QUALIFIED IMMUNITY AT TRIAL

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Qualified immunity doctrine is complex and important, and for many years it was assumed to have an outsize impact on civil rights cases by imposing significant barriers to success for plaintiffs. Recent empirical work has cast that assumption into doubt, at least as to the impact qualified immunity has at pretrial stages of litigation. This Essay adds to this empirical work by evaluating the impact of qualified immunity at trial, a subject that to date has not been empirically tested. The results reported here suggest that juries are rarely asked to answer questions that bear on the qualified immunity defense. At the same time, the data illustrate that qualified immunity can be a powerful barrier to plaintiffs' success in the rare instances in which it is presented to a jury.

INTRODUCTION

Qualified immunity is a powerful doctrine that can, in certain contexts, operate to displace a damages remedy even where a plaintiff can establish

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that her constitutional rights were violated. Academic literature has focused on many different aspects of the immunity defense, from broad views such as whether the current doctrine is faithful to its common-law roots to concrete consideration of how to resolve some of the intricacies in the doctrine's application.[1] In the backdrop, however, is the longstanding assumption that qualified immunity has a significant impact on the resolution of litigated cases.[2] For many years, however, that assumption was not subjected to empirical scrutiny.[3]

Recent empirical work has undermined some of these assumptions. In the area of *Bivens* litigation,[4] for example, I have presented data that suggest that qualified immunity rarely, if ever, has an impact on litigated *Bivens* cases.[5] And Joanna Schwartz's recent work suggests that the same may be said for the parallel area of Section 1983 litigation, at least in cases brought for alleged Fourth Amendment violations.[6]

Even as recent scholarship has raised questions about the perceived wisdom concerning the impact of the qualified immunity defense overall, the recent empirical literature has not addressed an important area: the relevance that the qualified immunity defense plays at trial. Indeed, until this Essay, there has been no systematic empirical study of how qualified immunity is raised and resolved at trial.

Although the number of trials in both state and federal courts has significantly declined over the past several decades,[7] studying the role of qualified

1 A comprehensive discussion of qualified immunity scholarship would test the patience of even the most devoted reader. By way of illustration, Westlaw reports that as of February 28, 2018, since 1980 there are 334 law review articles with the words "qualified immunity" in the title. This is surely an underestimate of the articles devoting substantial discussion to the doctrine—Westlaw reports that there are at least 1395 law review articles in which the phrase "qualified immunity" is used ten times or more over the same time period.

2 For a discussion of this literature, see generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–7 (2017). I have also written about how the doctrine might impact whether a case is even filed in court, Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011), but this has not been the focus of other scholars' attention.

3 *See* Schwartz, *supra* note 2, at 8.

4 In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment. *Id.* at 389. *Bivens* claims are similar to Section 1983 claims against state officials, but much more limited in scope. *See* 42 U.S.C. § 1983 (2012). *See generally* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473 (2013).

5 Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 843 (2010) (reporting that qualified immunity was the basis for dismissal in five out of 244 *Bivens* complaints identified).

6 *See* Schwartz, *supra* note 2, at 10 (reporting that "just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds").

7 *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 fig.1 (2004) (showing

immunity at trial is important for many reasons. First, as with the role of qualified immunity in general, the literature abounds with untested assumptions about the work done by qualified immunity at trial. For some scholars, it is obvious that the defense should rarely if ever play a role at trial,[8] whereas for others it is assumed that it will have a powerful impact on jury deliberations.[9] Second, Supreme Court doctrine regarding qualified immunity assumes that there will be a role for qualified immunity at trial, but has not elaborated on when and how that should happen.[10] Examining how and when trial courts instruct juries on qualified immunity helps to understand how ambiguous Supreme Court doctrine operates at the trial court level. Third, examining trials is perhaps the best way of understanding how lower courts have resolved the disputed status of qualified immunity as an affirmative defense.[11] Upon whom, and for what issues, have courts placed the burdens of production, proof, and persuasion? Finally, if, as many observers

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that the number of civil trials across all U.S. district courts dropped from more than 12,000 in the 1980s to fewer than 5000 in 2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 713 tbl.1 (2004) (presenting trial statistics from 1970 through 2000).

8 *See, e.g.*, Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 712–13 (2006) (taking position that jury should not decide qualified immunity, but leaving open role for jury in deciding issues of fact relevant to immunity); Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61, 68 (1989) (arguing, pre-*Saucier*, that the reasonableness inquiry in excessive force cases overlaps with qualified immunity inquiry, making qualified immunity inapplicable and raising concerns about jury confusion otherwise).

9 *See, e.g.*, Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 158 (2012) (noting that "many, if not most, qualified immunity claims have to go to trial because of fact-intensive issues," but providing no data); Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 547 (2001) (describing qualified immunity as "potent" defense at trial).

10 Indeed, as discussed below, the Supreme Court has rarely taken cases to address trial-related issues related to qualified immunity. *See infra* Section I.B.

11 Several articles have addressed how burdens should be allocated in resolving qualified immunity, but most have not specifically focused on how burdens should be allocated at trial. *See, e.g.*, 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, 68–98 (1997) (addressing burdens of production, proof, and persuasion at summary judgment stage); Duvall, *supra* note 9, at 166 (arguing that defendant should bear burden at all stages, including trial); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 634–42 (1989) (reviewing Supreme Court and lower court decisions regarding burdens of proof for qualified immunity in general); *cf.* Struve, *supra* note 8, at 710–13 (suggesting that juries should only resolve factual issues that bear on qualified immunity, but not addressing burden of persuasion on those issues). One exception in the literature focuses more specifically on burdens at trial and argues that where questions of fact are relevant to the outcome of qualified immunity determinations, allocating the burdens of proof and persuasion to the defendant at trial is the fairest outcome. *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 167–84 (2007).

assume, qualified immunity puts a substantial burden on plaintiffs seeking to remedy their rights, looking to trial outcomes is one means to test this hypothesis.

In this Essay, I present data reflecting how qualified immunity functioned at trials that took place during a three-and-a-half-year period in all federal district courts (beginning in mid-2012 through the end of 2015). The data may be surprising to some. First, they show that juries are rarely instructed on qualified immunity, nor are they routinely asked to resolve disputed factual questions that might bear on application of the defense. In more than eighty-five percent of civil rights trials in which qualified immunity had been raised at some point in the case, district courts gave no instruction on qualified immunity. Second, when they do instruct on qualified immunity or ask jurors to resolve disputed factual questions that bear on the immunity defense, lower courts are not attentive to issues related to the burdens of proof, production, and persuasion. Where lower courts allocate burdens, they are more likely to allocate it to the plaintiff, but in general lower courts neglect to even address burdens when they instruct juries on issues related to qualified immunity. Third, when juries are instructed on qualified immunity, plaintiffs are much less likely to prevail at trial. Indeed, plaintiffs' win rate nearly tripled in cases that went to verdict where the jury was not given a qualified immunity instruction, as compared to cases in which the jury was given such an instruction. This is the case even though there is little evidence that juries ever reach qualified immunity issues in deliberation.

