight cases, which amounts to 5.9% of the cases in which qualified immunity was raised at the motion to dismiss stage (136), and 5.2% of all motions to dismiss raising qualified immunity (154). *See* Schwartz, *supra* note 5, at 30, 33.

<sup>89</sup> *See* Butcher v. City of Cuyahoga Falls, No. 5:11-cv-939, 2011 WL 5971043, at \*2 (N.D. Ohio Nov. 28, 2011) (case stayed eighty-eight days while motion for judgment on the pleadings pending); Belniak v. Fla. Highway Patrol, No. 8:12-cv-1334-T-35MAP, 2014 WL 11394864 (M.D. Fla. March 24, 2014) (case stayed twenty-six days while motion to dismiss pending); Simmons v. Rutherford, No. 3:12-cv-946-J-25MCR, 2012 WL 4828582, at \*1 (M.D. Fla. Oct. 10, 2012) (case stayed 171 days while motion to dismiss pending); Holton v. Blankinship, No. 3:11-cv-00325, at 2 (M.D. Fla. Aug. 8, 2011) (case stayed sixty-three days while motion to dismiss pending); Stiles v. Judd, No. 8:12-cv-02375-T-27EAJ, 2013 WL 4714402, at \*1 (M.D. Fla. Aug. 30, 2013) (case stayed 199 days while motion to dismiss pending); Harvey v. Montgomery County, No. 11-cv-1815, 2012 WL 12530, at \*1 (S.D. Tex. Jan. 3, 2012) (case stayed 174 days while motion to dismiss pending); Hinojosa v. Sandlin, No. 1:12-cv-00012, at 1 (S.D. Tex. Jan. 23, 2012) (case stayed 293 days while motion to dismiss pending); Shabazz v. City of Houston, No. 4:11-cv-1125, 2012 WL 12877853, at \*1 (S.D. Tex. Mar. 30, 2012) (case stayed 213 days while motion was pending).

<sup>90</sup> *See, e.g.*, N.D. Cal. Attorney B (describing a case that took eight years to resolve because of qualified immunity appeals); N.D. Cal. Attorney F (explaining that interlocutory appeals “delay everything by 18 months”); N.D. Ohio Attorney D (explaining that qualified immunity increases the time it takes to litigate a case by “six months to a year” because of the appeals); N.D. Ohio Attorney G (explaining that one of his cases “got delayed for a year and a half when it went up [to the] Sixth Circuit and back.”); *see also infra* notes 91–93, 103 and accompanying text.

<sup>91</sup> *See, e.g.*, E.D. Pa. Attorney A (“I’m particularly irked when frivolous qualified immunity claims which are shut down by the district court on summary judgment end up being the subject of interlocutory appeal. So you’ve got to spend another six to twelve months or longer dealing with that.”); M.D. Fla. Attorney G (“You used to be able to get a jury trial and go win money. Now you’ll get an interlocutory appeal to the 11th Circuit . . .”).

<sup>92</sup> *See, e.g.*, M.D. Fla. Attorney E (describing preparing jury instructions, his witness list, and exhibits while a denial of qualified immunity was on interlocutory appeal).

or years that qualified immunity motions are litigated and appealed.<sup>93</sup> And interlocutory appeals require attorneys to brief and argue their cases in a court of appeals—a setting that may be less familiar and less comfortable than a district court for some attorneys.<sup>94</sup>

My docket dataset suggests some regional variation in the costs associated with litigating qualified immunity. Defendants in the Southern District of Texas and Middle District of Florida raised qualified immunity in a greater percentage of cases than did defendants in the other three districts.<sup>95</sup> Defendants in the Southern District of Texas and the Middle District of Florida more often raised qualified immunity at the motion to dismiss stage than did defendants in the other three districts,<sup>96</sup> and more often raised qualified immunity at multiple stages of litigation.<sup>97</sup> Courts in the Southern District of Texas and the Middle District of Florida also granted stays of discovery while qualified immunity motions were pending more often than did courts in the other districts.<sup>98</sup> By each of these metrics, the costs of

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<sup>93</sup> See Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah*, *supra* note 27, at 19 (“The resources required to see [an interlocutory appeal] through may render the effort untenable, with financial outlays compounding as evidence grows stale. These effects will be especially pronounced for claims promising only modest monetary recovery.”); Alphonse A. Gerhardtstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 264 (2016) (“Interlocutory appeals cause witnesses’ memories to fade or disappear . . . .”); see also S.D. Tex. Survey 5 (“I have never handled a 1983 suit that didn’t have an interlocutory appeal in the middle—while witnesses disappear and documents get shredded.”).

<sup>94</sup> See, e.g., N.D. Cal. Attorney B (explaining that interlocutory appeals are frustrating in part because “we’re trial lawyers and we don’t want to be appellate lawyers”).

<sup>95</sup> In the Southern District of Texas and the Middle District of Florida, defendants raised qualified immunity in 54.7% and 54.2% of the cases in which the defense could be raised, respectively, compared to 47.5% of the cases in the Northern District of Ohio, 33.8% of the cases in the Northern District of California, and 23.9% of the cases in the Eastern District of Pennsylvania. See Schwartz, *supra* note 5, at 29.

<sup>96</sup> In the Middle District of Florida and the Southern District of Texas, defendants raised qualified immunity in a motion to dismiss in 32.9% and 19.8% of the cases in which the defense could be raised, respectively, compared to 12.2% of the cases in the Northern District of Ohio, 7.8% of the cases in the Northern District of California, and .08% of the cases in the Eastern District of Pennsylvania. See *id.* at 29, 30.

<sup>97</sup> In the Middle District of Florida and the Southern District of Texas, defendants raised qualified immunity two or more times in 13.6% and 9.4% of the cases in which the defense could be raised, respectively, compared to 6.1% of the cases in the Eastern District of Pennsylvania, 6% of the cases in the Northern District of California, and 3.6% of the cases in the Northern District of Ohio. See *id.* at 33.

<sup>98</sup> Of the twenty-three qualified immunity motions to dismiss in the Southern District of Texas, three (13%) cases were stayed while the motions were pending. Of the fifty-nine qualified immunity motions to dismiss in the Middle District of Florida, four (6.8%) cases were stayed while the motions were pending. Of the seventeen qualified immunity motions to dismiss in the Northern District of Ohio, one (5.8%) case was stayed while the motion was pending. There were thirty motions to dismiss on qualified immunity grounds brought in the Eastern District of Pennsylvania and fourteen motions to dismiss on

litigating qualified immunity are higher in the Southern District of Texas and the Middle District of Florida than in the other three districts in my study. But plaintiffs in the Northern District of Ohio bear one type of qualified immunity-related cost more than those in any other district in my study: defendants in the Northern District of Ohio are far more likely to immediately appeal denials of qualified immunity.<sup>99</sup>

Attorneys' reports of the costs associated with qualified immunity are consistent with the regional variation apparent in the docket dataset. Attorneys from the Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio reported that defendants usually raise qualified immunity at summary judgment.<sup>100</sup> In contrast, attorneys from the Southern District of Texas and Middle District of Florida reported that defendants regularly raise qualified immunity in both motions to dismiss and at summary judgment.<sup>101</sup> Attorneys from Texas and Florida described

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qualified immunity grounds brought in the Northern District of California; no cases were stayed while any of these motions were pending.

<sup>99</sup> Defendants in the Northern District of Ohio brought interlocutory appeals in seventeen of thirty-five (48.6%) partial or full denials of qualified immunity. In contrast, defendants in the Southern District of Texas brought interlocutory appeals in five of twenty-six (19.2%) partial or full denials of qualified immunity; defendants in the Middle District of Florida brought interlocutory appeals in nine of the forty-six (19.6%) partial or full denials of qualified immunity; defendants in the Northern District of California brought interlocutory appeals in nine of forty-three (20.9%) partial or full denials of qualified immunity; and defendants in the Eastern District of Pennsylvania brought interlocutory appeals in one of forty-one (2.4%) partial or full denials of qualified immunity. *See id.* at 40.

<sup>100</sup> *See, e.g.*, N.D. Cal. Attorney A (explaining that qualified immunity practice depends on the jurisdiction, that "San Francisco does not typically file a 12(b) motion on a police excessive force case," and that "defense attorneys will always include a qualified immunity section of their summary judgment motions"); N.D. Cal. Attorney E (explaining that "most of the lawyers in the Bay Area" wait until summary judgment to raise qualified immunity); N.D. Cal. Attorney F (explaining that defendants usually include qualified immunity in their summary judgment motions but that he has not seen qualified immunity raised at the motion to dismiss); N.D. Ohio Attorney C ("I don't think I've ever had a police misconduct case where defendant's counsel did not file a motion for summary judgment and which allows in large part qualified immunity. So absolutely qualified immunity is a huge issue in these types of cases."); N.D. Ohio Attorney F (explaining that qualified immunity is not raised in excessive force cases at the motion to dismiss, but that it sometimes is in "more murky legal case[s]"); N.D. Ohio Attorney G (explaining that "district judges really don't like qualified immunity motions at the pleading stage" but that "we still get qualified immunity motions on summary judgment in almost every case"); E.D. Pa. Attorney F (explaining that defense counsel "put [qualified immunity in] every summary judgment motion" but "almost never at motion to dismiss stage"); E.D. Pa. Attorney G (reporting that defense counsel will "save" qualified immunity arguments for summary judgment).

<sup>101</sup> *See, e.g.*, M.D. Fla. Attorney B (explaining that, even a few years ago, qualified immunity motions "did not appear in some motions for summary judgment" but "now it's coming up in more and more motions to dismiss"); M.D. Fla. Attorney D (explaining that qualified immunity is raised "every time, even if it's not valid they'll take a stab at it, they'll take a run at it"); M.D. Fla. Attorney G (explaining that defendants raise qualified immunity in motions to dismiss); S.D. Tex. Attorney B



defendants' efforts to stay proceedings while motions to dismiss raising qualified immunity were pending,<sup>102</sup> and attorneys from Ohio complained about delays associated with interlocutory appeals.<sup>103</sup>

### *B. How Qualified Immunity Affects the Probability of Success*

Qualified immunity can reduce the likelihood of success because a successful motion can cause a plaintiff's case to be dismissed. In my docket dataset, I found that this happened relatively rarely.<sup>104</sup> Just seven (0.6%) of the 1,183 cases in my dataset were dismissed at the motion to dismiss stage on qualified immunity grounds, and just thirty-one (2.6%) of the 1,183 cases in my dataset were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds.<sup>105</sup> But the likelihood of dismissal on qualified immunity is greater in some districts than in others. Cases in the Southern District of Texas had the highest risk of dismissal on qualified immunity—9.2% of cases filed there were dismissed on qualified immunity grounds. In contrast, 6.7% of cases filed in the Middle

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(reporting that defendants raise qualified immunity in motions to dismiss “[e]very single time without fail. . . . [in] every kind of police misconduct case every time”).

<sup>102</sup> See M.D. Fla. Attorney B (explaining that defense attorneys “always try” to get stays while qualified immunity motions are pending but “I would say that maybe once or twice in all the cases that I can think of they were actually able to get stays”); S.D. Tex. Attorney B (describing that “the first thing [defendants] do is file a motion to dismiss and since the court will not allow discovery in a . . . case where they assert qualified immunity prior to ruling on a motion to dismiss, you’re just hamstrung because you can’t get the discovery before suit”).

<sup>103</sup> See, e.g., N.D. Ohio Attorney D (explaining that cases would be “completed sooner” without qualified immunity “because if qualified immunity is granted, I appeal it. If qualified immunity is denied, they appeal it. It adds time and then [adds] lawyer hours, it [adds] briefing hours, it adds argument hours. The whole court of appeals component adds another year, year and a half to a case in our circuit”); N.D. Ohio Attorney E (“[Qualified immunity] gives the defendants the ability to call timeout in the middle of litigation . . . . [D]efendants get a free shot [to get the case dismissed through an interlocutory appeal and] they often take it.”); N.D. Ohio Attorney F (describing interlocutory appeals as “a tactic that most of the defense lawyers just feel they have to use . . . . They don’t care if they are shut down [on appeal], because at least they get the benefit of the delay” and observing that defendants appeal qualified immunity denials “whenever they can”); N.D. Ohio Attorney G (describing a case that was delayed for a year and a half while on interlocutory appeal).

<sup>104</sup> See generally Schwartz, *supra* note 5 (finding that qualified immunity was rarely the formal reason cases were dismissed in five federal districts over a two-year period). Although my study did not consider the role of qualified immunity at trial, Alexander Reinert has recently studied this question by looking at 287 cases in which qualified immunity was raised, jury instructions were proposed, and the case went to or through a jury trial. Reinert, *supra* note 71. Consistent with my findings about the impact of qualified immunity when raised in motions to dismiss and at summary judgment, Reinert found that “qualified immunity rarely plays a significant role in jury trials.” *Id.* at 2088.

<sup>105</sup> Schwartz, *supra* note 5, at 45. When one eliminates pro se filings from the dataset, just 0.2% of the 910 cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 3.4% were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds.

District of Florida, 2.3% of cases in the Northern District of Ohio, 1.2% of cases in the Northern District of California, and 1% of cases in the Eastern District of Pennsylvania were dismissed on qualified immunity grounds.<sup>106</sup>

Attorneys from the different districts described the likelihood of dismissal on qualified immunity grounds in a manner consistent with the regional variation seen in the docket dataset. In the Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio, attorneys reported that defendants regularly raise qualified immunity—particularly in false arrest cases—but that qualified immunity motions are infrequently granted.<sup>107</sup> Attorneys in these districts reported that they can avoid dismissal on qualified immunity grounds if they can create an issue of fact, and reported that excessive force cases are rarely if ever dismissed on qualified immunity grounds.<sup>108</sup> In contrast, attorneys from the Southern District of Texas and the Middle District of Florida expressed more concern about the prospect of dismissal on qualified immunity grounds in all types of cases and at all stages of litigation.<sup>109</sup>

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<sup>106</sup> *Id.* at 46. If one looks only at represented plaintiffs, the results are approximately the same: Ten of 104 (9.6%) counseled cases filed in the Southern District of Texas were dismissed on qualified immunity grounds, compared with twelve of 148 (8.1%) counseled cases filed in the Middle District of Florida, four of 131 (3.1%) counseled cases filed in the Northern District of Ohio, three of 187 (1.6%) counseled cases filed in the Northern District of California, and four of 340 (1.2%) counseled cases filed in the Eastern District of Pennsylvania. *Id.*

<sup>107</sup> *See, e.g.*, E.D. Pa. Attorney A (explaining that if he gathers the evidence necessary to create a factual dispute that defeats summary judgment, the “great bulk of the judges here are going to follow the law and not grant qualified immunity in most cases”); E.D. Pa. Attorney E (reporting that defendants do raise qualified immunity, but “it doesn’t work [in the Eastern District of Pennsylvania] for the most part”); N.D. Cal. Attorney A (reporting that “defense attorneys will always include a qualified immunity section of their summary judgment motions” but “with more video [recordings] available, we can create triable issues of fact, and the qualified immunity defense, so long as we have an expert and they have an expert, does not tend to be disposing of as many of these cases”); N.D. Ohio Attorney G (explaining that he “can’t think of one” case of his that has been dismissed on the pleadings).

<sup>108</sup> *See, e.g.*, E.D. Pa. Attorney A (“I think the law is now so well developed . . . that it’s really tough . . . to lose . . . an excessive force case on qualified immunity grounds.”); E.D. Pa. Attorney D (“I have never heard of a motion for qualified immunity in just excessive force [cases] here. Not just my cases but any cases.”); E.D. Pa. Attorney F (“[W]ith respect to excessive force cases, I seldom . . . if ever see the court grant a summary judgment on those qualified immunity issues . . . .”); E.D. Pa. Attorney G (“If we [think force used by an officer is unreasonable], I don’t think qualified immunity deters us in those cases.”); N.D. Cal. Attorney G (explaining that, in excessive force cases, “there are a lot more cases and even though you may not have a case on all fours, it’s easier to make the argument that the officer should have known that what he was doing violated the Constitution when he struck that person while he was on the ground in handcuffs or with one handcuff on with his face down, right?”).