These findings have significant implications, which I discuss toward the end of this Essay. Do jury trials rarely address qualified immunity because, despite the abstract guidance provided by the Supreme Court in cases like *Saucier v. Katz*,[12] parties and district courts simply cannot discern a line between an officer who violates the Constitution and an officer who acts reasonably in so doing? Are courts treating qualified immunity solely as an immunity from suit and not also a defense to liability, again despite contrary language from the Supreme Court? Or are most cases in which qualified immunity is raised ones in which the principal dispute between the parties consists of the meaning of "clearly established" law and not the reasonableness of the defendant's conduct? These are just some of the questions raised by these findings.

The Essay proceeds as follows. In Part I, I review the basic outlines of qualified immunity doctrine, with which I assume most readers of this volume will be familiar, pausing to focus more directly on two issues that have confounded lower courts: (1) when and how qualified immunity may be raised at trial; and (2) upon whom burdens of production, proof, and persuasion should rest. In Part II, I briefly describe my empirical methodology, and in Part III I present the results of my study. In Part IV, I discuss the implications of these results and avenues for future research. I then offer a brief conclusion.

12 533 U.S. 194 (2001).

I. Qualified Immunity at Trial: Doctrinal Guidance

A. *Qualified Immunity Policy and Procedure*

The qualified immunity defense was first refined by the Supreme Court in the *Bivens* context[13] to permit public officials to escape liability for unconstitutional conduct where the law governing their conduct was unclear at the time of the violation or where they behaved objectively reasonably, even if unconstitutionally, in light of the clearly established law.[14] If an official can establish either of these elements,[15] then she is immune from damages liability. The Court has crafted the immunity defense to balance the tension between providing citizens with a remedy for constitutional violations, while recognizing 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."[16]

The goal of modern qualified immunity doctrine is to provide courts with a means for dismissing claims early on in the life cycle of a case, thus shielding defendants from the burdens of discovery, let alone trial. This is reflected in several aspects of the doctrine. First, in the seminal decision *Harlow v. Fitzgerald*, the Court instructed lower courts to base resolution of the defense on the "objective reasonableness" of the defendant's conduct in light of clearly established law, not the then-prevailing good-faith standard.[17] The Court viewed the latter standard, with its emphasis on the subjective intentions of the defendant, as insufficiently protective because of the abilities of "ingenious plaintiff's counsel" to create material issues of fact based on little evidence.[18] Thus, moving to an "objective reasonableness" standard was viewed as necessary to "permit the resolution of many insubstantial claims on summary judgment."[19]

Second, because qualified immunity is an immunity from suit and not just a defense to liability, defendants who assert the defense are entitled to many procedural protections. Qualified immunity can be raised at any time: at the motion to dismiss stage, after limited or full discovery through summary judgment, or at trial.[20] A defendant need not raise it at any particular

13 *See supra* note 4 and accompanying text.

14 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986).

15 Qualified immunity has been described as an affirmative defense, *see* Gomez v. Toledo, 446 U.S. 635, 640 (1980), but as discussed below, not every circuit consistently allocates to the defendant the burdens of establishing the defense.

16 *Harlow*, 457 U.S. at 814.

17 *Id.* at 818.

18 *Id.* at 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

19 *Id.* at 818.

20 *See* Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

time to preserve it for trial and may raise it as many times as she wishes.[21] Defendants may be able to seek protection from discovery until the threshold legal question of qualified immunity is resolved.[22] They may pursue multiple interlocutory appeals of otherwise unappealable denials of motions to dismiss or summary judgment, so long as their appeal is confined to law-based qualified immunity arguments.[23] This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly.[24]

B. Qualified Immunity Burdens: The Doctrinal Void

The Court thus has directed lower court judges to resolve qualified immunity, if possible, prior to trial, for the value of the immunity is "effectively lost if a case is erroneously permitted to go to trial."[25] As such, we should not be surprised that the Court has focused on qualified immunity decisions made at the motion to dismiss and summary judgment stage, and not on how the immunity defense is resolved at trial. Of the scores of qualified immunity cases that the Supreme Court has decided[26] since it created the modern version of the defense in *Harlow v. Fitzgerald*, only a handful of opinions reviewed a case at which a jury trial transpired—every other case reviewed a decision on a motion for summary judgment or to dismiss.[27] Two of the cases that reviewed a jury trial did not address trial-related issues, but rather the relevant law that governed application of the defense.[28] The third case—*Ortiz v. Jordan*—addressed whether a defendant who unsuccessfully moved for summary judgment on qualified immunity grounds could appeal that denial after a jury trial had concluded. The Court held that such an

21 This is the implication of *Behrens* and *Mitchell*, which permit interlocutory appeal of denials of qualified immunity at the motion to dismiss and summary judgment stages without regard for how many times a defendant has raised the defense.

22 *See* Siegert v. Gilley, 500 U.S. 226, 232 (1991).

23 *See Behrens*, 516 U.S. at 307–09; *Mitchell*, 472 U.S. at 526–27.

24 *See Behrens*, 516 U.S. at 306.

25 Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting *Mitchell*, 472 U.S. at 526).

26 *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (identifying thirty cases that addressed the substance of the immunity rather than procedural issues).

27 *See* Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (reviewing judgment on jury verdict); Ortiz v. Jordan, 562 U.S. 180, 183 (2011) (addressing appealability of summary judgment denial after conclusion of jury trial); Malley v. Briggs, 475 U.S. 335, 339 (1986) (reviewing First Circuit's reversal of directed verdict). In one case heard by the Court, the plaintiff had been granted relief after a bench trial. *See* Scherer v. Davis, 543 F. Supp. 4 (N.D. Fla. 1981), *aff'd sub nom.* Scherer v. Graham, 710 F.2d 838 (11th Cir. 1983), *rev'd sub nom.* Davis v. Scherer, 468 U.S. 183 (1984).