<sup>109</sup> *See, e.g.*, M.D. Fla. Attorney F (explaining that he fears getting “bounced” on qualified immunity); M.D. Fla. Attorney G (describing one case in which a police officer fired forty-four bullets into a car but the Eleventh Circuit granted qualified immunity because there was not a prior case on point, and another case in which the Eleventh Circuit granted qualified immunity based on the pleadings); S.D. Tex. Attorney B (“Motions to dismiss [on qualified immunity] get granted a lot.”); S.D. Tex. Attorney C

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

[I]f you're going to go to federal court you're committing for one attorney . . . a fairly substantial amount of time and a substantial amount of funds for the client . . . There's nothing worse than championing a client's claim for two or three years and having it turn out to be a zero. That's not [a] good use of the attorney time—especially if you're on contingency fee. It's not a good use of the client's time—they end up unhappy, they get their hopes up, they turn down mediation money and then get nothing. That's not . . . desirable for anybody.<sup>110</sup>

Although cases are infrequently dismissed in the Eastern District of Pennsylvania and the Northern District of California on qualified immunity grounds, defendants in these districts generally raise qualified immunity at summary judgment, after plaintiffs' counsel have invested in costly discovery and motion practice.<sup>111</sup> Lawyers in these districts expressed concern that they would spend significant time and money in discovery, only to have the case dismissed on qualified immunity grounds at summary judgment.<sup>112</sup>

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

Qualified immunity may also decrease the size of judgments. In seventy-nine of the 1,183 cases (6.7%) in my dataset, district courts granted qualified immunity motions in whole or in part, but additional parties or claims remained in the case. It is possible that in some of these cases, courts may have dismissed the higher damages claims on qualified immunity grounds, even as they allowed other federal claims to proceed.<sup>113</sup>

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(explaining that when cases are dismissed at the motion to dismiss stage, "a large percentage are qualified immunity"); S.D. Tex. Attorney E ("[N]ine times out of ten they will win the qualified immunity argument."); S.D. Tex. Attorney F (describing a case in which police shot the plaintiff in the face while he was in a stationary vehicle but the court dismissed on qualified immunity grounds).

<sup>110</sup> M.D. Fla. Attorney D.

<sup>111</sup> See *supra* notes 97, 100 and accompanying text.

<sup>112</sup> See, e.g., N.D. Cal. Attorney B (explaining that attorneys need to factor in the fact that their case may be delayed by motion practice and interlocutory appeals, and that attorneys "have to factor in the appeal, and especially now with the courts going the way they are and your chances are reducing by having that level of uncertainty intervening"); E.D. Pa. Attorney D (explaining that a concern in case selection is "whether I think I'm going to get two years down the road, a year down the road, and then they file a qualified immunity [motion] and I'm out").

<sup>113</sup> For example, in *Porter v. City of Santa Rosa*, No. 3:11-cv-04886-EDL (N.D. Cal. Dec. 5, 2012), the district court dismissed the plaintiff's § 1983 claims against defendant police officers, leaving only

In other cases, courts dismissed all of plaintiffs' federal claims on qualified immunity grounds but allowed plaintiffs' parallel state law claims to proceed.<sup>114</sup> Even though these state law claims concerned the same conduct as the federal claims that were dismissed, plaintiffs may have been able to recover less for the state law claims than they could have for the federal claims. For example, Florida caps damages for state law claims at \$300,000 per claim.<sup>115</sup> Accordingly, when federal claims are dismissed on qualified immunity grounds, the total potential recovery—including attorneys' fees—is limited to \$300,000. This cap can diminish the potential size of recovery or discourage plaintiffs from continuing to pursue their claims.<sup>116</sup> Plaintiffs whose federal claims are dismissed also lose their opportunity to seek attorneys' fees under Section 1988.<sup>117</sup>

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his *Monell* claim against the City of Santa Rosa. See Notice of Motion, No. 3:11-cv-04886-EDL (N.D. Cal. May 7, 2012); Motion for Summary Judgment (July 2, 2012). Plaintiff's counsel stopped responding to defendant's communications, and the case was dismissed for failure to prosecute. See Order Dismissing Case, No. 3:11-cv-04886-EDL (N.D. Cal. Dec. 5, 2012). In *Killian v. City of Monterey*, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr. 16, 2014), the plaintiff alleged that he was falsely arrested for driving under the influence after he was found asleep in his car. He brought claims for unreasonable search and seizure, excessive force, malicious prosecution, and violation of due process and equal protection. *Id.* The court granted defendant qualified immunity for all but the equal protection claim. See Order Granting-in-Part Defendants' Motion for Summary Judgment, *Killian*, No. 5:12-cv-05418-PSG, 2013 WL 6577064 (N.D. Cal. Dec. 13, 2013). Given the claims that were dismissed and the claim that remained, the summary judgment order may well have decreased the case's value. The parties subsequently entered settlement negotiations, and the plaintiff approved—but later refused to sign—the settlement agreement. See Order to Show Cause, *Killian*, No. 5:12-cv-05418-PSG (N.D. Cal. Feb. 20, 2014). Plaintiff's counsel then withdrew from the case and the last claim was dismissed. See Order Granting Summary Judgment and Motion to Withdraw, *Killian*, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr. 16, 2014).

<sup>114</sup> There were eight cases in my dataset in which federal claims were dismissed on qualified immunity grounds and the state law claims were dismissed without prejudice or remanded to state court. See Schwartz, *supra* note 5, at 42 n.103. In at least four additional cases, plaintiffs voluntarily dismissed their federal claims while qualified immunity motions were pending, so their state law claims were remanded to state court. See, e.g., *Glass v. City of Saint Petersburg*, No. 8:12-cv-02405-RAL-TGW (M.D. Fla. filed Oct. 24, 2012); *Cooks v. Bailey*, No. 3:12-cv-00869-HES-JBT (M.D. Fla. filed Aug. 1, 2012); *Joseph v. City of Orlando*, No. 6:12-cv-00131-JA-DAB (M.D. Fla. filed Jan. 27, 2012); *Forde v. Home Depot*, No. 2:11-cv-05823-JS (E.D. Pa. filed Sept. 15, 2011).

<sup>115</sup> See Fla. Stat. Ann. § 768.28 (West 2017).

<sup>116</sup> In one case in my docket dataset, *Spann v. Verdoni*, a Sarasota County deputy sheriff shot and killed a 20-year-old after he and a friend rang the deputy's doorbell late at night as a prank. *Spann v. Verdoni*, No. 8:11-cv-00707-TBM (M.D. Fla. filed Apr. 4, 2011). The district court granted the deputy summary judgment on the federal claims (granting qualified immunity in the alternative) and remanded the state claims to state court. See Summary Judgment Order, *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Nov. 27, 2012). The decedent's family's attorney informed me that his clients "made the decision not to pursue an action in State court" because the damages cap "severely restrict[ed] potential damages." E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, to author (Mar. 2, 2017, 10:15 AM) (on file with journal).

<sup>117</sup> See *supra* note 39 and accompanying text.

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

Some attorneys report—and my docket dataset suggests—that concerns about the costs and risks of qualified immunity sometimes cause them to encourage their clients to settle.<sup>118</sup> But do those costs and risks cause plaintiffs' attorneys to screen out cases before filing? And, if so, are the cases screened out “insubstantial,” as the Supreme Court has written it intends? In Part IV, I consider these questions.

#### IV. QUALIFIED IMMUNITY AND CASE SELECTION

Theories of case selection expect that lawyers accepting cases on contingency will be less inclined to accept cases where the anticipated costs exceed the likely return.<sup>119</sup> As I showed in Part III, attorneys across the five federal districts in my study reported that qualified immunity increases the costs and risks of civil rights litigation, and can reduce the size of a judgment. Accordingly, one would assume that attorneys would be less likely to accept cases where defendants are likely to raise qualified immunity in pretrial motions, and particularly unlikely to accept cases vulnerable to dismissal on qualified immunity grounds.

The docket dataset can only measure the effects of qualified immunity on case selection in an indirect way—by comparing the role of qualified immunity in pro se and counseled cases. If one assumes that attorneys—but

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<sup>118</sup> See, e.g., N.D. Cal. Attorney D (“[E]ven if I win on summary judgment, I might settle the case knowing that there’s a possibility that . . . qualified immunity could be a problem at trial.”); E-mail from N.D. Ohio Attorney B to author (Jan. 18, 2018, 11:14 AM) (reporting that concerns about qualified immunity caused clients to settle a case because they “did not want to either win and have [defendants] appeal or us lose and us appeal—this would have stopped the case dead in the water for approximately a year and a half”).

<sup>119</sup> See *supra* note 34-37 and accompanying text.

not pro se plaintiffs—evaluate the costs and risks of qualified immunity when deciding whether to file a case, and decline to file cases where those costs and risks are high,<sup>120</sup> one might expect that pro se plaintiffs would more often file cases vulnerable to dismissal on qualified immunity grounds, and more of their cases would, in fact, be dismissed on qualified immunity. My docket dataset does not support this theory. Pro se plaintiffs were successful far less often than represented plaintiffs,<sup>121</sup> and cases brought by pro se plaintiffs were, on average, dismissed earlier in the course of litigation.<sup>122</sup> But defendants raised qualified immunity in the same percentage of pro se and counseled cases (37.6%). And three times more counseled cases than pro se cases were dismissed on qualified immunity grounds.<sup>123</sup> Courts were more likely to grant defendants’ motions to dismiss and for summary judgment in cases brought by pro se plaintiffs—but they were less likely to grant those motions on qualified immunity grounds.<sup>124</sup> These data suggest that pro se plaintiffs are far less likely to succeed, but that neither defendants nor courts view pro se cases as more vulnerable to dismissal on qualified immunity grounds. This evidence is consistent with my previously stated view that qualified immunity is neither necessary nor well-suited to dismiss “insubstantial” cases before discovery and trial.<sup>125</sup> However, it does not foreclose the possibility that attorneys’ concerns about qualified immunity cause them to file more “substantial” cases than plaintiffs proceeding pro se.

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

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<sup>120</sup> For the bases for this assumption, see *supra* notes 52–53 and accompanying text.

<sup>121</sup> Just 16.1% of cases (44 out of 273) brought by pro se plaintiffs ended with a settlement, voluntary dismissal, or verdict partially or wholly in plaintiffs’ favor, whereas 71% of cases (637 out of 910) brought by represented plaintiffs ended with one of these outcomes.

<sup>122</sup> A total of 41.4% of pro se cases (113 out of 273) were dismissed sua sponte before the defendant answered, as compared to 1.4% of cases (13 out of 910) brought by represented plaintiffs. And 19% (52) of pro se plaintiffs’ cases were dismissed at the motion to dismiss stage, as compared to 4.5% (41) of cases brought by represented plaintiffs.

<sup>123</sup> A total of 3.6% of counseled cases and 1.5% of pro se cases were dismissed on qualified immunity.

<sup>124</sup> Although I did not track the bases for dismissals in these cases, cases at the motion to dismiss stage often fail because plaintiffs have not pled plausible claims or because a criminal conviction bars the claims, and at summary judgment courts often find that the plaintiffs have not presented sufficient evidence to create a material factual dispute about the existence of a constitutional violation. See Schwartz, *supra* note 5, at 56–57.

<sup>125</sup> See *id.* at 53–57.

the role qualified immunity plays in these attorneys' case-selection decisions.

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

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

Third, attorneys who decline cases vulnerable to motion practice and dismissal on qualified immunity reported doing so for reasons unrelated to the cases' merits. Instead, attorneys I interviewed reported declining cases if the cost of litigating qualified immunity outweighs the likely financial rewards, cases with fact patterns that have not previously been held unconstitutional, and cases involving certain types of claims—especially false arrest claims—where attorneys believe they must produce evidence of intentional misconduct to defeat qualified immunity motions.

Fourth, qualified immunity appears to cause some lawyers to reduce the number of civil rights cases they bring and discourage other attorneys from filing any civil rights cases. One attorney I interviewed reported that he has stopped accepting Section 1983 cases because immunities pose an insurmountable barrier. Circumstantial evidence suggests that the challenges of civil rights litigation—including qualified immunity—may cause many more lawyers to decrease the number of civil rights cases they file or get out of the business of civil rights litigation altogether.

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

#### *A. Attorneys' Case-Selection Considerations*

When I asked attorneys what factors they take into account when deciding whether to accept a case, five volunteered qualified immunity as a consideration, and another seventeen agreed, when asked, that qualified immunity plays a role. When I asked why attorneys considered qualified

immunity when selecting cases, I received predictable responses about the costs and risks associated with the doctrine. But every attorney I interviewed described multiple additional factors related to the probability of success, anticipated size of judgment, and cost of litigation that inform their case-selection decisions.

### *1. Considerations Related to the Probability of Success*

Many attorneys I surveyed and interviewed believe that judges and juries are more sympathetic to police officer defendants and generally hostile to plaintiffs' claims. When I surveyed attorneys about the biggest obstacle to bringing police misconduct cases, attorneys' most common answers were judges and juries.<sup>126</sup> Attorneys I interviewed agreed, observing that judges and juries are often unsympathetic to their clients, and that this perceived preference for government defendants can cause judges and juries to dismiss plaintiffs' claims or award plaintiffs minimal damages.<sup>127</sup>

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<sup>126</sup> Eighty-five of the ninety-four attorneys who took the survey answered this question, and offered a total of 114 responses. Twenty-seven (31.8%) of these attorneys described juries as one of the biggest obstacles to success, and twenty-two (25.9%) described judges as one of their biggest obstacles. *See* Appendix Table 6; *see also, e.g.*, E.D. Pa. Survey 11 ("Judges and juries still tend to believe police officers over citizens."); E.D. Pa. Survey 17 (describing "more rural/suburban juries" in federal court); E.D. Pa. Survey 18 ("Jury bias."); E.D. Pa. Survey 5 ("[C]itizens, judges and jurors believe a police officer's word over that of anybody else."); E.D. Pa. Survey 2 ("Juries believing cops."); N.D. Cal. Survey 10 ("The deference the courts give to police officers and law enforcement agencies."); N.D. Cal. Survey 8 ("The judges are extremely conservative. Pro-police bias all around."); N.D. Cal. Survey 7 ("Juries like police."); N.D. Cal. Survey 20 ("Judges excluding evidence of past misconduct of officers involved while including evidence of prior bad acts of victims thereby tainting the jurors' view of the victims."); N.D. Cal. Survey 9 ("Juror bias against minorities."); N.D. Ohio Survey 11 ("Public perception that police are acting in good faith."); N.D. Ohio Survey 1 ("Racism by public and judges."); N.D. Ohio Survey 2 ("Pro-police bias by judges."); M.D. Fla. Survey 15 ("Federal law and federal judges."); M.D. Fla. Survey 9 ("Jury sympathy with police."); M.D. Fla. Survey 5 ("Very conservative juries who lack empathy towards minorities and love [t]he police."); M.D. Fla. Survey 4 ("Having a sympathetic finder of fact."); S.D. Tex. Survey 17 ("Inherent racism."); S.D. Tex. Survey 16 ("Public attitude is very supportive of law enforcement."); S.D. Tex. Survey 11 ("Community perceptions about law enforcement."); S.D. Tex. Survey 10 ("Jurors and judges trust cops more than citizens."); S.D. Tex. Survey 5 ("Racial prejudice. If the cop doesn't bloody the arrestee . . . juries are more likely to let the cop off."); S.D. Tex. Survey 12 ("Juries will give police '2 strikes' before holding them accountable.").

<sup>127</sup> *See, e.g.*, E.D. Pa. Attorney A (explaining that federal juries are often conservative and "when we win . . . they give us very little"); E.D. Pa. Attorney C (observing that it is difficult to win before federal juries and that "federal courts are just very hostile to these kinds of cases"); E.D. Pa. Attorney D ("[F]ederal juries are very difficult."); M.D. Fla. Attorney A (explaining that judges in the Middle District of Florida "see these cases as almost a nuisance, waste of time" and describing a case in which a jury awarded \$1 to a man who, while in handcuffs, was kneed in the abdomen so hard that he lost his spleen); M.D. Fla. Attorney B ("The judges tend to simply accept what the police say as gospel."); M.D. Fla. Attorney E (describing a case where the plaintiff was bitten by a police dog, and the plaintiff was left "with [a] leg that look[ed] a chicken bone" and the jury entered a defense verdict); M.D. Fla. Attorney F (explaining "the jurors here are pretty damn conservative in the federal court"); S.D. Tex. Attorney B (explaining that "[c]ourts are so conservative" in the Southern District of Texas, and juries are "very pro



Accordingly, it should come as no surprise that attorneys look for cases and plaintiffs that judges and juries might find compelling. Part of this calculation concerns the underlying facts of the case. Attorneys report that they look for cases where the facts not only establish a constitutional violation, but are “horrific” or “outrageous.”<sup>128</sup> As one attorney explained, “I mean, if I’m shocked . . . I figure then maybe some jurors will be shocked.”<sup>129</sup>

Attorneys also look for cases with strong evidence of government liability. Ideally, the police department’s own reports establish that the police officer had engaged in wrongdoing.<sup>130</sup> If not—and it will be the officer’s word against the plaintiff’s—attorneys reported that they are more likely to take a case if there is a video or other evidence to corroborate the plaintiff’s claims and undermine the claims of the officer(s).<sup>131</sup>

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police”); S.D. Tex. Attorney D (“[A] lot of the judges here are pro-police, pro-government and the cases are just more difficult to prosecute here.”).