28 *See Carroll*, 135 S. Ct. at 350 (concluding that there was no "clearly established" law that put the defendant on notice that his actions violated the Fourth Amendment); *Malley*, 475 U.S. at 346 (holding that officer was not entitled to qualified immunity simply because a judge found probable cause supported warrant application).

appeal was not available, because once trial had occurred any entitlement to qualified immunity had to be resolved by reference to the trial record.[29]

Because the Court has highlighted the need to resolve qualified immunity early and often, it has provided very little guidance for how trial courts should, if at all, involve the jury in decisions regarding qualified immunity decisionmaking. It has not, for instance, clarified the burdens of production, proof, or persuasion for establishing the defense, although it has referred to it as an affirmative defense and allocated to the defense the burden of pleading.[30] Lower courts, accordingly, have taken varied approaches to what qualified immunity's status as an affirmative defense means.

Understanding how lower courts have treated the burdens of establishing qualified immunity is a challenge, in part because some courts have at times announced conflicting standards.[31] In addition, it is worth noting that the caselaw I discuss in this section, like the Supreme Court caselaw, does not usually arise in the context of a trial, but rather in appeals of district court decisions on motions to dismiss or motions for summary judgment. With that caveat, at one extreme are the Seventh and Tenth Circuits, which have stated that the plaintiff has the burden of proof in qualified immunity cases.[32] On the other end are the First, Second, Third, Fourth, and Ninth Circuits, which place the burden of both pleading and proving an entitlement to qualified immunity on the defendant.[33]

In between these extremes are the circuits that have adopted burden-shifting frameworks. In the Sixth Circuit, once the defendant raises qualified immunity as a defense, the plaintiff must show that the relevant right is clearly established, although the defendant carries the burden of showing that the challenged act was objectively reasonable in light of the law existing

29 *Ortiz*, 562 U.S. at 190–91.

30 *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

31 *See, e.g.*, Henry v. Purnell, 501 F.3d 374, 378 n.4 (4th Cir. 2007) (noting division within Fourth Circuit as to burden of persuasion); Duvall, *supra* note 9, at 144 n.48, 145 n.50 (noting intracircuit conflicts on issue in Fourth and Ninth Circuits).

32 *See, e.g.*, Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007) ("Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct."); Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007) ("Although the privilege of qualified immunity is a defense, the plaintiff carries the burden of defeating it."); *see also* Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (stating that at trial, the plaintiff bears the burden of persuasion "to overcome qualified immunity by showing a violation of clearly established federal law"); Poolaw v. Marcantel, 565 F.3d 721, 728 (10th Cir. 2009).

33 *See, e.g.*, Burns v. Pa. Dep't of Corr., 642 F.3d 163, 176 (3d Cir. 2011); Henry v. Purnell, 501 F.3d 374, 377–78 (4th Cir. 2007); Moreno v. Baca, 431 F.3d 633, 638 (9th Cir. 2005); DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 35 (1st Cir. 2001); Blissett v. Coughlin, 66 F.3d 531, 539 (2d Cir. 1995).

at the time.[34] In the Fifth and Eleventh Circuits, once the defendant shows he was acting within his discretionary authority at the time of the alleged unlawful conduct or that he acted in good faith, the burden of proof "shifts . . . to the plaintiff to show that the defendant is not entitled to qualified immunity."[35] In the Eighth Circuit, the defendant bears the burden of proof on all elements of the defense, except the plaintiff must show that the relevant law was clearly established.[36] Other commentators have come to similar conclusions regarding this split of authority.[37]

On the concrete issue of burdens of proof and qualified immunity, then, the Supreme Court has left a doctrinal void that lower courts have struggled to fill. The confusion does not abate when one considers the related question of whether, and how, qualified immunity should be raised at trial, a subject I take up next.

C. Qualified Immunity at Trial: Unanswered Questions

As discussed above, courts of appeals have paid some attention to how to allocate burdens of production, proof, and persuasion in resolving qualified immunity issues in general, but they have devoted less attention to the issue at trial. Many courts have, for example, referenced the availability of special interrogatories to resolve factual disputes relevant to qualified immunity, but have not necessarily done so while attentive to burdens of proof or persuasion.[38] These courts have also suggested that the issue of qualified immunity

34 Everson v. Leis, 556 F.3d 484, 494 (6th Cir. 2009) (citing Baker v. City of Hamilton, 471 F.3d 601, 605 (6th Cir. 2006); Barrett v. Steubenville City Sch., 388 F.3d 967, 970 (6th Cir. 2004); Tucker v. City of Richmond, 388 F.3d 216, 219 (6th Cir. 2004)).

35 Lanman v. Hinson, 529 F.3d 673, 683 (6th Cir. 2008); *see, e.g.*, Bates v. Harvey, 518 F.3d 1233, 1242 (11th Cir. 2008) (explaining that after defendant establishes that he was acting pursuant to authority, plaintiff must show that qualified immunity is not appropriate because "under the facts and circumstances known to the officer at the time, his actions violated clearly established law"); Breen v. Tex. A&M Univ., 485 F.3d 325, 331 (5th Cir. 2007) ("When a defendant invokes qualified immunity . . . the burden shifts to the plaintiff to rebut the applicability of the defense."); *see also* Bazan *ex rel.* Bazan v. Hidalgo Cty., 246 F.3d 481, 489 (5th Cir. 2001); Reinert, *supra* note 2, at 487 n.65.

36 *See* Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007).

37 Duvall, *supra* note 9, at 142–45 ("To sum up the qualified immunity tally: on the one side are the First, Second, Third, Fourth, Ninth, and D.C. Circuits, placing the burdens of proof for both major steps on the defendant; on the other side are the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, placing the burdens of proof for both major steps on the plaintiff; and in between are the Fourth and Eighth Circuits, splitting the burdens by step, but differently from each other.").

38 *See* Smith v. City of Hemet, 394 F.3d 689, 704 n.7 (9th Cir. 2005) (en banc) ("Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make."); Littrell v. Franklin, 388 F.3d 578, 585 (8th Cir. 2004) ("Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling."); Kerman v. City of New York, 374 F.3d 93, 120 (2d Cir. 2004) (noting that,

should be ultimately decided by the court, with juries limited to resolving disputed factual issues.[39] At least one circuit has expressed openness to instructing the jury on the defense and permitting the jury to resolve it at trial.[40]

But courts have generally neglected to attend to the question—if qualified immunity is to be decided by the jury, either through application of clearly established law or by resolving disputed factual questions—upon whom burdens of proof and persuasion lie. For example, if the defendant contends that certain facts entitled her to qualified immunity, must she establish the existence of those facts by a preponderance of the evidence or must the plaintiff establish that the facts did not exist?