<sup>128</sup> M.D. Fla. Attorney A (“[T]he conduct has to be somewhat egregious [and] the client didn’t provoke the conduct or cause what happened to him.”); M.D. Fla. Attorney B (“You’re looking for cases where the facts are horrific.”); N.D. Cal. Attorney C (explaining that he considers “how outrageous the conduct looks on the video”); *see also* E.D. Pa. Attorney B (“[I]f I tell the story of what happened here the person who is sitting on the other side hearing that story is going to go, ‘Really? They did that?’ If I don’t get that reaction that’s going to be a difficult case.”); E.D. Pa. Attorney F (“I consider, does what they’re telling me sound like a constitutional violation where there would be some measure of maliciousness involved or some kind of racial prejudice or other kind of prejudice?”); N.D. Ohio Attorney D (looking for cases with facts that “really demonstrate abuse and excessive [use] of force”); S.D. Tex. Attorney A (“It really just depends on the facts of the case and if I think it’s something that’s viable and more importantly is it something that I think the jury will understand.”); S.D. Tex. Attorney F (“[W]hat are the facts? Like, are you saying an officer called you a bad name and you want to sue them? Are you saying an officer shot you in the back ten times and you want to sue [them?]”).

<sup>129</sup> N.D. Cal. Attorney C.

<sup>130</sup> *See, e.g.*, M.D. Fla. Attorney C (“[T]here has to be a constitutional claim that I can prove. It’s helpful but not necessarily dispositive that when you read the police report, if you assumed everything is accurate that the cops still loses, which means that they have to lie their way out of it, and they’re not bashful about that—but that’s at least a good starting point.”).

<sup>131</sup> *See, e.g.*, E.D. Pa. Attorney G (“[T]he excessive force cases we bring, we almost always have something more than our client’s versions whether it’s on video or a photograph or very strong medical documentation or a witness.”); S.D. Tex. Attorney A (“Your typical tackling cases, or putting them to the ground, those are extremely difficult without some sort of video or witnesses or things of that nature, at least to illustrate that it’s not necessary.”); S.D. Tex. Attorney B (“If there’s video of course that’s a big factor.”); N.D. Cal. Attorney B (“There has to be a good witness to your version of events. Like this one I was just looking at there’s a guy who’s on probation and an officer sees him and sees he has a gun in his waistband and he was just talking with a friend. And the guy ran and of course the officer says he turns around and points the gun at him. So I need either a good witness or a video that gives us some evidence that that didn’t happen.”); N.D. Cal. Attorney G (“I take cases that a lot of lawyers don’t take and would never touch, either because I have a video that proves the officer lied or just because we have a great shot of proving that the officer lied in his report . . . and/or independent witnesses that are good witnesses that corroborate the victim’s story . . .”); M.D. Fla. Attorney C (“[I]f it turns out that the police report does at least allege something that rises to the level of a criminal offense, then do I have independent witnesses or objective evidence like a videotape that supports the argument that the police

Attorneys also reported considering whether the plaintiff would be compelling to a jury.<sup>132</sup> Attorneys want clients that juries will find sympathetic,<sup>133</sup> and therefore reported preferring plaintiffs who are “likeable,” “credible,” and “articulate.”<sup>134</sup> Some attorneys will not represent a person who was convicted of the underlying offense; a conviction or guilty plea bars a Section 1983 claim inconsistent with the criminal conviction,<sup>135</sup> and, even when the Section 1983 claim is not barred, some attorneys reported declining cases where the plaintiff was convicted of a crime in connection with the incident for fear that a jury would not find them sympathetic or credible.<sup>136</sup> Some lawyers reported reluctance to represent a person who has

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officer was dishonest in how they wrote their report.”); N.D. Cal. Attorney F (“We look to see were there witnesses? Is there video?”); N.D. Ohio Attorney G (“Sometimes, the person will feel very strongly that they were mistreated, and I’ll get the . . . bodycam and the video or cruiser cam, and I don’t agree.”).

<sup>132</sup> Plaintiffs’ attorneys’ interests in selecting plaintiffs they believe judges and juries will find sympathetic, likeable, and credible may make attorneys less likely to represent people of color, LGBTQ+ people, the mentally ill, and members of other marginalized groups—the very groups subject to disproportionate levels of policing. *See, e.g.*, DAVIS ET AL., *supra* note 1, at 4, 8, 16 (finding that Black residents were more likely to be stopped by police than white or Hispanic residents; that Black and Hispanic residents were more likely than white residents to have multiple contacts with police; and that police were twice as likely to threaten or use force against Black and Hispanic residents than white residents); DORIS A. FULLER ET AL., TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015) (reporting evidence that the mentally ill make up a disproportionate number of people killed by police); CHRISTY MALLORY ET AL., THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBTQ COMMUNITY 4–11 (2015) (describing studies showing discrimination and harassment of LGBTQ+ communities by law enforcement).

<sup>133</sup> *See, e.g.*, M.D. Fla. Attorney D (describing several cases brought on behalf of senior citizens who had interactions with the police).

<sup>134</sup> *See* E.D. Pa. Attorney F (“My number one consideration is whether it’s a case that I could take to trial and win. So I look at who the plaintiff is and what they tell me about what happened to them. Do they sound credible?”); E.D. Pa. Attorney C (“[C]redibility of the plaintiff is of course paramount . . . .”); N.D. Cal. Attorney C (“[P]art of it is the overall circumstances; the client, who is the client, do I think the client is likable, or do I think the jury would like or feel sympathetic to the client. That’s not necessarily a deal breaker but it’s nice . . . [if the client] is going to come across sympathetic and articulate.”); S.D. Tex. Attorney B (describing the credibility of the plaintiff or complainant as a factor when deciding whether to take a case).

<sup>135</sup> *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994).

<sup>136</sup> *See, e.g.*, E.D. Pa. Attorney E (reporting that he will not take a false arrest case if the plaintiff was “convicted of the underlying crime” because then jurors will believe “he either got what he deserved,” or conclude “I don’t believe it.”). Attorneys reported being less concerned when the civil claim was for excessive force. *See, e.g., id.* (explaining that “a different type of analysis” goes into excessive force cases because “a guy can be in the midst of committing a robbery, a police officer pursues him, but the police officer walks away without a scratch and this guy winds himself up in the hospital and he’s convicted of, say, the robbery, that is not an impediment at all to me taking the case”); M.D. Fla. Attorney C (“I tend to shy away from people who have not prevailed in the criminal arena . . . if it’s a use of force case, I’m far less likely to be concerned about the outcome in the criminal case, because I’ve known since the very beginning, people can be—can be guilty, and just beaten senseless.”).

ever been convicted of a crime, for fear that a jury will not believe them, or will award minimal damages because they have already been in the criminal justice system.<sup>137</sup>

## 2. Concerns Related to the Amount of Damages

Despite the availability of attorneys' fees if a plaintiff prevails at trial, plaintiffs' civil rights attorneys generally expect that their cases will settle—if they are successful—and that they will be paid a percentage of their client's settlement.<sup>138</sup> Accordingly, attorneys have strong incentives to accept cases with high potential damages.<sup>139</sup> Unsurprisingly, then, many attorneys reported that the amount of recoverable damages plays a significant role in their case-selection decisions,<sup>140</sup> and several attorneys reported declining cases with low damages.<sup>141</sup> As one attorney explained:

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<sup>137</sup> See, e.g., E.D. Pa. Attorney F (“Do they have a prior criminal history? Do they have a prior conviction history? Do they have a prior arrest history?”); M.D. Fla. Attorney A (“Generally, I won’t take a case if it’s somebody that’s ever been arrested before or spent time in jail because, usually, the only real damage you have is their loss of liberty and the trauma of going through the jail process and having charges pending. If somebody’s already had that in the past, then it’s not as traumatic or worth it in my opinion to take those cases.”); S.D. Tex. Attorney F (“[E]ventually the jury is the one who awards your client money and a three-time convicted child molester or a murderer . . . may get no money.”). Other attorneys expressed less concern about their clients’ criminal history. See, e.g., N.D. Cal. Attorney E (“I don’t care what crime he’s committed or whatever.”); S.D. Tex. Attorney A (“[M]ost of the people that have had a run in with the law, it’s not their first time to the rodeo so to speak. I’ve represented people that were two-time convicted murderers in regards to a due process case, so that does not necessarily sway my opinion one way or another. It really just depends on the facts of the case and if I think it’s something that’s viable and more importantly is it something that I think the jury will understand.”).

<sup>138</sup> See *supra* notes 35–39 (describing attorney fee arrangements).

<sup>139</sup> Despite these strong incentives, some attorneys accept cases with lower potential damages. Some attorneys reported that they are less concerned about taking a case with low damages if they expect to take the case to trial and win, some attorneys made clear that they are more interested in the values underlying the cases than the amount of recoverable damages, and some attorneys reported taking a combination of low- and high-damages cases to spread these financial risks. For further discussion of attorneys’ varying views regarding the importance of damages in case selection, see Schwartz, *supra* note 42.

<sup>140</sup> See, e.g., E.D. Pa. Attorney C (“[O]f course we look at damages.”); N.D. Cal. Attorney A (“Well, there has to be some damage, obviously. Nominal damages don’t get us anything in these cases, so you have to have some damage.”); N.D. Cal. Attorney C (“I will usually start with the victim’s injuries, either it’s a serious injury or the video is outrageous or both.”); E.D. Pa. Attorney F (reporting they consider “what their injuries are. For example, if I’m going to take a malicious prosecution case or a wrongful false arrest case, I consider how long they were in jail.”); M.D. Fla. Attorney B (“Obviously you’re looking for cases where the damages are significant.”); M.D. Fla. Attorney G (“I look at the case—of course the seriousness of the abuse is a big driver.”); S.D. Tex. Attorney B (describing the “severity of the injury” as one of the considerations when deciding whether to take a case); S.D. Tex. Attorney D (considers “the severity of the injury”); S.D. Tex. Attorney F (“[Y]ou look at the physical damages and the monetary damages just like you would in any other case.”).

<sup>141</sup> E.g., N.D. Ohio Attorney C (“[A]lways one of the issues is, you know, ‘Were they physically assaulted by the police officer?’ and if they say they [weren’t], I’m happy for them. No one wants

Obviously death cases or severe injury cases, I'm going to take a longer look at the case. But if it's a simple, like, they called me a name, or they used a derogatory term or—I spent—they kept me in the back of their car for four hours. I'm not going to take a case like that. But if there's a significant injury then I will.<sup>142</sup>

Another attorney put it more bluntly: “[I]t sounds crass but we say, ‘Well, is there blood on the street? Because if there isn’t, why are we doing it?’”<sup>143</sup>

### 3. *Concerns Related to the Cost of Litigation*

When a plaintiff's attorney receives a portion of her client's settlement, she profits only if she receives more than the value of her time plus any money she spent litigating the case. Accordingly, lawyers may estimate how much time and money they will need to invest in a case before prevailing, and qualified immunity is one of many costs associated with these cases. For example, one attorney reported considering the need for an expert when deciding whether a case made financial sense to accept.<sup>144</sup> Two attorneys reported that they consider where the law enforcement agency is, and how long it will take to travel to and from the department and the courthouse.<sup>145</sup> Some lawyers reported considering which jurisdiction is involved because different defense counsel have different approaches to defending these

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someone to be violently assaulted by a police officer. But [by] the same token there's quite a lesser chance that I will take the case. So, they have to illustrate to me some type of tangible and somewhat substantial damages . . . .”; N.D. Ohio Attorney F (“[W]e’ve been focusing on the cases where the damages are significant enough [for] the investment that we put into the case in time, and money, because you know these cases are expensive.”); N.D. Ohio Attorney G (“Sometimes it’s just the damages are really, really low.”); M.D. Fla. Attorney F (“[I]f someone is just arrested, I’m not a big fan of those. Frankly, it’s not worth my time.”); S.D. Tex. Attorney C (explaining that the main factor going into a decision about whether to take a case “is the extent of the injuries; a lot of people get handcuffed or falsely arrested or whatever, or even taken to jail for a few hours or overnight. It’s kind of like getting hit by a car but you don’t sustain any personal injury so they don’t have any kind of injuries. I’ll let those go . . . .”); *accord* KRITZER, *supra* note 37, at 84 (reporting that, for contingency fee attorneys, “lack of liability and inadequate damages (singly or together) are the dominant reasons for declining cases, accounting for about 80 percent”).

<sup>142</sup> S.D. Tex. Attorney D.

<sup>143</sup> M.D. Fla. Attorney E.

<sup>144</sup> *See* M.D. Fla. Attorney E; *see also* M.D. Fla. Attorney F (explaining he would be willing to bring cases in state court (which has a \$300,000 damages cap) that he “would rate \$50,000 to \$200,000 and don’t have a lot of expense,” and describing them as “kind of safe bets, because of where I could get them to settle”).

<sup>145</sup> *See* M.D. Fla. Attorney B (“You know distance might make a difference. So it’s kind of a mathematical calculation of miles divided by damages or you know whatever the formula is . . . . I’ve done some pretty serious police cases in Key West which is, you know, like 12 to 14 hours from here.”); N.D. Cal. Attorney D (explaining that “distance and location . . . is somewhat important”); M.D. Fla. Attorney D (explaining that she limits the number of federal cases she accepts in part because the federal courthouse is an hour from her office).

cases.<sup>146</sup> As one attorney explained: “[T]he agencies matter, they do. Some of them you just know that you’re going to have to go all the way, and you got to make the decision, am I going to go all the way.”<sup>147</sup>

#### 4. *Weighing the “Cornucopia of Factors”*

No lawyer described all of these considerations regarding the likelihood of success, amount of damages, and cost of litigation as relevant to their case-selection analysis, but every lawyer reported that some combination of these factors played into their decisions. Some lawyers noted one area of strength can make up for weaknesses in another area.<sup>148</sup> And several lawyers could not pinpoint what causes them to take a case.<sup>149</sup> As one described, “it’s a little like, how the United States Supreme Court defined pornography way back in the day . . . they can’t define it, but they know [it] when they see it.”<sup>150</sup>

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<sup>146</sup> See N.D. Cal. Attorney E (explaining that the City of San Jose offers very low settlements before trial because they want “to discourage lawyers from bringing 1983 claims,” but attorneys representing the county of Santa Clara “are willing to offer reasonable money to resolve the case sometimes” because “they look at it a little bit more from a business point of view”); M.D. Fla. Attorney F (reporting considering which jurisdiction is involved when deciding whether to take a case “because your chances of getting a resolution, short of getting in front of a jury . . . become more limited when you’re . . . dealing with a government entity like the City of Jacksonville”); M.D. Fla. Attorney D (explaining that some contract defense attorneys’ compensation is capped at \$50,000, so defense counsel “runs me around until they’ve gotten themselves paid \$50,000 and then they’ll start talking about settlements”).

<sup>147</sup> M.D. Fla. Attorney E.

<sup>148</sup> See, e.g., M.D. Fla. Attorney A (describing his general reluctance to accept a case where the plaintiff was previously arrested, but accepting one case despite the plaintiff’s criminal history because of the egregiousness of the facts); M.D. Fla. Attorney C (“[T]he stronger the Fourth Amendment violation, perhaps the less strong the client needs to be. Like, they can have obviously a horrific history of arrests, but if they’re a proven innocent person, if the case isn’t defensible, absent the police having a lie contradicting what’s in their police reports, I’ll probably do it. Unless the person is just such a jerk that I know that . . . they’ll never be happy with anything that I do.”); N.D. Ohio Attorney D (“I take cases for the following reasons. Number one, I really like the client and the client has a great case, the facts are—really demonstrate abuse and excessive of force. I take the case because I don’t like the client necessarily but the facts are great. I take the case because—I’ll take a case because everything sucks—not only do I not like the client but I don’t like the facts, but the issue is so important that I feel the need to litigate it, which I’m criticized for [by] my office because I lose money, but it fulfills me.”); N.D. Cal. Attorney G (“If it’s a he-said, she-said situation, I’m really less inclined to take that unless there’s some special factors like perhaps my client here is a salt of the earth little old lady who’s never had problems, and she tells a story that’s hard to believe, but the event can only be explained with her version, so, if there’s something unique, I’ll take a one-on-one, but it has to [be] something kind of really dramatic and novel and unique to that circumstance.”).

<sup>149</sup> See, e.g., M.D. Fla. Attorney C (“I cannot wrap my arms around what it is that causes me to think that this is the case I can work with.”); E.D. Pa. Attorney F (“[I]n the same way that the court considers the totality of circumstances, that’s kind of how I consider the cases.”).

<sup>150</sup> M.D. Fla. Attorney C.