Guidance from the circuit courts regarding jury instructions does not clarify matters. Many circuits provide model jury instructions, but these do not generally address burdens of proof or persuasion on qualified immunity issues. The First Circuit does not provide pattern instructions for qualified immunity, but notes that it recognizes that courts might ask a jury to resolve factual questions relevant to the immunity defense.[41] The Second Circuit does not have pattern jury instructions, but has approved of courts using special interrogatories to resolve disputed factual questions for qualified immunity.[42] The Third Circuit's model instructions do not approve of instructing

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because it is an affirmative defense, defendant had burden of requesting that the jury be charged on particular questions relevant to qualified immunity, but not addressing burdens of proof or persuasion on the issue); Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury."); Rakovich v. Wade, 850 F.2d 1180, 1202 n.15 (7th Cir. 1988) ("In the unusual circumstance where an immunity inquiry remains unresolved at the time the case goes to the jury, the district court may consider the use of special interrogatories to allow the jury to resolve disputed facts . . . ."), *overruled on other grounds by* Spiegla v. Hull, 371 F.3d 928, 941–42 (7th Cir. 2004).

39 *See, e.g.*, Curley v. Klem, 499 F.3d 199, 208–11 & 211 n.12 (3d Cir. 2007) (holding that "whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury"); Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005) (holding that "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury"); *accord* Int'l Ground Transp., Inc. v. Mayor & City Council of Ocean City, 475 F.3d 214, 220 n.3 (4th Cir. 2007); *see also* Acevedo-Garcia v. Monroig, 351 F.3d 547, 563 (1st Cir. 2003) ("[T]he judge is certainly not obliged to submit the ultimate issue [of qualified immunity] to the jury."); *Johnson*, 280 F.3d at 1318 ("[T]he jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.").

40 *See* McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000) (rejecting argument that the trial judge erred in submitting qualified immunity issue to the jury, and explaining that, "while qualified immunity ordinarily should be decided by the court long before trial, if the issue is not decided until trial the defense goes to the jury").

41 *See* CHAMBERS OF THE HON. D. BROCK HORNBY, FIRST CIRCUIT PATTERN JURY INSTRUCTIONS FOR CASES OF EXCESSIVE FORCE IN VIOLATION OF THE FOURTH, EIGHTH, AND FOURTEENTH AMENDMENTS 5, 7 n.8 (2011).

42 *See, e.g.*, *Kerman*, 374 F.3d at 109.

on qualified immunity, but like the First and Second Circuits, notes that where historical facts are in dispute the jury should resolve those questions so as to assist the court in making the legal determination as to whether qualified immunity is appropriate.[43] The Fourth Circuit, like the Second, does not create pattern instructions, but has suggested that juries are not to decide the legal question of qualified immunity but are limited to resolving disputes of historical fact that bear on the defense.[44]

The Sixth Circuit has been less than clear about what role qualified immunity can play at trial, but one recent district court decision, after thoughtfully reviewing Sixth Circuit precedent, concluded that at most a jury might be asked to resolve factual questions that bear on the defense.[45] The Seventh Circuit's current pattern instructions contain no reference to qualified immunity.[46] Courts in the circuit have, however, approved of allowing the jury to resolve disputed issues of fact that would permit the court to resolve the legal entitlement to the defense.[47]

The Eighth Circuit has no specific instruction on qualified immunity, but in the Eighth Amendment excessive force context specifically, the circuit recommends that no instruction be given, on the theory that if the plaintiff can establish facts that the defendant used force "maliciously and sadistically for the very purpose of causing harm,"[48] then the qualified immunity defense is irrelevant.[49] And Eighth Circuit caselaw directs lower courts to limit juries to considering disputed facts that might be relevant to the immunity defense.[50]

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43 COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT, MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT 4.7.2 (2017) [hereinafter THIRD CIRCUIT MODEL JURY INSTRUCTIONS].

44 *See Willingham*, 412 F.3d at 560. At the same time, the court appears to contemplate that juries can be instructed on the legal issue of qualified immunity. *See, e.g.*, *Int'l Ground Transp.*, 475 F.3d at 219–20 (reviewing a case in which the jury was instructed on qualified immunity, rendered a general verdict in favor of individual defendants but also found municipality liable for constitutional violations; the court construed the verdict as finding the individual defendants entitled to qualified immunity).

45 Wesley v. Rigney, No. 10-51, 2016 WL 853505, at *7 (E.D. Ky. Mar. 3, 2016), *aff'd sub nom.* Wesley v. Campbell, 864 F.3d 433 (6th Cir. 2017). On appeal of the district court's decision, the court found no abuse of discretion in the district court's refusal to instruct on qualified immunity and seemed to approve of the line drawn between questions of fact and questions of law. *Campbell*, 864 F.3d at 441–42.

46 *See* COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT (2017).

47 *See, e.g.*, Castillo v. City of Chicago, No. 11 C 7359, 2012 WL 1658350, at *5 (N.D. Ill. May 11, 2012).

48 This is the standard for establishing an Eighth Amendment excessive force claim. *See* Wilson v. Seiter, 501 U.S. 294, 302 (1991) (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986)).

49 COMM. ON MODEL JURY INSTRUCTIONS, EIGHTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 4.42 COMMITTEE COMMENTS (2017).

50 *See* Littrell v. Franklin, 388 F.3d 578, 585 (8th Cir. 2004).

The Ninth Circuit's pattern instructions direct lower courts to only ask juries to resolve disputed issues of fact relevant to qualified immunity, but also make clear that not every case will require this of the jury.[51] For example, where, to find for the plaintiff, the jury would be required to believe facts that would eliminate qualified immunity as a defense, a district court does not abuse its discretion by declining to give special interrogatories.[52]

The Tenth Circuit does not have pattern instructions, but has approved of instructing the jury on the qualified immunity defense, along these lines:

> You are instructed that Defendant . . . cannot be held liable to Plaintiff in the event that you determine he is entitled to qualified immunity for his actions. If you find, after considering all the evidence before you, that the actions of defendant . . . were such that a reasonable person would have believed them to be lawful and not violative of some established statutory or constitutional right, which a reasonable person would have known, Defendant . . . is entitled to qualified immunity.[53]

In general, however, the Tenth Circuit has held that it is inappropriate to ask the jury to resolve the legal question of qualified immunity; instead, the proper course is to ask the jury special interrogatories to determine the existence of facts that bear on the qualified immunity defense.[54] The court also acknowledged that in rare circumstances a court could define the clearly established law and then instruct the jury "to determine what the defendant actually did and whether it was reasonable in light of the clearly established law defined by the judge."[55] The Eleventh Circuit also has approved of using special interrogatories where necessary to resolve factual issues relevant to qualified immunity.[56]

Among all of these courts, however, little attention has been paid to allocating burdens of proof and persuasion at trial. The Third Circuit has placed on defendants the burden of requesting and justifying the need for special

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51 NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 9.34 (2018); *see also* Morales v. Fry, 873 F.3d 817, 819–26 (9th Cir. 2017) (collecting cases and summarizing Ninth Circuit's approach).

52 *See, e.g.*, Hung Lam v. City of San Jose, 869 F.3d 1077, 1086 (9th Cir. 2017) (finding that the district court did not abuse its discretion by declining to give special interrogatories where the trial court reasoned that if the jury believed the plaintiff's version of the facts, the defendant would not be entitled to qualified immunity).

53 Bass v. Pottawatomie Cty. Pub. Safety Ctr., 425 F. App'x 713, 718 (10th Cir. 2011).

54 *See* Gonzales v. Duran, 590 F.3d 855, 859–60 (10th Cir. 2009) ("Thus, the predicate for submitting a qualified immunity question to the jury is the existence of disputed issues of material fact—that is, the question of what actually happened.").

55 *Id.* at 859.

56 *See* JUDICIAL COUNCIL OF THE U.S. ELEVENTH JUDICIAL CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CIVIL CASES 5.0 (2018); *see also* Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury.").

interrogatories, but has not addressed the burden of proof.[57] The Second Circuit has assigned the burden of proof on qualified immunity to the defendant.[58] The Sixth Circuit has rejected the idea that interposition of a qualified immunity defense imposes on a plaintiff the need to prove more than she otherwise would have to prove to establish her constitutional claim, but has not clarified what that means in terms of instructions as to burdens of proof.[59]

The Fifth Circuit has, by contrast, indicated its acceptance of juries deciding entitlement to qualified immunity beyond simply resolving facts, and places on the plaintiff the burden of disproving the applicability of the immunity.[60] The Fifth Circuit's pattern instruction provides as follows:

> As to each claim for which Plaintiff [name] has proved each essential element, you must consider whether Defendant [name] is entitled to what the law calls "qualified immunity." Qualified immunity bars a defendant's liability even if [he/she] violated a plaintiff's constitutional rights. Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent government [officers/officials], or those who knowingly violate the law. It is Plaintiff [name]'s burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case.
>
> Qualified immunity applies if a reasonable [officer/ official] could have believed that [specify the disputed act, such as the arrest or the search] was lawful in light of clearly established law and the information Defendant [name] possessed. But Defendant [name] is not entitled to qualified immunity if, at the time of [specify the disputed act], a reasonable [officer/official] with the same information could not have believed that [his/her] actions were lawful. [Law enforcement officers/government officials] are presumed to know the clearly established constitutional rights of individuals they encounter.
>
> In this case, the clearly established law at the time was that [specify what constitutes the clearly established law.]
>
> If, after considering the scope of discretion and responsibility generally given to [specify type of officers/officials] in performing their duties and

57 *See* Velius v. Twp. of Hamilton, 466 F. App'x 133, 137 (3d Cir. 2012). Although the Third Circuit's pattern jury instructions do not address the burden of proof on issues related to qualified immunity, they do refer to qualified immunity as an affirmative defense and in general terms require that defendants bear the burden of proof on affirmative defenses. THIRD CIRCUIT MODEL JURY INSTRUCTIONS, *supra* note 43, at 1.10, 4.7.2.

58 *See* Johnson v. Perry, 859 F.3d 156, 170 (2d Cir. 2017) (stating that defendant has burden of proof on qualified immunity at trial); Lore v. City of Syracuse, 670 F.3d 127, 149 (2d Cir. 2012).

59 *See* Crutcher v. Kentucky, 883 F.2d 502, 504 (6th Cir. 1989) (rejecting argument and terming it a "deformity in civil rights law").

60 This is consistent with the Fifth Circuit's approach to qualified immunity when resolving motions to dismiss or for summary judgment. *See* Orr v. Copeland, 844 F.3d 484, 490 (5th Cir. 2016) (stating that at summary judgment a plaintiff must identify specific evidence that shows that the defense is not available and recognizing that qualified immunity alters the "usual" summary judgment allocations of burden).

> after considering all of the circumstances of this case as they would have reasonably appeared to Defendant [name] at the time of the [specify disputed act], you find that Plaintiff [name] failed to prove that no reasonable [officer/official] could have believed that the [specify disputed act] was lawful, then Defendant [name] is entitled to qualified immunity, and your verdict must be for Defendant [name] on those claims. But if you find that Defendant [name] violated Plaintiff [name]'s constitutional rights and that Defendant [name] is not entitled to qualified immunity as to that claim, then your verdict must be for Plaintiff [name] on that claim.[61]

Thus, for the most part, lower courts have little guidance, outside of the Fifth Circuit, as to how to allocate burdens when instructing juries on issues related to qualified immunity. And in some circuits, it remains an open question whether juries can be instructed at all on qualified immunity. Of course, it is up for grabs how important of a role the burden of persuasion plays in civil cases.[62] But doctrinally, the failure to properly allocate burdens of proof in the civil context can be sufficient to justify reversal on appeal.[63] This presumably reflects some judgment about the value of getting it right. And for determinations of historical fact, one might surmise that allocating burdens of persuasion is particularly important.

D. Qualified Immunity at Trial: Academic Commentary

Alan Chen has identified the confusion that exists in qualified immunity regarding the appropriate role for the jury "in assessing factual disputes underlying the immunity inquiry."[64] Nonetheless, legal scholars have considered the role of qualified immunity at trial, identifying two principal ways it could be raised: (1) by charging the jury on disputed factual questions; or (2) by instructing the jury on the qualified immunity defense itself with a description of the clearly established law to be applied to the case.[65] Most commen-

61 COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) 10.3 (2016) (footnotes omitted).

62 *See* Ravenell, *supra* note 11, at 179–84 (reviewing arguments but concluding that allocating the burden of persuasion is important in the qualified immunity context).

63 *See, e.g.*, *In re* Magnum Oil Tools Int'l, Ltd., 829 F.3d 1364, 1378–79 (Fed. Cir. 2016) (reversing for failure to properly allocate burden of persuasion); Jeff D. v. Otter, 643 F.3d 278, 287 (9th Cir. 2011) (reversing for using improper burden and standard of proof); *cf.* Berger v. Compaq Comput. Corp., 257 F.3d 475, 484 (5th Cir. 2001) (reversing for improper shift from plaintiff to defendant of burden of proof regarding element of Rule 23).