For the twenty-one lawyers who reported considering qualified immunity when selecting cases, it is one among many considerations related to the likelihood of recovery, the amount of recovery, and the cost of litigation. As one attorney explained, qualified immunity “is part of a bunch of factors . . . [j]udge, type of government sued, criminal history of the plaintiff, plaintiff’s personality, and damages to name a few.”<sup>151</sup> Although “QI is always a negative weighing against taking a case,” it is among “a cornucopia of factors [he considers] in deciding whether to take a case.”<sup>152</sup>

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

Thirteen of the lawyers I interviewed reported that they do not consider qualified immunity at case selection.<sup>153</sup> Another eleven reported that they do consider qualified immunity at case selection, but rarely decline cases because of qualified immunity.<sup>154</sup> These twenty-four attorneys recognized that qualified immunity is often raised in civil rights cases, often makes litigation more complex and costly, and sometimes results in dismissal. Nevertheless, they offered four reasons why they rarely decline cases because of qualified immunity.

*1. Other Considerations Duplicate the Challenges of Qualified Immunity*

One reason that qualified immunity does not play a dominant role in these attorneys’ case-selection decisions is that other concerns duplicate and thereby minimize qualified immunity concerns.<sup>155</sup> For example, several attorneys reported that concerns about judges’ and juries’ predispositions against police misconduct suits cause them to select cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds.<sup>156</sup> As an attorney from the Eastern District of Pennsylvania explained, “[i]n the intake of the case I want to know that—qualified immunity or not—that if I tell the story of what happened

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<sup>151</sup> E-mail from S.D. Tex. Attorney F to author (June 9, 2018, 7:53 AM).

<sup>152</sup> E-mail from S.D. Tex. Attorney F to author (June 9, 2018, 7:29 AM).

<sup>153</sup> See Appendix Table 7 (setting out interviewed attorneys’ observations about whether and how qualified immunity influences their case-selection decisions).

<sup>154</sup> See Appendix Table 7.

<sup>155</sup> Alexander Reinert’s interviews with plaintiffs’ attorneys who bring *Bivens* cases revealed a similar perspective. See Reinert, *supra* note 48, at 493 (“[M]ultiple respondents indicated that they only accepted the most egregious cases for representation, which made it unlikely that qualified immunity would play a role.”).

<sup>156</sup> See *supra* notes 126–137 and accompanying text.

here the person who is sitting on the other side hearing that story is going to go, 'Really? They did that?' If I don't get that reaction that's going to be a difficult case."<sup>157</sup> As another attorney from the Eastern District of Pennsylvania explained:

[W]hen I say qualified immunity is not a major factor [in case selection,] I think that's because on excessive force particularly we're pretty careful to begin with, putting aside any possible qualified immunity. I think our screening is such that—because we know particularly with juries [that they] often rule for the police in these cases anyway—we want to make sure we've got a pretty strong claim. And that will incorporate almost always enough evidence to show what the officer claims to have happened isn't true and therefore, no qualified immunity.<sup>158</sup>

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

We're always evaluating: "Can we win?" If we think we can win, then we're not worried about the situation where it's close. Qualified immunity, I guess, would affect the marginal case where you're not sure you're going to win, and if it's close enough, the judge might say, "Well, I think the defendants were acting in good faith." But even just talking it through and think[ing] about it, I don't think qualified immunity affects our case selection.<sup>159</sup>

Several other attorneys agreed that they only take cases with egregious facts and clear constitutional violations because judges and juries tend to be very sympathetic to police and qualified immunity does not tend to be an issue in these types of cases.<sup>160</sup>

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<sup>157</sup> E.D. Pa. Attorney B.

<sup>158</sup> E.D. Pa. Attorney G.

<sup>159</sup> N.D. Ohio Attorney E.

<sup>160</sup> See, e.g., N.D. Cal. Attorney B (reporting that qualified immunity is not "where my decision point is . . . because it's all—I see it as so similar to whether you would win at trial"); N.D. Ohio Attorney C ("[I]t's kind of hard to argue that the officer has qualified immunity if the victim says the officer beat the crap out of the person. I don't see how I can argue qualified immunity for that . . . that's another reason why I'm looking for more those types of cases."); N.D. Ohio Attorney F (agreeing that qualified immunity is a consideration "but that doesn't scare me as much as what the case looks like if you're going to trial . . . [I]f we feel that the case is actually good in terms of what happened, and there are disputed facts, then we don't worry, we know [the qualified immunity motion is] going to come most likely. But we factor that in, I mean, it's just part of the litigation."); M.D. Fla. Attorney A (explaining that qualified immunity "really doesn't even come in as the factor" when selecting cases because he only takes cases with "clear . . . civil rights violation[s]").

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

A second reason that qualified immunity appears not to be a driving factor in case-selection decisions for some lawyers is that they have figured out how to structure cases in ways that limit the impact of the doctrine.<sup>161</sup> Attorneys reported bringing 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.<sup>162</sup>

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

[T]here are clearly instances where police officers find incredibly unique ways to violate people's rights, and I know that qualified immunity from the outset is going to be a problem. It may or may not deter me from accepting the case. But more commonly I'll try to find a way to work around it . . . .<sup>163</sup>

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

I can think of instances where I filed cases in the federal court, got the wrong judge. I voluntarily dismissed and refiled in the state court. . . . I'm always going to try to squeeze some money out of it in the state court if qualified immunity is going to be an impenetrable barrier.<sup>164</sup>

An attorney from the Eastern District of Pennsylvania described the same strategy, observing that, “[w]hen we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don't have to run up against the [qualified immunity] doctrine.”<sup>165</sup> As another Florida attorney explained, qualified immunity is “not the end-all be-all . . . . [I]t's a

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<sup>161</sup> *Accord* Reinert, *supra* note 48, at 493 (observing that some civil rights attorneys avoid qualified immunity by filing cases in state court).

<sup>162</sup> *See, e.g.*, E.D. Pa. Attorney G (explaining that he might not bring a damages claim regarding a right that is not clearly established, but might pursue a claim seeking injunctive relief); S.D. Tex. Attorney E (explaining that he can avoid qualified immunity by suing the municipality); N.D. Ohio Attorney G (describing a case his organization brought against a sergeant who organized a SWAT raid instead of the individual officers in the raid because they “didn't want to get distracted by their qualified immunity, which they thought they probably had”).

<sup>163</sup> M.D. Fla. Attorney C.

<sup>164</sup> *Id.*

<sup>165</sup> E.D. Pa. Attorney C.



barrier but it's a barrier to go around and if you're in litigation that's all you do every day all day anyway."<sup>166</sup>

### 3. *The Risks of Qualified Immunity are Unpredictable*

Some attorneys reported that qualified immunity plays a limited role in their case-selection decisions because courts' applications of the doctrine are so unpredictable. These attorneys observed that the judges in their jurisdiction have widely varying views of the doctrine, and so the dangers of qualified immunity often depend on which judge is assigned the case.<sup>167</sup> As one attorney from California explained, "qualified immunity is an issue everywhere, but it has more to do with what judge you get than the facts of the particular case."<sup>168</sup> Likewise, an attorney from Florida observed:

It's almost sort of a luck of the draw. If you get a certain judge, you think, "All right, I'm going to survive summary judgment." Other judges you get, you think, "All right, I know . . . I'm going to have a summary judgment against me and I'm going to have to file at [the] Eleventh Circuit and get it reversed."<sup>169</sup>

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

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

Several attorneys reported that they accept some cases, knowing they might be dismissed on qualified immunity grounds, because they hope the cases will have other types of benefits—they might clearly establish the law for future cases, reveal facts in discovery that could be used in future cases,

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<sup>166</sup> M.D. Fla. Attorney D.

<sup>167</sup> See, e.g., N.D. Cal. Attorney B ("[M]y feeling is it depends on the judge you get more than the case law that's out there."); N.D. Cal. Attorney E (explaining that qualified immunity does not play a role in case selection in part because "it depends on the judge. And then it depends on, you know, your panel in the Ninth Circuit. . . . A case [that] looks cool today on qualified immunity in two weeks might look pretty bad. So, I don't even think about it."); M.D. Fla. Attorney C (explaining that qualified immunity does not influence his case filing decisions because "it . . . depends on which judge you get . . . and you're not going to know who the judge is until you file the case"); see also *infra* notes 168–169 and accompanying text.

<sup>168</sup> N.D. Cal. Attorney C.

<sup>169</sup> M.D. Fla. Attorney A.

or reveal facts that would be meaningful to the plaintiff.<sup>170</sup> Other attorneys report filing cases they know are vulnerable to dismissal on qualified immunity grounds simply because the cases are too important not to bring.<sup>171</sup> As one lawyer explained:

[W]e are constantly bringing cases where we contend that the officer either had a person in custody and increased the risk of harm to the person or through some affirmative act dramatically increased the risk of harm . . . . [T]hose are gut cases that we feel we have to pursue because in our book the officer conduct is terrible and we need to—if we can come up with a theory, we’re going to pursue it. But those are going to be out there as high-risk cases.<sup>172</sup>

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

I don’t think [qualified immunity] plays that much [of a role in case selection]. I don’t think much at all. I mean, I get excited if I find an Eleventh Circuit case[] that says that [the right is] “clearly established” . . . . But I don’t shy away from [cases] because I’m afraid I’m going to lose, because I think there’s some value in bringing these cases. I really do.<sup>173</sup>

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

[Qualified immunity] comes with [the] territory and you have to just be prepared to go up to the Ninth Circuit because there’s going to be many cases, if you win on qualified immunity, they’re going to appeal, and if you lose, you’re going to appeal, so . . . that’s just part of the equation. If you aren’t ready for that, you shouldn’t be doing these cases.<sup>174</sup>

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<sup>170</sup> See, e.g., S.D. Tex. Attorney C (“[I]f someone comes in and they got the crap beat out of them, or something happened to their spouse or kid or whatever I’ll still take [their case] to just create a paper trail about the particular agency or about the particular officer so that if something happens again, then at least there will be something there for someone else.”); see also Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014) (describing the ways meritless—as opposed to frivolous—litigation can reveal valuable facts or help advance future changes in the law).

<sup>171</sup> See, e.g., M.D. Fla. Attorney G (reporting that he does not “shy away” from cases that might be dismissed on qualified immunity “because I think there’s some value in bringing these cases. I really do. I’m not in the majority I can promise you.”); N.D. Ohio Attorney F (“[T]here are areas where we feel that the case is important enough to take the risk of losing on qualified immunity, just litigating it [is important].”); see also *infra* notes 172–173 and accompanying text.

<sup>172</sup> N.D. Ohio Attorney G.

<sup>173</sup> M.D. Fla. Attorney G.

<sup>174</sup> N.D. Cal. Attorney C.

Indeed, many attorneys described civil rights litigation as a very financially risky line of work and reported that attorneys who litigate these cases are generally willing to work at a discount or loss because they believe in the underlying principles.<sup>175</sup>

Models of case selection assume that attorneys and plaintiffs are rational economic actors and so will not file a case in which the financial risks outweigh the potential benefits. Scholars regularly recognize that these models do not capture noneconomic motivations for filing suit, but nevertheless rely on the model to predict filing decisions.<sup>176</sup> Yet, for many attorneys I interviewed, decisions about which police misconduct cases to take—and decisions to pursue this line of work more generally—are not guided exclusively or primarily by economic calculations. Many of these same attorneys reported that they are not dissuaded from taking cases by the risk of dismissal on qualified immunity grounds.

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

Although all attorneys I interviewed reported that qualified immunity increases the costs and risks of Section 1983 litigation, and twenty-two attorneys I interviewed agreed that qualified immunity is among their considerations when selecting cases, just eleven agreed that concerns about

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<sup>175</sup> See, e.g., E.D. Pa. Attorney B (explaining that he is “glad that [his] practice doesn’t just depend on civil rights cases because that’s a very tough way to make a living”); E.D. Pa. Attorney D (“Personally, I enjoy [constitutional litigation] but [qualified immunity is] why a lot of attorneys won’t do it. You’re not going to make a lot of money from it. You can, but you have to stick with it and it is . . . sometimes tough-going, and, as I said, it’s not for the faint-hearted. You have got to be dedicated to it.”); N.D. Cal. Attorney B (“[T]hese cases don’t pay, you know . . . I basically had to be ready to retire before I could financially take these cases . . .”); N.D. Cal. Attorney C (observing that some people in the Northern District of California have made money bringing civil rights cases, but “you don’t do [this work] because you become a lawyer and you want to get rich. It’s, you know, you do it because it’s a calling.”); N.D. Cal. Attorney D (“[Civil rights litigation is] not lucrative, and it has to be a labor of love, because anyone who is doing it simply to carve out a niche to make money, simply is not making money as effectively as they could be, and is going to be disappointed by it.”); N.D. Ohio Attorney D (“I get that people don’t want to do [police misconduct litigation] because there’s easier ways to make money. You know you could be a candy salesman, selling M&Ms or Snickers, and have a route and you’ll have a more consistent income than some civil rights lawyers.”); M.D. Fla. Attorney A (describing civil rights cases as “a long upward battle that’s not financially rewarding”); M.D. Fla. Attorney C (“[L]ooking back on [my decision to take civil rights cases] from the financial perspective, obviously it’s not the best decision.”); M.D. Fla. Attorney D (“[B]asically anything else will make you more money.”); M.D. Fla. Attorney F (reporting that he takes civil rights cases out of “public interest . . . I don’t rely on those cases like, ‘Oh, wow. That’s going to be—as a private practitioner, a big hit.’ I look at it more like . . . holding them accountable, a real wrong took place, and I think there’s exposure.”).

<sup>176</sup> See, e.g., FARHANG, *supra* note 34, at 22 (recognizing that “the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money”); Hubbard, *supra* note 37, at 712–13 (describing the possibility that some lawyers are not motivated by financial calculations of risk and reward).

qualified immunity cause them to decline cases with any regularity.<sup>177</sup> These attorneys described three types of cases that they are inclined to reject because of concerns about qualified immunity.

First, several attorneys explained that qualified immunity makes them less likely to accept a case if there is not a prior decision holding similar facts to be unconstitutional.<sup>178</sup> Presumably, the existence of helpful precedent will always militate in favor of accepting a case. But the Supreme Court's qualified immunity doctrine creates a particularly forceful pressure to find a prior case on point. The Court has repeatedly stated that government officials violate clearly established law only when "[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right.'"<sup>179</sup> Although attorneys reported they are more inclined to decline cases when they cannot find factually similar precedent because of concerns about qualified immunity,<sup>180</sup> one attorney made clear that he would be willing to take a case involving a "de minimis violation" if there was a prior case on point.<sup>181</sup>

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<sup>177</sup> See, e.g., E.D. Pa. Attorney A ("[W]e don't take a case [when it] seems pretty clear to us it's going to run into serious immunity issues."); E.D. Pa. Attorney D ("[T]he false arrests—if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove. If I think that the individual officers are going to get out on qualified immunity, I will decline it."); N.D. Cal. Attorney A ("I have to determine what the story is going to be at trial . . . so I can determine whether or not we're actually going to get by summary judgment on a qualified immunity issue."); N.D. Ohio Attorney A ("The immunity doctrines are everything in . . . real world litigations."); M.D. Fla. Attorney E ("I married a lot of bad brides over the years . . . And that has resulted in some painful losses over the years. Where QI gets granted, and you're just shaking your head like, how. So now, I'm—I would [say]—I'm definitely not gun shy. I'm just more cautious before I get involved . . .").

<sup>178</sup> See, e.g., N.D. Cal. Attorney D ("[I]t seems like if there is not a case directly on point indicating that the law was clearly established to constitute a violation . . . then you risk being dumped on summary judgment because of qualified immunity."); S.D. Tex. Attorney A (explaining that when deciding whether to accept a case he will assess whether the violation was "clearly established"); S.D. Tex. Attorney B ("[Q]ualified immunity [plays a role in case selection] and whether or not there was any established law that would support the position that the officer knew that the conduct was unconstitutional at the time."). A few attorneys observed that the challenge of finding prior precedent is more difficult in false arrest cases than in excessive force cases. See E.D. Pa. Attorney G (explaining that concerns about qualified immunity play a limited role in case selection for excessive force cases, but that in some false arrest cases his firm will conclude there was a constitutional violation but expect that a court will find that facts are unique and the officer acted in good faith, and grant qualified immunity); N.D. Cal. Attorney G (explaining that in excessive force cases "there are a lot more cases and even though you may not have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution when he struck that person while he was on the ground in handcuffs or with one handcuff on with his face down, right? . . . You don't need another case that says that. You can just argue generally.").

<sup>179</sup> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alteration in original and emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>180</sup> See *supra* note 178.

<sup>181</sup> N.D. Cal. Attorney D.