64 Chen, *supra* note 11, at 9.

65 *See* David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 217 (1994) (proposing bifurcating trial with jury determining factual issues relevant to qualified immunity first); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 72–73 (1989) (arguing that instructing the jury to apply clearly established law is fraught and instead arguing that juries should be limited to making findings of fact through special interrogatories); Schwartz, *supra* note 9, at 546–47 (2001) (discussing first two options); Struve, *supra* note 8, at 712–13 (2006) (discussing special interrogatories); Henk J. Brands, Note, *Qualified Immunity and the Allocation of Deci-*

tators take the view that of these two options, the first is preferable.[66] Karen Blum has argued forcefully in favor of only permitting juries to resolve qualified immunity through special interrogatories directed to disputed questions of fact.[67] Chen has argued that, to the extent that qualified immunity is a pure question of law, it does not belong in the jury's hands, even as he acknowledges that the Court has expressed ambivalence on this question.[68] But where a qualified immunity defense depends on disputed facts, allocating the burdens of proof and persuasion is necessary to resolve the defense.[69] And Catherine Struve has argued that juries should not be tasked with answering whether a defendant behaved reasonably while also unreasonably violating the Fourth Amendment, but instead should only be asked to determine questions of historical fact that might be relevant to determining whether qualified immunity is available to a defendant.[70] But neither Struve, Chen, nor Blum dig deep into the issue of instructing a jury on qualified immunity, how to do it, or how to allocate burdens in such a case.

As Teresa Ravenell has argued, assigning evidentiary burdens in the context of law-based qualified immunity claims may make little sense, and has been at least implicitly disapproved by the Supreme Court in *Elder v. Holloway*.[71] But by the time the case reaches trial, law-based qualified immunity

sion-Making Functions Between Judge and Jury, 90 COLUM. L. REV. 1045, 1065 (1990) (arguing that judges should consider identifying "clearly established" law, instructing juries as to its content, and asking juries to resolve whether qualified immunity is appropriate).

66 The risk of instructing the jury on the full qualified immunity defense was identified by Second Circuit Judge Jon Newman: jurors will tend to give the benefit of the doubt to officers because of their presumption that the officer subjectively believed he was following the law, even though jurors may be instructed that they are not to consider an officer's subjective state of mind when resolving the defense. *Federal Response to Police Misconduct: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 34 (1992) (statement of Jon O. Newman, J., United States Court of Appeals for the Second Circuit). Along similar lines, Sheldon Nahmod has expressed concern about how qualified immunity creates empathy among judges for defendants, marginalizing the plaintiff's counternarrative. Sheldon Nahmod, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT L. REV. 819, 821 (1997).

67 *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 209 (1993); Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as It Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 589 (2005); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 940–41 (2015) (arguing in favor of special interrogatories and against judges resolving disputed factual questions on qualified immunity through summary judgment). Blum has even gone so far as to argue that the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), might make jury instruction on excessive force unnecessary, with juries only required to decide factual questions that would then enable a court to decide the question of qualified immunity. Karen M. Blum, Scott v. Harris*: Death Knell for Deadly Force Policies and* Garner *Jury Instructions?*, 58 SYRACUSE L. REV. 45, 72 (2007).

68 *See* Chen, *supra* note 11, at 75.

69 *See id.* at 95.

70 Struve, *supra* note 8, at 712–13.

71 Ravenell, *supra* note 11, at 167–84 (citing Elder v. Holloway, 510 U.S. 510, 515 (1994)).

claims should be resolved, except to the extent they depend on disputed facts. Indeed, the Supreme Court's focus has been almost exclusively on how lower courts resolve qualified immunity *prior to* trial.[72] For fact-based qualified immunity defenses, however, assigning evidentiary burdens may be sensible—after all, the defense depends on the defendant's reasonable perception of the facts available to him at the time of the alleged constitutional violation, a question that can be resolved at least in part through fact-finding.[73] And there are compelling arguments for assigning those burdens to the defendant.

First, as others have noted, the burden of proof generally is allocated according to who has the burden of pleading.[74] And the Supreme Court has made clear that plaintiffs do not bear any burden to anticipate qualified immunity by seeking to overcome it through pleading.[75] But this is tempered by the fact that the Court has routinely spoken of the plaintiff's burden to "overcome" the defense of qualified immunity.[76] But putting aside the general rule regarding allocation of burdens, because the fact-based qualified immunity defense depends on facts known to the defendant at the time of the alleged violation, establishing those facts would seem to lie most naturally at the feet of the defendant.[77] And finally, as Alan Chen has argued, placing the burden on plaintiffs would amount to adding an additional element to a plaintiff's Section 1983 claim, beyond which the Court has said are the required elements a plaintiff must prove.[78]

Of course, one must be cautious about allocating the burden to the defendant—if the defendant has the burden of proving a set of facts that overlaps entirely with the plaintiff's case-in-chief, then one might reasonably worry that instructing that the defendant has the burden of proof would functionally put the burden on the defendant to convince a jury that the plaintiff's story is not true.[79] Indeed, no matter what regime one chooses, it might be a recipe for jury confusion.[80]

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72 *See supra* Section I.B.

73 Ravenell, *supra* note 11, at 171–72.

74 *Id.* at 173.

75 *See* Gomez v. Toledo, 446 U.S. 635, 640–41 (1980). It is noteworthy that Justice Rehnquist stated that he read the majority opinion as addressing only the burden of pleading and not the burden of proof. *Id.* at 642 (Rehnquist, J.).

76 Ravenell, *supra* note 11, at 175 (discussing cases).

77 *Id.* at 177–79.

78 *See* Chen, *supra* note 11, at 96–97 ("[A]ssignment of the burden of persuasion to the plaintiff would have serious legal ramifications. It is at least clear that assigning the burden to the plaintiff would mean that she must prove more than she would in order to prevail on the merits.").

79 *Id.* at 97.

80 *Id.* at 98. Rachel Harmon has suggested that jury instructions in qualified immunity excessive force cases provide "little help in shaping a determination about excessiveness," but her claim does not seem rooted in empirical study. Rather, it reviews model jury instructions for the courts of appeals. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1144–45 (2008).

II. METHODOLOGY

It has long been assumed that qualified immunity plays a substantial role in the inability of many civil rights plaintiffs to prevail against government officials, but there is little empirical support for that proposition.[81] To the extent that the assumption has been grounded in empirics, studies have focused on data from decisions reported on electronic databases such as Westlaw,[82] which may not provide a representative sample of relevant cases.[83] But data from a wider range of cases have not suggested that qualified immunity plays a substantial role in the resolution of civil rights claims.[84]

This study is devoted to a related question: the role that qualified immunity plays in resolving cases tried to a jury. Arguably, the jury has a particularly important role in civil rights cases, given its historical role as serving as a bulwark against governmental overreaching.[85] But, as with scholarly commentary on qualified immunity in general, many academics assume that juries will be hesitant to award damages against governmental officials, in part because of defenses like qualified immunity.[86] This is despite the absence of any reliable empirical data on the question. Notably, Joanna Schwartz's study of the role of qualified immunity in cases involving law enforcement officers, while comprehensive and informative, did not study the role qualified immunity played at trial or in jury instructions.[87]

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81 *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS, at xx, 100 (1983) (arguing for expanded governmental liability in lieu of individual liability, because the immunity doctrine is unpredictable, does not deter, and often leaves victims without compensation).

82 *See, e.g.*, Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 136 n.65, 145 n.106 (1999) (finding that qualified immunity defenses were denied in only twenty percent of federal cases over a two-year period, but citing only reported cases).

83 *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 n.20 (2015) (discussing potential selection bias in Westlaw- and LEXIS-based studies and reviewing literature).

84 Reinert, *supra* note 5; Schwartz, *supra* note 2.

85 Struve, *supra* note 8, at 706–07 (arguing that "a jury finding of liability in a civil rights case serves as a more effective pronouncement than a judge's disposition would, because it can be seen as embodying the judgment of representatives of the community"); Michael L. Wells, Scott v. Harris *and the Role of the Jury in Constitutional Litigation*, 29 REV. LITIG. 65, 87–88 (2009) (reviewing literature supporting "democratic value of jury decision making" in § 1983 litigation).

86 Diana Hassel, *A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions*, 49 OKLA. L. REV. 455, 475 (1996) (describing resistance of courts and jurors to awarding damages against individual federal employees); Schwartz, *supra* note 9, at 546–47 (describing defense as "potent" and claiming that "[a] very large percentage of Section 1983 cases get resolved in favor of the defendants based upon qualified immunity"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 385 (identifying fear of reprisals, expense of litigation, effectiveness of good faith defenses, "unsympathetic nature of many plaintiffs," and juries' biases as reasons that civil enforcement of Fourth Amendment in general is unsuccessful).

87 Schwartz, *supra* note 2, at 30 n.85.

To determine how qualified immunity is raised and resolved at trial, I sought to identify federal civil rights cases that met the following conditions: (1) qualified immunity was raised at some point during the proceedings; (2) jury instructions were proposed or adopted; and (3) a jury trial occurred.[88] I limited my search to civil rights cases litigated over a three-year period between January 1, 2013, and December 31, 2015.[89]

My initial search identified cases that settled shortly before or after trial, as well as cases resolved on summary judgment prior to trial. For the purposes of completeness, I included these cases in my initial data collection, but my analysis in this paper focuses on cases that went to trial in some form.

I coded each case for the following variables: (1) district of origin; (2) circuit of origin; (3) filing date; (4) termination date; (5) whether court-adopted jury instructions were available; (6) whether only party-proposed jury instructions were available; (7) whether a trial occurred; (8) case outcome; (9) jury award, if applicable; (10) whether proposed or adopted jury instructions included language regarding qualified immunity;[90] (11) whether special interrogatories were used at trial; and (12) whether the burden of persuasion on issues related to qualified immunity were addressed in the jury instructions. Where necessary, I consulted trial transcripts to establish the content of instructions provided to the jury.

Because this study is related to resolution of qualified immunity issues by juries, it does not include data on how post-trial motions as a matter of law were resolved, although my impression from the data is that judges generally denied those motions, whether brought by plaintiffs or defendants. Similarly, very few motions for new trial were granted, but where a new trial occurred, I coded the most recent trial.

III. Results

A. Fundamental Case Characteristics

I identified 287 unique cases in which qualified immunity was raised, jury instructions were proposed or adopted, and the case was resolved shortly prior to or through a jury trial. Of these cases, 211 proceeded to a jury trial

88 I identified cases through Bloomberg Law, conducting a broad docket search for cases that included the following terms in either documents or docket entry: "qualified immunity," "verdict," and "jury instructions." Bloomberg Law, unlike Westlaw or LEXIS, contains the full docket and decisions of all civil cases in the federal system.

89 To limit the cohort to civil rights cases, I relied on case coding by the Administrative Office of the United States Courts, searching for cases that were coded as civil rights or prisoners' rights cases, including employment discrimination cases (AO Codes 440, 442, 550, and 555). Admin. Office of the U.S. Courts, Civil Nature of Suit Code Descriptions 3, 4 (June 2017), http://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf.

90 I also coded for instructions that used the term "arguable" probable cause, because it is a stand-in for qualified immunity in some Fourth Amendment contexts. *See, e.g.*, Gates v. Khokhar, 884 F.3d 1290, 1298 (11th Cir. 2018); Dufort v. City of New York, 874 F.3d 338, 354 (2d Cir. 2017).

that resulted in a final judgment; the remainder were resolved through settlement, summary judgment, or remain unresolved.[91] The median time from filing to resolution of all cases was over two years (903 days); for cases that proceeded to trial, the median time for resolution was basically identical (900 days).[92] This was slightly longer than the median time from filing to trial in all federal civil cases over the same time period.[93] This is unsurprising, because one would assume that cases involving qualified immunity would take longer to resolve, given the opportunity for motion practice and interlocutory appeal.[94]

Of the cases that went to trial, the plaintiff prevailed in slightly over twenty-five percent of the cases, the defendant prevailed in almost seventy percent of the cases, and the remainder settled or were disposed of in other manners. This is comparable to success rates that have been reported in civil rights cases overall.[95]

The vast majority of cases in the cohort involved Fourth Amendment claims brought against law enforcement officers—claims of unreasonable searches and seizures and excessive force amounted to about sixty-five percent of the cohort. Approximately ten percent of the cases involved First Amendment claims, and another ten percent involved Eighth Amendment claims brought by people in prison. The remaining fifteen percent of the cohort was a mix of discrimination, procedural due process, and substantive due process claims.

Finally, there was a wide range of representation of the district courts, as reflected in their circuit of origin. The Second, Fifth, Seventh, Ninth, and Eleventh Circuits were overrepresented in the sample—cases from the Second Circuit accounted for a little more than twenty percent of the cohort, cases from the Fifth, Seventh and Eleventh Circuits each made up about ten percent, and the Ninth Circuit accounted for almost one quarter of the cases

91 In a handful of cases, there was no unanimous jury verdict, thus requiring a retrial.

92 The average time from filing to resolution of all cases was almost two years (916 days). For cases that proceeded to trial, the average time for resolution was nearly identical (919 days).