Second, several attorneys reported that qualified immunity doctrine discourages them from taking cases where they interpret the qualified immunity standard to require intentional misconduct.<sup>182</sup> Attorneys repeatedly used false arrest cases as an example: although an officer has violated the Fourth Amendment if he made an arrest without probable cause, he is entitled to qualified immunity if he had “arguable probable cause”—meaning he reasonably, though mistakenly, thought there was probable cause to arrest.<sup>183</sup> In one attorney’s view, plaintiffs have to show that defendants “were fabricating evidence” to defeat a qualified immunity motion in a false arrest case.<sup>184</sup> Several attorneys offered examples of false arrest cases that they had declined because the plaintiff could not show that the officers engaged in intentional wrongdoing.<sup>185</sup> These same lawyers were less concerned about qualified immunity in other types of cases—repeatedly noting that qualified immunity plays little role in their decisions about whether to accept excessive force cases.<sup>186</sup>

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<sup>182</sup> Presumably, any claim requiring proof of intent will be more difficult to prove. *See generally* Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211 (2018) (describing the challenges of proving intent). In false arrest cases, the constitutional violation does not require proof of intentional misconduct, but attorneys believe defeating a qualified immunity motion does.

<sup>183</sup> *See, e.g.,* *Lawrence v. Gwinnett Cty.*, 557 F. App’x 864, 870–72 (11th Cir. 2014) (describing and applying the “arguable probable cause” standard).

<sup>184</sup> E.D. Pa. Attorney D.

<sup>185</sup> *See, e.g.,* E.D. Pa. Attorney A (“[T]here’s not a day that goes by that I don’t get a call from somebody who was just acquitted because it turns out that the person who said that they robbed them or stole from them or assaulted them had made it all up and the police arrested them anyway. And you know, these kinds of cases have qualified immunity written all over them. The police rely on a report. They have no reason to suspect that the person’s making it up . . . . [W]e don’t take a case that seems pretty clear to us it’s going to run into serious immunity issues.”); E.D. Pa. Attorney C (“[T]he issue of qualified immunity for us usually goes to false arrest type situations.”); E.D. Pa. Attorney D (“[T]he cases that I primarily decline are those dealing with just strictly false arrests. If I decline them at all—and I would say there is a small percentage of those that I decline—but the ones that I do decline, the false arrests if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove.”); E.D. Pa. Attorney G (describing false arrest cases he has reviewed where he believed there was a Fourth Amendment violation, but the judge was likely to find “arguable probable cause”); N.D. Cal. Attorney G (“In the false arrest arena, that is more problematic than in the excessive force arena.”); M.D. Fla. Attorney E (“I just spent this morning on the phone on a DUI case with the ex-cop in New York that got arrested for DUI. And he’s got so much righteous indignation. And a lot of it is properly placed . . . . But at the end of the day . . . he’s probably going to have to pay me hourly to litigate that case, because I don’t see a happy ending under QI, because DUI is an opinion-based crime for the large part.”); S.D. Tex. Attorney F (explaining the challenges of proving “arguable probable cause” in false arrest cases).

<sup>186</sup> *See, e.g.,* E.D. Pa. Attorney A (explaining that he is “certainly less concerned” about qualified immunity in excessive force cases); E.D. Pa. Attorney D (explaining that there is “no qualified immunity” in excessive force cases); E.D. Pa. Attorney G (explaining that his analysis of excessive force cases would be no different in a world without qualified immunity, but that in cases involving probable cause there might be “somewhat [of] an uptick in the cases we would bring”); N.D. Cal. Attorney G (“[T]here are a lot more cases [in the excessive force area than in the false arrest area] and even though you might not

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

[T]hey're going to appeal every single time that their qualified immunity motion is denied and that adds two years minimum to the litigation and, I mean, this case I'm about to try in February was up on appeal for three years at least. So, that's something that goes into the decision. Whereas you used to think okay if I go through the discovery I get what I want, we go through mediation, this case could be over in two years. Now you have to figure minimum five years before you get to trial . . . . [W]e're trial lawyers and we don't want to be appellate lawyers. We want to win a trial and now you have to factor in the appeal . . . . It just makes the case that more difficult.<sup>187</sup>

Attorneys sharing this view are presumably more likely to decline low damages cases because their expected recovery will be smaller than the expected cost of litigating the qualified immunity defense.<sup>188</sup>

Attorneys I surveyed agreed that qualified immunity makes them reluctant to accept false arrest cases and cases with low damages. In the survey, I described a scenario in which police handcuffed an African American woman for thirty minutes on the mistaken belief that she was driving a stolen car, and asked whether the respondent would accept the case and, if not, why.<sup>189</sup> Forty-two of the ninety-two attorneys who answered this question reported that they would not accept the case.<sup>190</sup> Of those who offered

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have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution.”).

<sup>187</sup> N.D. Cal. Attorney B. Note, though, that this attorney concluded that qualified immunity is not where her “decision point” is. *Id.*; see also N.D. Ohio Attorney C (describing his concern about cases going up on interlocutory appeal but also reporting that qualified immunity has more to do with what judge you get than the facts of the particular case).

<sup>188</sup> See, e.g., E-mail from N.D. Ohio Attorney B to author (Jan. 8, 2018, 11:14 AM) (explaining that, because he “work[s] for an unrestricted legal services program and receive[s] a salary . . . [he] can take cases that private lawyers won't take because they're not financially rewarding enough to justify the work. . . . [He] imagine[s] private lawyers trying to make a living have to make some hard decisions about whether to bring a case and whether to assert claims that might end up with qualified immunity fights.”).

<sup>189</sup> The full question read as follows: “Client A comes to your office. She is an African-American woman. She has no prior arrests. She tells you that, six months prior, she drove home from work and parked her car next to her apartment building. As she exited the vehicle she was stopped by two police officers. The officers told her that the vehicle she was driving was reported stolen and demanded to know what she was doing with the car. The officer had put the wrong license number into the police department computer system. The woman explained to the officer that she had her title and registration in the car, but the officer refused to check. The woman says that the officer handcuffed her hands very tightly for about one-half hour, at which point she was released. She reports continuing pain, tingling, and numbness in her wrist, continuing emotional distress, and \$8750 in medical bills.” Joanna C. Schwartz, Police Misconduct Attorney Survey (UCLA, IRB No. 16-000470).

<sup>190</sup> See Schwartz, *supra* note 36.

explanations for their decisions to decline the case, many wrote that the case would likely be dismissed on qualified immunity grounds because the officers did not engage in intentional misconduct, and that the expenses of litigation—including litigating qualified immunity—would be greater than the recoverable damages.<sup>191</sup>

#### *D. Does Qualified Immunity Screen Out Lawyers?*

Qualified immunity may also cause lawyers to reduce the number of civil rights cases they bring and discourage some attorneys from filing civil rights cases altogether. One attorney I interviewed reported that concerns about qualified immunity had caused him to stop taking Section 1983 cases.<sup>192</sup> This attorney has a diverse civil practice which at one point included a few civil rights cases. He filed one Section 1983 case in the Southern District of Texas during the study period with a colleague from Dallas.<sup>193</sup> Whenever he has co-counseled a civil rights case with that colleague, they “brief and brief” the cases on qualified immunity, but the cases “get pitched at summary judgment.”<sup>194</sup> He has not filed any police misconduct cases since

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<sup>191</sup> See, e.g., N.D. Cal. Survey 6 (“Her damages are too low[,] and the police made an ‘honest’ mistake which could be dismissed on summary judgment.”); N.D. Cal. Survey 10 (“Court would probably dismiss case based on qualified immunity. Also, damages not high enough to warrant the time and money needed to prosecute this case.”); N.D. Cal. Survey 14 (“The expenses of litigation, unfortunately, would be greater than any expected recovery (including attorney’s fees.)”); M.D. Fla. Survey 13 (“The expense, cost, and burden of litigation in a case like this does not make economic sense for the law firm . . . . Claims against the officers could be dismissed under qualified immunity, and any *Monell* claim against the agency may be dismissed unless there is a policy or custom of this activity.”); M.D. Fla. Survey 14 (“An affidavit from the police officer saying that he [or] she believed they had probable cause despite the error police made, given the fact that the error was not evident and known to the arresting officer, will suffice for qualified immunity purposes.”); N.D. Ohio Survey 2 (“There’s not enough damages. The cost of taking these cases to trial is routinely higher than the amount she is likely to recover.”); N.D. Ohio Survey 15 (“May not get past immunity. Client hasn’t sustained sever[e] injuries.”); N.D. Ohio Survey 16 (“Fees incurred in litigation (time spent) will be wished away by the defense and the federal courts . . . . Qualified immunity is a nightmare because federal district courts will grant it even where not warranted. The potential damages therefore must be much higher.”); E.D. Pa. Survey 19 (“[I]mmunity.”); S.D. Tex. Survey 13 (“I don’t think qualified immunity can be defeated and *Monell* almost impossible without some prior racist incidents involving the same officers.”). Other attorneys raised concerns related to other factors that increase the costs and risks of a case, including judge and jury bias against plaintiffs and facts that were not sufficiently egregious. See, e.g., M.D. Fla. Survey 9 (“Injuries have to be substantial in the jurisdiction where I practice to have any real chance of recovery.”); N.D. Ohio Survey 16 (“Unwarranted hostility to such claims . . . . [W]e would like to take these cases, if federal courts were not so hostile.”); S.D. Tex. Survey 2 (“Jurors (and judges in my circuit) forgive an ‘honest mistake.’”); S.D. Tex. Survey 5 (“Not an egregious [sic] scenario for Texas.”); S.D. Tex. Survey 7 (“[B]etween difficult [j]udges and [j]uries, acceptable outcomes on similar cases are rare.”).

<sup>192</sup> See S.D. Tex. Attorney G.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

2012; in fact, he reports that he is “out of the business for the most part of suing the government. Simply because of all the immunities it is too difficult to be successful against them.”<sup>195</sup>

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

Several attorneys I interviewed reported that they knew of personal injury and criminal defense attorneys who took one or two Section 1983 cases and then decided to stop bringing the cases because they were simply too challenging.<sup>196</sup> As an attorney from Texas explained:

[A] lot of lawyers bring one case and then when they’re confronted with what the rules and the laws are, they don’t do it, because the cases are very attractive to a personal injury lawyer who doesn’t know better. He goes, “Look, there’s a dead guy! What’s that worth, \$10, \$20 million? I’m going to retire!” Then they

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<sup>195</sup> *Id.*

<sup>196</sup> See, e.g., E.D. Pa. Attorney D (explaining that qualified immunity is “certainly a high burden and that’s why a lot of attorneys don’t like to do” civil rights work); N.D. Cal. Attorney C (“I’ve seen a lot of lawyers who were successful personal injury attorneys and thought that, ‘oh, wow, well, I’m a good, successful PI attorney, I can take this police case and turn it into a nice settlement, a nice verdict,’” and then are unprepared to litigate police misconduct cases because they are in federal court and juries are less able to relate to the plaintiffs); N.D. Cal. Attorney F (explaining that some attorneys “like the idea of the work but then when you start doing it and you realize that you’re not going to be the big hero that you may have thought you were going to be . . . [s]ome people get a little gun shy or they feel like, well, I’m not going to take a case unless I have a guaranteed payment. That’s happening.”); M.D. Fla. Attorney A (“Not many people take these cases because you really don’t make any money on them.”); M.D. Fla. Attorney D (“I think it’s important work so I keep doing it but the colleagues I know that used to do it have dropped out, because they don’t find it to be lucrative enough.”); M.D. Fla. Attorney F (explaining that there are “very few [lawyers] who can make a living just doing these claims”); M.D. Fla. Attorney G (suggesting that eliminating qualified immunity “would encourage other lawyers to take these cases”); S.D. Tex. Attorney A (“[T]here are people that I hear of occasionally filing one [civil rights case], but they’re the same people that eventually decide they never want to file one again, and usually call me at the end of the day saying, ‘oh my god this case is screwed up, can you help me?’”); see also *infra* notes 197–198 and accompanying text.



run into the civil rights laws. They spend \$25,000 on their case and they lose it. And that's the last one they bring.<sup>197</sup>

An attorney from Florida similarly observed, "I think there's a lot of . . . one and two and out . . . [T]here's only so much money you can lose before you figure out that it's not the right way to go."<sup>198</sup>

Other attorneys reported that they have reduced the number of civil rights cases they accept because the cases are expensive to litigate and difficult to win.<sup>199</sup> For example, one attorney from Pennsylvania explained that he now spends the bulk of his time on personal injury and medical malpractice cases, which he considers "easier work that pays a lot more money."<sup>200</sup> Another attorney from Florida used to bring only police misconduct cases but now litigates dental malpractice cases as well with the hopes that "the dental stuff perhaps will pay some bills."<sup>201</sup> Even attorneys who have been bringing police misconduct cases for decades and are experts in the field report that these cases are often money losers.<sup>202</sup>

Responses from surveyed attorneys tell a similar story. Although the ninety-four attorneys I surveyed filed more cases, on average, than the 1,022 attorneys who entered appearances in the cases in my docket dataset, the majority of surveyed attorneys from each of the five districts spend 25% or less of their time on police misconduct cases. Twenty-five (27.7%) of the ninety-four attorneys I surveyed reported that the percentage of time they spent on police misconduct cases was greater than the percentage of fees they received from police misconduct litigation—only two of the ninety-four attorneys I surveyed reported the converse.<sup>203</sup>

Attorney appearances in the 1,183 cases in my five-district docket dataset offer additional circumstantial evidence to suggest that many lawyers may bring few civil rights cases—or stop bringing civil rights cases

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<sup>197</sup> S.D. Tex. Attorney F.

<sup>198</sup> M.D. Fla. Attorney C.

<sup>199</sup> See, e.g., E.D. Pa. Attorney D (explaining that he has brought police misconduct cases for twenty-four years but that, in recent years, he "transitioned into . . . easier work that pays a lot more money, which is personal injury and medical malpractice"); M.D. Fla. Attorney E ("I'd say that I probably went from 50%, maybe 60% [civil rights cases] to 20 to 25% over the years . . . as I commonly say if you like to have your teeth in your hand after a fight, then do civil rights litigation. You'll enjoy going to the dentist after most of the battles. And so, you know, I've decreased the number that I [pick]."); see also *infra* notes 200–201 and accompanying text.

<sup>200</sup> E.D. Pa. Attorney E.

<sup>201</sup> M.D. Fla. Attorney C.

<sup>202</sup> See *supra* note 175.

<sup>203</sup> See Appendix Tables 4–5. Appendix Table 4 sets out the percentage of time surveyed attorneys reported spending on police misconduct cases, and Appendix Table 5 sets out the percentage of their fees surveyed attorneys reported collecting from police misconduct cases.

altogether—because of qualified immunity and other barriers to relief. More than three-quarters of the 1,022 attorneys who entered appearances in the Section 1983 cases in my docket dataset entered just one such appearance over the two-year period of my study.<sup>204</sup> Just 3% of the attorneys entered six or more appearances in Section 1983 cases involving law enforcement during the study period.<sup>205</sup> There is significant regional variation in attorneys' filing practices—just one attorney entered six or more appearances in Section 1983 cases in the Southern District of Texas during the two-year study period, whereas fifteen attorneys entered six or more appearances in Section 1983 cases in the Eastern District of Pennsylvania during the same period.<sup>206</sup> This regional variation tracks variation in the challenges associated with qualified immunity: In the Southern District of Texas, qualified immunity is far more often raised and granted than in the Eastern District of Pennsylvania.<sup>207</sup>

It is difficult to parse out the extent to which qualified immunity—as opposed to other challenges associated with Section 1983 litigation—might be discouraging lawyers from bringing civil rights cases. As I explore in other work, multiple aspects of civil rights litigation—including jury bias, procedural hurdles, and limitations on state law claims—may make it more difficult to practice civil rights law in Texas than in Pennsylvania.<sup>208</sup> But, assuming others share the views of the attorney from the Southern District of Texas I interviewed, qualified immunity not only screens out some cases, but also screens out some lawyers.

## V. IMPLICATIONS

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

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<sup>204</sup> See Appendix Table 1. Note, though, that some of these attorneys may have filed civil rights cases in federal districts that are not the focus of my study, or in state courts.

<sup>205</sup> See Appendix Table 1 (setting out attorney appearances during the study period).

<sup>206</sup> See Appendix Table 1.

<sup>207</sup> See *supra* notes 95–97 and accompanying text.

<sup>208</sup> See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. (forthcoming 2020) (describing these various factors and the ways in which they combine to create dramatically different environments for civil rights litigation).

*A. Understanding the Role of Qualified Immunity in  
Constitutional Litigation*

In a prior study I found that courts dismiss only a small percentage of police misconduct cases on qualified immunity grounds.<sup>209</sup> This study makes clear that formal dismissals only tell part of the story of qualified immunity's role in constitutional litigation. Qualified immunity motions had to be researched, briefed, and decided in almost one-third of the Section 1983 cases in my dataset. Stays while motions in the district court and on interlocutory appeal were pending increased delay.<sup>210</sup> Although the absolute risk of dismissal on qualified immunity grounds is low, my surveys and interviews make clear that the risk of dismissal weighs heavily on the minds of attorneys who file these cases—particularly because qualified immunity is most often raised and successful at summary judgment, after counsel, often representing plaintiffs on contingency, have invested in discovery.

Apart from the costs and challenges associated with litigating qualified immunity in individual cases, qualified immunity doctrine increases the difficulty of engaging in the practice of civil rights litigation. Attorneys I interviewed echoed what judges and scholars have long said—qualified immunity is exceedingly complex, and it takes time to understand and stay abreast of changes in the doctrine.<sup>211</sup> In addition, the pervasive threat of interlocutory appeals means attorneys must be comfortable litigating in both trial and appellate court. The costs and risks associated with qualified immunity are greater in some districts than in others. But lawyers around the country agree that the doctrine makes it more costly to bring these cases and more difficult to recover.<sup>212</sup>

Models of attorney decision-making behavior suggest that attorneys would decline cases vulnerable to motion practice and dismissal on qualified immunity grounds because of these costs and risks. But my study demonstrates that the relationship between these costs and risks and attorneys' case-selection decisions is not so straightforward. Twenty-four of the thirty-five attorneys I interviewed reported that qualified immunity rarely or never causes them to decline cases; another ten attorneys reported that the doctrine plays a more significant role in their decision-making process; and one attorney reported having stopped bringing Section 1983 cases because

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<sup>209</sup> Schwartz, *supra* note 5.

<sup>210</sup> See *supra* notes 86–89 and accompanying text; see also Reinert, *supra* note 71, at 2080 (finding cases in which qualified immunity was raised took longer, on average, than the median of all federal civil rights cases filed during the same period).

<sup>211</sup> See *supra* notes 81–85 and accompanying text.

<sup>212</sup> See *supra* Part III.

of the doctrine. Attorneys so discouraged by qualified immunity that they abandon their civil rights practice are likely underrepresented by my study.<sup>213</sup> But I cannot otherwise estimate the extent to which my data reflect attorney perceptions and practices in the five districts I studied or around the country.

What does seem clear is that qualified immunity plays a range of roles in attorneys' case-selection decisions, and its power as a prefiling filter is highly dependent on which attorney is considering the case.<sup>214</sup> The lawyers I interviewed and surveyed appear to agree that qualified immunity increases the costs and risks of bringing civil rights cases. Returning to the language of standard models of case selection, qualified immunity increases the cost of litigation (C), decreases the probability of success ( $p$ ), and can reduce the size of possible judgments (J). But the lawyers I interviewed held different views about the extent to which these costs and risks duplicate other considerations at case selection, the magnitude of these costs and risks, the predictability of these costs and risks, the attorneys' ability to mitigate these costs and risks through creative litigation strategy, and their willingness to accept cases despite these costs and risks.<sup>215</sup>

To some lawyers, the challenges associated with qualified immunity appear insurmountable; others view qualified immunity as one of many challenges lawyers are trained to get around. Some lawyers shy away from false arrest cases because they must show an officer knowingly arrested their client without probable cause in order to defeat a qualified immunity motion. Others willingly accept these same types of false arrest cases, bringing state law claims in state court where qualified immunity cannot be raised as a defense. Some lawyers file cases they consider likely to be dismissed on qualified immunity grounds because they advance important interests—the cases may clearly establish a constitutional right for future cases, develop evidence of unconstitutional conduct by the officer or department that can be

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<sup>213</sup> See *supra* notes 192–208.

<sup>214</sup> Although my top-line conclusion appears to contrast with that of Reinert, *supra* note 48, at 494, who concluded that: “Most attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation[;]” our observations from our interviews are largely consistent. Reinert and I both find that attorneys believe qualified immunity doctrine increases the costs and risks of constitutional tort litigation. See *id.* We also both find that some attorneys report qualified immunity plays a limited role in case selection because “they only accept[] the most egregious cases for representation, which ma[kes] it unlikely that qualified immunity would play a role,” that some attorneys limit the impact of qualified immunity by filing in state court, that some attorneys do not consider qualified immunity because cases vulnerable to dismissal advance other interests, and that attorneys who do consider qualified immunity when selecting cases may decline cases alleging novel or ill-defined constitutional violations. See *id.* at 493–94.

<sup>215</sup> Variation in attorneys' weights and measurements of these factors complicates standard models of case-selection decisions. See *supra* note 34 and accompanying text.

used in future cases, or reveal information important to the plaintiff or her loved ones. Other lawyers view civil rights cases as sensible to bring only if they are likely to be financially remunerative. Lawyers, new to civil rights litigation, may lose their first few cases on qualified immunity grounds.<sup>216</sup> Following these defeats, some lawyers may decide to dedicate the time necessary to learn how to avoid or defeat future motions raising the defense; others may decide never to bring another civil rights case again.

How an attorney views and weighs the costs and risks associated with qualified immunity at case selection may be a product of any number of things, including that attorney's prior experience bringing civil rights cases, the percentage of their legal practice dedicated to these cases, or their motivations for entering into this line of work. Attorneys' approaches to qualified immunity at case selection may also be influenced by the jurisdiction in which they practice. My research shows that qualified immunity imposes more risks and costs in some parts of the country than in others. Other challenges associated with Section 1983 litigation—including unsympathetic juries and judges, and other substantive and procedural barriers—may also be particularly difficult to overcome in those same jurisdictions.<sup>217</sup> In a related project, I explore how these various factors combine to create what I call civil rights ecosystems around the country.<sup>218</sup> For now, it is worth noting that the costs and risks of litigating Section 1983 cases—including the costs and risks of qualified immunity—do not fall evenly across the country, and that that variation may well lead to region specific case-selection decisions.

### *B. Evaluating the Purposes Served by Qualified Immunity*

My study also reveals insights critically important to ongoing debate about whether qualified immunity doctrine achieves its intended policy goals. Although the Supreme Court has repeatedly described qualified immunity doctrine as drawn from common law defenses in existence when Section 1983 became law,<sup>219</sup> it acknowledged over thirty years ago that it

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<sup>216</sup> See *supra* notes 196–198 and accompanying text (describing examples of this type of loss by novice civil rights attorneys).

<sup>217</sup> See Schwartz, *supra* note 208.

<sup>218</sup> See *id.*

<sup>219</sup> See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (asking whether immunities “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them” (quoting *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967))); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (“[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress’ intent by the common-law tradition.”).

“completely reformulated qualified immunity along principles not at all embodied in the common law.”<sup>220</sup> The Court restructured qualified immunity doctrine to balance “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>221</sup> Scholars, advocates, and courts have criticized qualified immunity doctrine for failing to properly balance these interests.<sup>222</sup> These critics contend that qualified immunity is unnecessary and ill-suited to shield officers from the costs and burdens of being sued, and undermines interests in government accountability.<sup>223</sup> My findings about qualified immunity’s selection effects support each of these criticisms.

*1. Qualified Immunity Is Unnecessary and Ill-Suited to Shield Government Officials from “Insubstantial” Cases*

The Supreme Court imagines that qualified immunity is important to “society as a whole”<sup>224</sup> because it shields government officials who have acted reasonably from the “harassment, distraction, and liability”<sup>225</sup> associated with litigation. Specifically, the Court expects that qualified immunity shields government officials from financial liability and from the burdens of participating in discovery and trial in insubstantial cases, thereby encouraging government officials to vigorously enforce the law and members of the public to accept public office. For decades, the Court’s assumptions about qualified immunity’s role in constitutional litigation and the deterrent effect of litigation went unchallenged.<sup>226</sup> But, in recent years,

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<sup>220</sup> *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

<sup>221</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>222</sup> For courts’ and advocacy groups’ criticisms of qualified immunity, see *supra* notes 26–27 and accompanying text. Scholars also raise criticisms of qualified immunity. See, e.g., Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (arguing that qualified immunity has prevented the development of the law, overprotected officers, created confusion about the applicable standards, and increased the cost and complexity of civil rights litigation); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1 (1997) (arguing that qualified immunity is ill-suited to resolve cases at summary judgment); John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010) (criticizing qualified immunity doctrine for overly focusing on prior factually similar precedent instead of whether an officer clearly violated the Constitution); Schwartz, *The Case Against*, *supra* note 2 (describing each of these criticisms of qualified immunity).

<sup>223</sup> See sources cited *supra* note 222 (describing these criticisms).

<sup>224</sup> *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015)).

<sup>225</sup> *Pearson*, 555 U.S. at 231.

<sup>226</sup> See Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094–95 (2018).

mounting evidence has shown that qualified immunity is neither necessary nor well-suited to perform its intended role. Police officers virtually never contribute to settlements and judgments entered against them, and there is no reason to believe that other types of government officials contribute more often.<sup>227</sup> Cases are rarely dismissed on qualified immunity grounds before discovery and trial.<sup>228</sup> And many other doctrines and procedural rules—including courts' power to dismiss pro se cases sua sponte at the outset of a case, pleading rules that require plaintiffs to allege "plausible" claims, summary judgment requirements, and substantive constitutional requirements—are available to weed out cases before discovery and trial.<sup>229</sup> One of the only remaining ways qualified immunity might serve its intended goal is by screening out insubstantial cases before filing, thereby sparing government officials the burdens and distractions of litigation. This study offers two important reasons to conclude that qualified immunity cannot be justified on this ground.

First, qualified immunity does not reliably cause lawyers to screen out cases vulnerable to the defense. Two-thirds of the attorneys I interviewed stated that they rarely or never decline cases because of concerns about qualified immunity. Some attorneys reported that qualified immunity plays little role in their case-selection decisions because other considerations cause them to select only the most egregious cases, which are not vulnerable to dismissal on qualified immunity grounds. These responses suggest that qualified immunity is unnecessary to screen out weaker cases; other concerns already dissuade attorneys from bringing them.

Other attorneys' explanations for their inattention to qualified immunity make clear that the doctrine is in many ways ill-suited to screen out cases before filing. Because the application of qualified immunity is judge-

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<sup>227</sup> See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (studying litigation payouts in forty-four of the largest law enforcement agencies and thirty-seven smaller agencies over a six-year period, and finding that officers paid approximately 0.2% of the dollars awarded to plaintiffs and never contributed to the payment of a punitive damages award); see also Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 406 (2018) (concluding that my indemnification findings, see Schwartz, *supra* note 227, likely "are valid across the whole field of constitutional tort litigation").

<sup>228</sup> See Schwartz, *supra* note 5 (finding that 0.6% of 1,183 cases filed in five federal districts over a two-year period were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds).

<sup>229</sup> See *id.*; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018) (describing the many barriers to relief in prison litigation that amount to "practical immunity" that "insulates prison defendants from liability at least as much as qualified immunity"); accord Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah*, *supra* note 27, at 20 ("Generally applicable rules governing pleading and proof are more than up to the task of weeding out frivolous Section 1983 litigation—just as they do in all others.").

dependent, some attorneys conclude that it does not make sense to decline a case because of the doctrine; instead, they file the case, see which judge is assigned, and then decide how to proceed. Because qualified immunity applies to Section 1983 damages actions against individual officers—but not municipal liability claims, claims for injunctive relief, or state law claims—attorneys report including claims invulnerable to dismissal on qualified immunity grounds to minimize the effects of the doctrine. And some attorneys are willing to accept the risk of dismissal on qualified immunity grounds as a means of developing the law, gathering evidence for future claims, or uncovering information valuable to the plaintiff about the case.

Second, to the extent that concerns about qualified immunity cause attorneys to decline cases, the doctrine does not appear to do a good job of screening out “insubstantial” cases. Although the Court has not clarified what makes a case insubstantial, it has repeatedly suggested that insubstantial claims are “baseless” and “frivolous,” brought against “innocent” government officials who acted “reasonably.”<sup>230</sup> However, the cases attorneys report declining because of qualified immunity do not appear baseless or frivolous. Attorneys report declining false arrest cases because they believe they must show intentional wrongdoing in order to defeat qualified immunity. But such cases are not necessarily baseless or frivolous—a plaintiff may be able to show a Fourth Amendment violation, which requires a showing of unreasonable behavior, without being able to establish a knowing violation. Other attorneys report declining cases with factual scenarios that a court has not previously held unconstitutional. But, as the Court has recognized, novelty is not a good proxy for merit.<sup>231</sup> Attorneys also report declining cases that do not make economic sense to bring given the costs and delays associated with qualified immunity. And some attorneys decline all civil rights cases because of the costs and risks of qualified immunity. None of these responses suggest that concerns about qualified immunity cause attorneys to decline cases that are baseless or frivolous.

Perhaps, though, the Supreme Court intends qualified immunity to have a broader reach. The Court has repeatedly stated that qualified immunity should protect “all but the plainly incompetent or those who knowingly

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<sup>230</sup> See *supra* notes 44–46 and accompanying text.

<sup>231</sup> See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that “officials can still be on notice that their conduct violates established law even in novel factual circumstances” and observing that the Court had previously “rejected a requirement that previous cases be ‘fundamentally similar’” (quoting *United States v. Lanier*, 520 U.S. 259, 263 (1997))).



violate the law,”<sup>232</sup> and may intend for qualified immunity to discourage lawyers from filing any case that does not meet that exacting standard. To the extent that qualified immunity discourages some lawyers from filing false arrest cases in which an officer has not knowingly arrested someone without probable cause, the doctrine arguably furthers this goal.<sup>233</sup> Some attorneys report declining cases without factually similar precedent on point unless the case is so egregious that it could amount to an obvious constitutional violation.<sup>234</sup> To the extent that qualified immunity encourages attorneys only to file egregious constitutional claims, the doctrine also, arguably, furthers this goal.

But because plaintiffs’ attorneys can defeat a qualified immunity motion by pointing to a prior decision holding factually similar conduct unconstitutional, the doctrine does not actually encourage attorneys to screen based on the egregiousness of an officer’s behavior. Instead, it encourages attorneys to screen cases based the existence of prior precedent. An attorney may reject a case alleging serious misconduct because no court has held similar conduct unconstitutional, but accept a case involving a “de minimis” constitutional violation if there is a prior case on point.<sup>235</sup> Moreover, to the extent that concerns about qualified immunity discourage some attorneys from taking any constitutional claims, the doctrine may prevent the filing of cases where defendants were plainly incompetent or knowingly violated the law.

Qualified immunity has already been shown to be unnecessary and ill-suited to shield government officials from the burdens of litigation in filed cases because of the prevalence of indemnification and the infrequency with which cases are dismissed on qualified immunity grounds before discovery and trial.<sup>236</sup> This study suggests that qualified immunity also fails to serve its intended goals by screening out insubstantial cases before they are filed. Qualified immunity does not reliably cause lawyers to decline cases, and the cases that attorneys do report declining because of concerns about qualified immunity are not reliably insubstantial under any plausible meaning of the term.

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<sup>232</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

<sup>233</sup> See *supra* notes 183–185 and accompanying text.

<sup>234</sup> See *supra* notes 178–181 and accompanying text.

<sup>235</sup> See N.D. Cal. Attorney D; see also *infra* note 251 and accompanying text.

<sup>236</sup> See Schwartz, *The Case Against*, *supra* note 2, at 1803–11 (describing this evidence).

## 2. *Qualified Immunity Inhibits Government Accountability*

This study offers further reasons to conclude that qualified immunity harms interests in government accountability. Although the Supreme Court has stated that qualified immunity doctrine is intended to allow plaintiffs to “hold public officials accountable when they exercise power irresponsibly,”<sup>237</sup> courts and commentators have observed that qualified immunity doctrine undermines government accountability in several ways—by fostering uncertainty about the contours of constitutional law,<sup>238</sup> shielding from liability officers who intentionally engage in misconduct,<sup>239</sup> and “send[ing] an alarming signal to law enforcement officers . . . that they can shoot first and think later.”<sup>240</sup> This study suggests that qualified immunity may compromise government accountability in two additional ways.

First, qualified immunity makes it more difficult and less reliably remunerative to bring civil rights cases. Researching, briefing, and arguing qualified immunity motions and appeals takes time and money. Stays while motions and appeals are pending can delay litigation and weaken plaintiffs’ evidence. Qualified immunity can reduce the monetary value of a case, either by dismissing higher value claims or limiting recovery to state law claims that may have damages caps and attorneys’ fees limitations. Qualified immunity carries with it the risk that cases will be dismissed—often after contingency fee attorneys have dedicated significant resources to the case. And, in order effectively to oppose qualified immunity motions, attorneys need to understand and keep up to date with changes in a very complex and dynamic doctrinal terrain and be prepared to litigate in both trial and appellate courts. Some lawyers accept these costs, burdens, and risks as among the many challenges associated with bringing civil rights cases. But it should come as no surprise that other attorneys, faced with these challenges, limit the number of civil rights cases they bring or get out of the business of civil rights litigation altogether.

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<sup>237</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

<sup>238</sup> *See, e.g., Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willet, J., concurring dubitante) (“If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive.”), *opinion withdrawn on reh’g*, 928 F.3d 457 (5th Cir. 2019).

<sup>239</sup> *See* John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1974–75 (2018) (describing *Mullenix v. Luna*, in which the defendant was shielded from liability on qualified immunity grounds despite acting in violation of an order, and *Robles v. Prince George’s County*, in which defendants were shielded from liability despite acting in violation of police regulations and state law).

<sup>240</sup> *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *see also* Schwartz, *The Case Against*, *supra* note 2, at 1814–20 (describing these and other arguments that qualified immunity impairs government accountability).

By reducing the number of lawyers willing to bring civil rights cases, as well as reducing the number of cases civil rights lawyers are willing to bring, qualified immunity undermines the government accountability goals reflected in both Sections 1983 and 1988. As Congress recognized when it passed the Civil Rights Attorneys' Fees Awards Act of 1976, "civil rights laws depend heavily upon private enforcement."<sup>241</sup> And, as Pamela Karlan has noted, "[a]ttorney's fees are the fuel that drives the private attorney general engine."<sup>242</sup> Commentators have criticized the Supreme Court for limiting the circumstances in which plaintiffs' attorneys can recover fees under Section 1988 because these decisions reduce the number of attorneys willing to take civil rights cases and skew the types of cases they select.<sup>243</sup> To the extent that qualified immunity doctrine makes it more difficult for lawyers to make a living bringing civil rights cases and discourages lawyers from entering into this line of work, the doctrine likewise undermines longstanding interests in creating a market for private attorneys general.

Second, qualified immunity doctrine inhibits the development of constitutional law in underappreciated ways. Commentators have already observed that the Court's qualified immunity jurisprudence—which allows courts to grant qualified immunity without ruling on the underlying merits of plaintiffs' constitutional claims—leads to constitutional stagnation.<sup>244</sup> This study suggests that qualified immunity may also inhibit the development of constitutional law by discouraging lawyers from filing cases involving novel claims. Attorneys believe that cases are more likely to be dismissed on qualified immunity grounds if they cannot point to factually similar precedent, and some report they are more likely to decline cases if they cannot find a prior case on point. The inclination not to file these types of novel cases creates a vicious cycle—if lack of precedent makes a certain

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<sup>241</sup> S. REP. NO. 1011, at 2 (1976).

<sup>242</sup> Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205.

<sup>243</sup> See, e.g., Bagenstos, *supra* note 36, at 185–86 (describing Supreme Court decisions that limit what it means to be a "prevailing party" (*Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)), eliminate fee enhancements for risky cases (*City of Burlington v. Dague*, 505 U.S. 557 (1992)), and allow defendants to offer settlements conditioned on waivers of attorneys' fees (*Evans v. Jeff D.*, 475 U.S. 717 (1986)), and arguing that all three limitations on attorneys' fees "limit the effectiveness of the private attorney general system"); Karlan, *supra* note 242, at 207–08 (explaining that the Court's decision in *Buckhannon* skews attorneys' case-selection decisions, pushing them to "choose lawsuits in which damages are available over lawsuits that involve only injunctive relief, even if the latter lawsuits are more socially valuable"); Reingold, *supra* note 36, at 12–20 (arguing that the Court's decision in *Evans* discourages lawyers from taking cases with modest damages and those seeking solely injunctive relief).

<sup>244</sup> See Nielson & Walker, *supra* note 50, at 34.

type of case difficult to bring, then fewer lawyers will bring those types of cases, and those rights are even less likely to become clearly established.<sup>245</sup>

Some have defended qualified immunity on the ground that it encourages the development of constitutional law by allowing a court to announce a new constitutional right while shielding the government officials sued in the case from financial liability.<sup>246</sup> I have previously expressed skepticism about this argument in favor of qualified immunity, both because courts infrequently decide cases in this manner and because those decisions infrequently do much to expand the contours of constitutional rights.<sup>247</sup> This study offers another reason to be skeptical of this defense of qualified immunity. When a court announces a new constitutional right but grants qualified immunity to the defendants in the case, the plaintiff does not recover and the plaintiff's attorney—who likely will have brought the case on contingency—will not be paid. Lawyers willing to bear this risk of financial loss will continue to file cases vulnerable to dismissal on qualified immunity grounds as a means of developing the law. But it is far from clear that we should expect plaintiffs' attorneys to bankroll efforts to clarify the scope of constitutional rights. And few attorneys may be willing or able to bear the risk of these financial losses with any regularity.

### C. *Moving Forward*

The Supreme Court has said that evidence about the realities of constitutional litigation might “justify reconsideration of the balance struck” in its qualified immunity decisions.<sup>248</sup> In previous work, I have shown that government defendants rarely bear financial liability in civil rights cases, and that qualified immunity rarely leads to the dismissal of cases before discovery and trial.<sup>249</sup> Here, I show that qualified immunity imposes previously unappreciated costs and burdens on attorneys bringing these cases, and is unnecessary and ill-suited to screen out insubstantial cases before filing. This evidence, taken together, makes clear that the Court should adjust the balance it has struck with qualified immunity. My findings

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<sup>245</sup> *Accord* Reinert, *supra* note 48, at 494 (suggesting that attorneys' case-selection decisions, geared to avoid qualified immunity dismissals, may mean that “the vast majority of *Bivens* cases never test the limits of existing law, because the attorneys who file them select cases that are within the ‘clearly established’ zone that will defeat a qualified immunity defense”).

<sup>246</sup> See, e.g., John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 484 (2011).

<sup>247</sup> See Schwartz, *The Case Against*, *supra* note 2, at 1826–30.

<sup>248</sup> *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987).

<sup>249</sup> See Schwartz, *supra* note 5, at 65–70; Schwartz, *supra* note 227, at 938–43.

about qualified immunity's role in case selection support several possible adjustments to the doctrine that I and other commentators have proposed.

For example, John Jeffries has argued that an officer's entitlement to qualified immunity should turn not on whether the law is clearly established by prior decisions, but on whether the conduct was "clearly unconstitutional."<sup>250</sup> In Jeffries's view, the current standard's focus on whether a prior case has held the conduct unconstitutional fails to punish behavior that is clearly unconstitutional, yet novel.<sup>251</sup> The "clearly established" standard also makes unfounded assumptions about the ways in which government officials learn about the law. As Judge Browning has explained:

The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case.<sup>252</sup>

Moreover, as Fred Smith has argued, if qualified immunity turned on whether the defendant's conduct was clearly unconstitutional, the standard would be better aligned with common law principles that are the ostensible basis for the doctrine.<sup>253</sup>

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<sup>250</sup> Jeffries, *supra* note 81, at 867–68.

<sup>251</sup> See John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013). For illustrations of this concern, see Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, *Baxter*, *supra* note 27, at 14–16, 16 n.16, which describes several cases in which courts have found constitutional violations but granted qualified immunity, including cases against "deputy sheriffs who conducted an 'early-morning, SWAT style raid' in which a family with young children was detained for two-and-a-half hours in their house after a warrant-based search turned up empty"; an officer who lied in an affidavit supporting a teacher's arrest for falsifying student grades; a child-protective-services caseworker "whose false statements in support of a removal order resulted in minor children being taken from their families, separated, and denied visitation"; a police officer who "during a routine traffic stop, directed the vehicle's driver to sit on the officer's cruiser, pointed a gun at the driver's head, and threatened to kill him if he declined to surrender on weapons charges when the officer discovered a gun in the back seat"; police officers who stole personal property seized as evidence; and a police officer who "unlawfully detain[ed], handcuff[ed], interrogate[d], and book[ed] and charge[d] [a] seventh-grader in the hallway during class as permitted by his disability accommodation".

<sup>252</sup> *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 (D.N.M. 2018).

<sup>253</sup> See Smith, *supra* note 226, at 2110–11 (arguing that nineteenth century American courts applied something akin to a negligence or fault standard for government actors, which "arguably comes closer to

This study offers additional reasons to prefer the “clearly unconstitutional” standard. Just as the “clearly established” standard can cause courts to dismiss meritorious yet novel claims,<sup>254</sup> it can also lead attorneys to decline meritorious cases simply because a prior decision has not held similar conduct to be unconstitutional. During litigation, the “clearly established” standard can increase the time and cost associated with motion practice, as plaintiff’s counsel must search for cases in which factually similar conduct was held unconstitutional in order to defeat qualified immunity. And, in order to maintain a successful civil rights practice, lawyers must stay abreast of complicated, confusing, and perpetually changing rules about how similar the facts of prior cases must be and which courts can clearly establish the law—a challenge that appears to cause some attorneys to stop bringing civil rights cases altogether.

My findings also support calls to eliminate interlocutory appeals of qualified immunity denials.<sup>255</sup> The Supreme Court allows defendants immediately to appeal denials of qualified immunity motions because it believes interlocutory appeals further the doctrine’s goal of shielding government officials from the costs and burdens of litigation.<sup>256</sup> Yet, as Judge Gwin of the Northern District of Ohio has observed, interlocutory appeals often have the opposite effect, “increas[ing] the burden and expense of litigation both for government officers and for plaintiffs” because they take time and money to brief and decide.<sup>257</sup> Moreover, because lower court decisions are usually affirmed, interlocutory appeals often do not even save parties and judges the time needed to be spent on trial.<sup>258</sup> The plaintiffs’ attorneys I interviewed and surveyed shared Judge Gwin’s concerns about the cost and time necessary to litigate qualified immunity. In addition, attorneys reported that the possibility of interlocutory appeal increases the difficulty of bringing civil rights cases for several reasons: because attorneys must be prepared to litigate in both trial and appeals courts; because the delay

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Jeffries’s ‘clearly unconstitutional’ or ‘clearly unlawful’ standard than the Court’s ‘clearly established’ standard”).

<sup>254</sup> Jeffries, *supra* note 251, at 256.

<sup>255</sup> For other arguments that qualified immunity is unlawful, and other suggested fixes, see Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. 169 (2019), which argues that the collateral order doctrine does not support allowing interlocutory appeals of qualified immunity denials, and recommends that appeals be prohibited or limited, and that courts more frequently sanction frivolous appeals.

<sup>256</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

<sup>257</sup> *Wheatt v. City of East Cleveland*, Nos. 1:17-cv-377 and 1:17-cv-611, 2017 WL 6031816, at \*4 (N.D. Ohio Dec. 6, 2017). For another discussion of the complexities of deciding interlocutory appeals, see Bryan Lammon, *Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. (forthcoming 2020).

<sup>258</sup> See *Wheatt*, 2017 WL 6031816, at \*4.

can make it more costly to prepare for trial; and because witnesses' recollections may fade in the year or more that a case is stayed on appeal. These costs, delays, and challenges make it more taxing to bring civil rights cases and may discourage some lawyers from pursuing this line of work. Eliminating interlocutory appeals would reduce these barriers for plaintiffs' attorneys, and would further the Court's interest in reducing the cost, time, and complexity of civil rights litigation.

Finally, the results of my study support calls to eliminate qualified immunity or return the defense to the scope of common law defenses in existence at the time Section 1983 became law. The original justification for qualified immunity—that it serves as an extension of common law principles in effect when Section 1983 became law—has been called into serious doubt.<sup>259</sup> For more than thirty-five years, the Supreme Court has defended qualified immunity doctrine as a means of balancing interests in government accountability with interests in shielding government officials from the costs and burdens of insubstantial litigation.<sup>260</sup> But this study, and my research more generally, makes clear that qualified immunity fails to achieve this balance. The doctrine undermines government accountability in multiple ways and has proven ill-suited and unnecessary to screen out insubstantial cases both before and after cases are filed. If qualified immunity is not serving its intended policy goals, we should do away with qualified immunity or, at the very least, reverse the expansions to the doctrine made with the intent of achieving these goals.<sup>261</sup>

### CONCLUSION

The Court has long asserted that qualified immunity benefits society by shielding government officials from the costs and burdens of litigation. But a growing body of empirical research makes clear that qualified immunity doctrine is not achieving its intended policy goals. This Article explores a

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<sup>259</sup> See generally William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that there was no common law defense comparable to qualified immunity in existence in 1871, when § 1983 became law); see also *supra* note 27 (briefs raising this concern).

<sup>260</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (describing qualified immunity as balancing “the importance of a damages remedy to protect the rights of citizens” and “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority”).

<sup>261</sup> The Court may be reluctant to do away with qualified immunity for fear that doing so would harm government and society in a variety of ways. Commentators have predicted that eliminating qualified immunity would cause plaintiffs to file many more frivolous suits and recover more money against government defendants in these cases, would cause government officials to be overly timid on the street, and would make it more difficult to hire people for government jobs. For further discussion of these concerns, and my alternative predictions about how constitutional litigation would function in a world without qualified immunity, see Schwartz, *supra* note 42.

previously untested justification for qualified immunity suggested by its defenders—that the doctrine discourages plaintiffs from filing insubstantial cases. Based on a study of almost 1,200 federal court dockets, and surveys and interviews of plaintiffs’ attorneys who entered appearances in these cases, I find that qualified immunity doctrine amplifies the burdens and risks of constitutional litigation on plaintiffs’ attorneys and likely dampens attorneys’ willingness to bring these types of cases, but does not effectively weed out insubstantial cases at the prefiling stage.

The Supreme Court will undoubtedly have multiple opportunities to reconsider qualified immunity in the near future. When the Court does grant certiorari in a qualified immunity case, advocates across the political spectrum will likely argue that qualified immunity should be abolished or greatly limited because the doctrine bears little resemblance to common law defenses in 1871, and because the doctrine fails to achieve its intended policy goals. This study offers additional reasons to conclude that qualified immunity fails to achieve these policy goals and undermines interests in government accountability.



## APPENDIX

Tables 1–3 reflect the total number of appearances by all of the 1,022 attorneys who entered appearances in 2011–2012 in my docket dataset (Table 1); the appearances of attorneys I interviewed during the two-year period in my docket dataset (Table 2); and the appearances surveyed attorneys reported over a five-year period in police misconduct cases (Table 3). Because the attorney surveys were confidential, I cannot verify the accuracy of Table 3. Appendix Table 4 sets out the percentage of time surveyed attorneys reported spending on police misconduct cases, and Appendix Table 5 sets out the percentage of their fees surveyed attorneys reported collecting from police misconduct cases. Appendix Table 6 sets out survey respondents' answers regarding the “biggest obstacle to bringing police misconduct cases” in the jurisdiction they sue most frequently. Appendix Table 7 sets out general information about the attorneys I interviewed.

TABLE 1: APPEARANCES BY ALL ATTORNEYS IN 2011–2012

Appearances	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
1	120 (87.0%)	140 (76.1%)	136 (78.2%)	216 (81.2%)	184 (70.7%)	796 (77.9%)
2	14 (10.1%)	26 (14.1%)	17 (9.8%)	30 (11.3%)	37 (14.2%)	124 (12.1%)
3–5	3 (2.2%)	14 (7.6%)	19 (10.9%)	11 (4.1%)	24 (9.2%)	71 (6.9%)
6+	1 (0.7%)	4 (2.2%)	2 (1.1%)	9 (3.3%)	15 (5.8%)	31 (3.0%)
N (Attorneys)	138	184	174	266	260	1022

TABLE 2: APPEARANCES BY INTERVIEWED ATTORNEYS IN 2011–2012

Appearances	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
1	5 (71.4%)	2 (28.6%)	3 (42.9%)	1 (14.3%)	2 (28.6%)	13 (37.1%)
2	0	2 (28.6%)	0	2 (28.6%)	0	4 (11.4%)
3–5	1 (14.3%)	1 (14.3%)	3 (42.9%)	1 (14.3%)	4 (57.1%)	10 (28.6%)
6+	1 (14.3%)	2 (28.6%)	1 (14.3%)	3 (42.9%)	1 (14.3%)	8 (22.9%)
N (Interviews)	7	7	7	7	7	35

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TABLE 3: APPEARANCES REPORTED BY SURVEYED ATTORNEYS FROM 2012–2017

	<b>S.D. TX</b>	<b>M.D. FL</b>	<b>N.D. OH</b>	<b>N.D. CA</b>	<b>E.D. PA</b>	<b>All</b>
<b>0–5</b>	12 (66.7%)	10 (66.7%)	9 (56.3%)	15 (68.2%)	13 (56.5%)	59 (62.8%)
<b>6–10</b>	3 (16.7%)	1 (6.7%)	6 (37.5%)	4 (18.2%)	1 (4.3%)	15 (15.9%)
<b>11–20</b>	1 (5.6%)	1 (6.7%)	0	2 (9.1%)	0	4 (4.3%)
<b>21–30</b>	1 (5.6%)	1 (6.7%)	0	1 (4.5%)	2 (8.7%)	5 (5.3%)
<b>30+</b>	1 (5.6%)	2 (13.3%)	1 (6.25%)	0	7 (30.4%)	11 (11.7%)
<b>All</b>	18	15	16	22	23	94

TABLE 4: AVERAGE PERCENTAGE OF TIME CURRENTLY SPENT ON POLICE  
MISCONDUCT CASES, REPORTED BY SURVEYED ATTORNEYS

<b>% Time Spent</b>	<b>S.D. TX</b>	<b>M.D. FL</b>	<b>N.D. OH</b>	<b>N.D. CA</b>	<b>E.D. PA</b>	<b>All</b>
<b>No response</b>	0	0	0	0	1 (4.35%)	0
<b>0</b>	2 (11.1%)	0	0	0	0	2 (2.1%)
<b>25% or less</b>	13 (72.2%)	11 (73.3%)	10 (62.5%)	13 (59.1%)	14 (60.9%)	62 (65.9%)
<b>26%–50%</b>	2 (11.1%)	2 (13.3%)	5 (31.3%)	5 (22.7%)	1 (4.3%)	15 (15.9%)
<b>51%–75%</b>	1 (5.6%)	0	1 (6.25%)	3 (13.6%)	5 (21.7%)	10 (10.6%)
<b>More than 75%</b>	0	2 (13.3%)	0	1 (4.5%)	2 (8.7%)	5 (5.3%)
<b>All</b>	18	15	16	22	23	94

TABLE 5: PERCENTAGE OF FEES CURRENTLY EARNED FROM POLICE MISCONDUCT CASES, REPORTED BY SURVEYED ATTORNEYS

<b>% Fees Earned</b>	<b>S.D. TX</b>	<b>M.D. FL</b>	<b>N.D. OH</b>	<b>N.D. CA</b>	<b>E.D. PA</b>	<b>All</b>
<b>0</b>	7 (38.9%)	2 (13.3%)	1 (6.25%)	3 (13.6%)	3 (8.7%)	16 (17.0%)
<b>1%–25%</b>	8 (44.4%)	10 (66.7%)	12 (75%)	15 (68.2%)	13 (60.9%)	58 (61.7%)
<b>26%–50%</b>	2 (11.1%)	1 (6.7%)	2 (12.5%)	1 (4.5%)	2 (8.7%)	8 (8.5%)
<b>51%–75%</b>	1 (5.6%)	0	1 (6.25%)	2 (9.1%)	3 (13.0%)	7 (7.4%)
<b>More than 75%</b>	0	2 (13.3%)	0	1 (4.5%)	2 (8.7%)	5 (5.3%)
<b>All</b>	18	15	16	22	23	94

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TABLE 6: SURVEYED ATTORNEYS' REPORTED "BIGGEST OBSTACLE  
TO BRINGING POLICE MISCONDUCT CASES"

A question in my online survey asked: "What is the biggest obstacle to bringing police misconduct cases in the jurisdiction you sue most frequently?" Attorneys had a blank space that they could fill in. Eighty-five of the ninety-four attorneys who took the survey answered this question and offered a total of 114 responses.

	<b>S.D. TX</b>	<b>M.D. FL</b>	<b>N.D. OH</b>	<b>N.D. CA</b>	<b>E.D. PA</b>	<b>Total</b>
<b>Juries/community</b>	6 (26.1%)	3 (15%)	2 (13.3%)	5 (16.1%)	11 (44%)	27 (23.7%)
<b>Judges</b>	4 (17.4%)	5 (25%)	5 (33.3%)	4 (12.9%)	4 (16%)	22 (19.3%)
<b>Qualified Immunity</b>	5 (21.7%)	5 (25%)	3 (20%)	4 (12.9%)	4 (16%)	21 (18.4%)
<b>Other laws</b>	8 (34.7%)	4 (20%)	2 (13.3%)	3 (9.7%)	3 (12%)	20 (17.5%)
<b>Defense counsel</b>	0	1 (5%)	0	4 (12.9%)	0	5 (4.4%)
<b>Evidence</b>	0	1 (5%)	0	3 (9.7%)	1 (4%)	5 (4.4%)
<b>Cost of litigation</b>	0	0	2 (13.3%)	3 (9.7%)	0	5 (4.4%)
<b>Plaintiffs</b>	0	0	0	2 (6.5%)	1 (4%)	3 (2.6%)
<b>Damages</b>	0	1 (5%)	0	1 (3.2%)	0	2 (1.8%)
<b>Police</b>	0	0	1 (6.7%)	1 (3.2%)	0	2 (1.8%)
<b>Unclear</b>	0	0	0	1 (3.2%)	1 (4%)	2 (1.8%)
<b>Total</b>	<b>23 (100%)</b>	<b>20 (100%)</b>	<b>15 (100%)</b>	<b>31 (100%)</b>	<b>25 (100%)</b>	<b>114 (100%)</b>

E.D. PA Attorneys							
							Consider Q1 at case selection?
Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	
A 25 years	50+	90%–95%	51%–75%	Prisoner medical treatment, homelessness, and First Amendment cases	80% contingency fee; 20% pro bono (with ability to seek fees pursuant to § 1988)	Small firm (2–10 attorneys)	Yes, “[W]e don’t take a case that seems pretty clear to us it’s going to run into serious immunity issues.”
B 10 years	1–5	“I’m certain [I’ve declined cases]. But I can’t remember the individual cases because we didn’t take them on.”	25% or less	Trusts and estates, legal malpractice, personal injury cases	100% contingency fee	Small firm (2–10 attorneys)	No. “[I]n the intake of the case I want to know that—qualified immunity or not—that if I tell the story of what happened here the person who is sitting on the other side hearing that story is going to go, ‘Really? They did that?’ If I don’t get that reaction that’s going to be a difficult case . . . And that usually—and that usually means, by the way, that you can overcome qualified immunity. That reaction means that you can overcome it.”
C 20 years	50+	93% (“I would say we bring one out of fifteen”)	51%–75%	Criminal defense, employment discrimination cases	100% contingency fee	Small firm (2–10 attorneys)	Yes, but “[qualified immunity] has a big influence in terms of where we file. When we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don’t have to run up against the doctrine.”

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	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider Q1 at case selection?
<b>E.D. PA Attorneys</b>								
<b>D</b>	16 years	50+	10%–20%	51%–75%	Personal injury, First Amendment, criminal cases	70% contingency fee, 30% retainer plus contingency	Solo	Yes. “The cases that I primarily decline are those dealing with just strictly false arrests . . . . If I think that the individual officers are going to get out on qualified immunity, I will decline it.”
<b>E</b>	25 years	5	Reports getting requests “probably a dozen to two dozen times a year” and “reject[ing] the majority”	25%	Personal injury and medical malpractice cases	100% contingency fee	Small firm (2–10 attorneys)	No. “[Q]ualified immunity exists and they’re able to make the argument, but those are not going to be meritorious cases, I’m just really selective in the ways I choose my cases. . . . [I]f there’s a conditional violation, you’re going to get over [qualified immunity], if there’s not, you’re not.”
<b>F</b>	8 years	20–30	96%–98%	25%	Employment discrimination cases	100% contingency fee	Small firm (2–10 attorneys)	No. “[I]n my experience . . . qualified immunity [is] much less of a factor [than] whether there is just general liability under Section 1983.”
<b>G</b>	40+ years	50+	90+%	51%–75%	Prisoner medical treatment, homelessness, and First Amendment cases	100% contingency fee	Small firm (2–10 attorneys)	Yes, but “I don’t have a sense of a significant number [of cases] we don’t bring because of—literally just a qualified immunity defense as opposed to - there was no qualified immunity, we’d bring it. I think it’s a fairly small number.”

N.D. CA Attorneys								
Consider QI at case selection?	Practice setting	Police misconduct case fee structure	Other legal work	Portion of business (%)	Cases declined (%)	Estimated police misconduct cases filed over past 5 years	Years bringing police misconduct cases	
Yes, but “I wouldn’t say [qualified immunity is] where my decision point is. I guess because . . . I see it as so similar to whether you would win at trial.”	Solo	100% contingency fee	Personal injury, business litigation, consumer litigation, and First Amendment cases	26%–50%	75%	21–30	25 years	A
No. Qualified immunity “is an issue everywhere, but it has more to do with what judge you get than the facts of the particular case.”	Small firm (2–10 attorneys)	70% contingency; 15% hourly; 10% retainer plus contingency; 5% 20% pro bono (with ability to seek fees pursuant to § 1988)	Employment discrimination, patient rights litigation, prison litigation	51%–75%	95%	11–20	40+ years	C

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N.D. CA Attorneys								Consider QI at case selection?
Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting		
D 7 years	7-9	93%-95%	25% or less	Criminal defense, personal injury, and employment cases	100% retainer plus contingency	Solo	Yes. "[I]f there is no case on point then the behavior has to be more egregious for me to be comfortable taking it."	
E 26 years	25-50	90+%	51%-75%	Criminal defense cases	100% contingency fee	Solo	No. "[I]t depends on the judge. . . . [A] case that looks cool today on qualified immunity in two weeks might look pretty bad. So, I don't even think about it."	
F 14 years	50+	85%-88%	51%-75%	Personal injury and criminal defense cases	100% contingency fee	Small firm (2-10 attorneys)	Yes, but "I'm not sitting here looking at a case, running it through the qualified immunity hurdle, but that's probably a good idea to start doing it."	
G 9 years	20-30	90%	More than 75%	Personal injury cases	100% contingency fee	Solo	Yes, but he "can't think of one" case he hasn't taken because of qualified immunity.	



	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider QI at case selection?	N.D. OH Attorneys		
A	13 years	10	94%–99%	51%–75%	Personal injury cases	100% contingency fee	Small firm (2–10 attorneys)	Yes. Qualified immunity “is <i>the</i> consideration.” “There were thousands more cases that were never filed” because of qualified immunity.			
B	9 years	1–5	Declines few cases	26%–50%	Cases on behalf of immigrants and farm workers.	100% pro bono (with ability to seek fees pursuant to §1988)	Medium nonprofit (10–30 attorneys)	Yes, but “I and other attorneys here have not decided to turn down cases because of qualified immunity, but we have not made certain claims in cases because of it.”			
C	28 years	1–5	“I’m sort of picky what I take.”	25% or less	Employment, land and water rights, and education cases	75% retainer plus contingency; 25% pro bono (with ability to seek fees pursuant to § 1988)	Solo	Yes, but there are additional reasons he declines cases asserting “a technical violation” and favors cases with serious damages.			

N.D. OH Attorneys		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider QI at case selection?
D	E	35 years	50+	92%	More than 75%	Jail and prison conditions cases and other civil rights cases	100% contingency fee	Small firm (2–10 attorneys)	No. “I don’t pay much attention to qualified immunity in taking a case.”
		20 years	50+	“Hundreds”	“Most”	Commercial, prison, First Amendment and whistleblower cases	100% contingency fee	Small firm (2–10 attorneys)	No. “[W]e’re always evaluating can we win? If we think we can win, then we’re not worried about the situation where it’s close . . . . I don’t think qualified immunity affects our case selection.”
		40 years	25–50	“We do turn down a lot of cases. I don’t know what the percentage is.”	65%	Criminal cases	“Virtually all contingency or fee shifting”	Small firm (2–10 attorneys)	Yes, but “there are areas where we feel that the case is important to take the risk of losing on qualified immunity . . . .”
G		30 years	50+	90%	51%–75%	Employment discrimination, prisoner abuse, reproductive freedom, civil rights	100% contingency fee	Small firm (2–10 attorneys)	No. “I’ve played the game . . . . I don’t turn down the case just because I was going to lose on qualified immunity. I just work harder.”

M.D. FL Attorneys								
	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider QI at case selection?
A	16 years	11–20	“I have a pretty high standard for a case that I’ll take.”	25% or less	Personal injury and medical malpractice cases	100% contingency fee	Small firm (2–10 attorneys)	No. “[N]ow, the way I look at cases, it really doesn’t even come in as a factor. I just look to see how clear is the civil rights violation.”
B	20 years	50+	99%	More than 75%	Prison abuse cases and “pro bono for kids”	100% contingency fee	Solo	No. “I don’t think I’m that sophisticated [to think about qualified immunity before filing]. I worry about qualified immunity towards the end of the case although I have to say that of all my cases I haven’t lost very many on that basis.”
C	22 years	50+	90+%	More than 75%	Dental malpractice	99% contingency fee; 1% contingency fee plus retainer	Solo	Yes, but “it may or may not deter me from accepting the case . . . . [M]ore commonly I’ll try to find a way to work around it.”
D	10 years	21–30	99%	26%–50%	Criminal defense and government transparency litigation	95% contingency fee; 5% pro bono (with ability to seek fees pursuant to Section 1988)	Solo	No. “[I]t’s a barrier but it’s a barrier to go around and if you’re in litigation that’s all you do every day all day anyway. . . . maybe it’s happened but I can’t think of a case that’s chased me out because of qualified immunity.”

M.D. FL Attorneys									
	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider QI at case selection?	
	E	12 years	50+	75%–80%	More than 75%	Criminal cases	95% contingency fee; 5% retainer with contingency	Solo	Yes. "[T]hat's a huge factor, and I mean we just rejected cases today, because I think, even though they're interesting . . . QI is going to kick it."
	F	28 years	6–10	80%	25% or less	Commercial, employment, products liability cases	95% contingency fee; 5% pro bono (with ability to seek fees pursuant to Section 1988)	Small firm (2–10 attorneys)	Yes. "This is my qualified immunity issue, that I'm not getting bounced up front because I'll never get a resolution or even the opportunity to get a resolution if I get tossed on—in the beginning stage of the case."
G	40+ years	15	"Definitely" agrees that "there's many, many more people who come to [him] seeking representation than [he] can possibly represent."	More than 75%	Criminal defense	100% contingency fee	Small firm (2–10 attorneys)	No. "I don't think [qualified immunity] plays that much [of a role in case selection]. I don't think much at all. I mean, I get excited if I find an Eleventh Circuit case that said . . . 'it is clearly established.' . . . But I don't shy away from [cases] because I'm afraid I'm going to lose, because I think there's some value in bringing these cases."	

S.D. TX Attorneys									
	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	Consider Q1 at case selection?	
	A	21 years	50+	80%–85%	26%–50%	Employment and criminal defense	95% contingency fee; 5% retainer plus contingency	Small firm (2–10 attorneys)	Yes. “I think you really have to concentrate more on the law [when selecting cases] and make sure you’re at least abreast of what’s going on in regard to qualified immunity issues. Is it clearly established, are there facts to support it, things of that nature.”
	B	20 years	11–20	99%	25% or less	Employment discrimination cases	100% contingency fee	Small firm (2–10 attorneys)	Yes. “Qualified immunity [plays a role in case selection] and whether or not there was any established law that would support the position that the officer knew that the conduct was unconstitutional at the time.”
C	18 years	6–10	50%	26%–50%	Labor, criminal defense, and personal injury	100% contingency fee	Solo	Yes, but “I’ll probably still take [a case that doesn’t seem like it will get past qualified immunity] . . . I’ll still take it to just create a paper trail about the particular agency or about the particular officer so that if something happens again, then there will be something more for someone else.”	

	S.D. TX Attorneys							Consider QI at case selection?
	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)	Portion of business (%)	Other legal work	Police misconduct case fee structure	Practice setting	
<b>D</b>	6 years	15	99%	25% or less	Premises liability cases	50% contingency fee; 50% retainer plus contingency	Small firm (2–10 attorneys)	Yes. “[I]t’s a very high standard, which I understand—I mean, I understand there needs to be protections but it’s very—it’s very much subject to abuse.”
<b>E</b>	15 years	15	None (if they will pay)	25% or less	Employment and criminal defense	100% hourly fee	Solo	No. “[W]hen we go to federal court, we style the lawsuit in the officer’s individual as well as official capacity . . . . [M]ore often than not, you will have the courts being able to get the officer . . . a successful argument of qualified immunity—that, though, does not get him out of the lawsuit if you also sue the person in their official capacity.”
<b>F</b>	15–20 years	2130	99%	51%–75%	Other civil rights cases, personal injury, criminal cases	80% retainer plus contingency; 15% contingency fee; 5% hourly fee	Solo	Yes, but “I consider a cornucopia of factors in deciding whether to take a case. QI is always a negative weighing against taking a case.”
<b>G</b>	13 years	15	All	25% or less	Business disputes	100% contingency fee	Small firm (2–10 attorneys)	Yes. “I am out of the business for the most part of suing government simply because of all the immunities it is too difficult to be successful against them.”