93 *See Federal Court Management Statistics—Profiles*, ADMIN. OFFICE OF THE U.S. COURTS (Dec. 31, 2017), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2017.pdf (providing median disposition times for 2013, 2014, and 2015 of 26.5, 26.3, and 27.2 months, respectively).

94 *See supra* note 92 and accompanying text.

95 *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 129–30 (2009) (reporting 28.47% win rate for plaintiffs going to trial in employment discrimination cases, although rate rises to 37.63% in jury trials); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 n.57 (1989) (reporting plaintiff trial success rate of 27.4% in nonprisoner civil rights cases); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592 (2003) (reporting that plaintiffs prevailed in about 10% of trials in prisoners' rights claims).

in the cohort. This is likely consistent with the heavier caseload, and the civil rights caseload in particular, that characterizes these circuits.[96]

B. Overall Rates of Instruction on Qualified Immunity

Of the cases in the cohort, an instruction on qualified immunity was proposed or adopted in sixty cases,[97] with no instruction on the immunity proposed or adopted in 223 cases. Special interrogatories were proposed or adopted in thirty-two cases. In six cases, both special interrogatories and an instruction on qualified immunity were proposed or adopted. Table 1 summarizes these data:

TABLE 1. OVERALL RATES OF INSTRUCTION, ALL CASES

Instruction	Cases in which instruction was proposed or adopted
No QI instruction, no special interrogatories	199 (70.3%)
QI instruction and special interrogatories	6 (2.1%)
QI instruction, no special interrogatories	54 (19.1%)
Special interrogatories, no QI instruction	24 (8.5%)
Total cases	287

As discussed, however, not all of these cases involved trials, nor were they all cases in which there is an available record of a court-approved instruction.[98] When one limits the dataset to the cases involving jury trials, there were 211 cases in which jury trials were held, 168 of which clearly identified court-approved instructions. In the remaining forty-three cases, the parties proposed instructions but the court's instructions were not in the record. Among all cases, there were nineteen cases in which qualified immunity instructions were approved by the court and an additional twelve cases in which they were proposed. Even assuming that instructions were given in every case in which they were proposed, this would amount to approximately fifteen percent of cases. Table 2 more fully explores these data.

96 The Administrative Office of the United States Courts provides annual data that describes case filings by subject matter. District Courts in the Second, Fifth, Seventh, Ninth, and Eleventh Circuits consistently report high caseloads with a significant number of civil rights cases. *See, e.g.*, *Table C-3, U.S. District Courts—Civil Federal Judicial Caseload Statistics*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 31, 2017), http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2017/03/31.

97 This includes three instances in which an arguable probable cause instruction was requested or provided.

98 In some cases, although a qualified immunity instruction was proposed, the record does not indicate whether the instruction was given by the trial judge.

TABLE 2. INSTRUCTIONS PROPOSED AND APPROVED

Instruction	Instruction Approved	Instruction Proposed	Total Cases
No QI instruction, no special interrogatories	136 (80.9%)	19 (47.5%)	155 (74.5%)
QI instruction and special interrogatories	1 (0.6%)	3 (7.5%)	4 (1.9%)
QI instruction, no special interrogatories	18 (10.7%)	9 (22.5%)	27 (13.0%)
Special interrogatories, no QI instruction	13 (7.7%)	9 (22.5%)	22 (10.6%)
Total cases	168	40	208[99]

In sum, whether limited to all cases or only those involving trials, in the vast majority of instances, courts rarely instructed on qualified immunity or on special interrogatories. Juries were typically not asked to make any findings that bear on qualified immunity.

C. Qualified Immunity by Case Type

As discussed above, the cohort of cases studied here consisted principally of Fourth Amendment challenges to law enforcement conduct. Case type appeared to have some correlation with rates of instruction on qualified immunity, as well as rates at which special interrogatories were requested or adopted. As Table 3 shows, among cases that went to trial, cases involving different kinds of constitutional claims were associated with different rates of instruction on qualified immunity. Interestingly, cases involving Fourth Amendment challenges were significantly more likely to involve requests for special interrogatories.

TABLE 3. INSTRUCTIONS PROPOSED AND/OR APPROVED, BY CASE TYPE (CASES LITIGATED TO TRIAL)

Case Type	Qualified Immunity Instructions	Special Interrogatories
Fourth Amendment Claims	19 (13.9%)	25 (18.25%)
First Amendment Claims	2 (9.1%)	2 (9.1%)
Eighth Amendment Claims	6 (21.4%)	1 (3.6%)
Other	3 (13.6%)	0 (0%)

The results do not change dramatically when one examines only cases in which a court-approved instruction could be located—the only significant

99 There were three cases in which a trial occurred but in which data regarding the presence or absence of qualified immunity instructions could not be determined.

change is that the rate of instruction on qualified immunity in Eighth Amendment claims decreases to about 12.5% of the cohort. The significant variation in the use of special interrogatories remains, however, with special interrogatories much more likely to be requested and approved in cases involving Fourth Amendment claims.

D. Qualified Immunity Instruction by Circuit of Origin

Because each circuit has different approaches to qualified immunity,[100] understanding whether the prevalence of qualified immunity instructions is related to circuit of origin is important. One should expect, for example, that cases in the Fifth Circuit, where model jury instructions explicitly approve of qualified immunity instructions,[101] would be more likely to have trials in which instructions on qualified immunity are routinely provided. Table 4 provides these data for all circuits in the cohort:

TABLE 4. PROPOSED AND COURT-ADOPTED INSTRUCTIONS ON QUALIFIED IMMUNITY, BY CIRCUIT, ALL CASES LITIGATED TO TRIAL

Circuit	No QI, no special interrogatories	QI (with and without special interrogatories)	Special interrogatories, no QI	Total Cases
First	4	1	2	7
Second	26	4	14	44
Third	6	3	1	10
Fourth	2	2	0	4
Fifth	7	15	0	22
Sixth	6	1	0	7
Seventh	21	0	0	21
Eighth	8	0	0	8
Ninth	46	2	3	51
Tenth	12	1	1	14
Eleventh	17	2	0	19
D.C.	0	0	1	1

When one limits the data to cases in which it could be confirmed that the court adopted qualified immunity instructions, the incidence rates reduce: in the Second, Third, Tenth, and Eleventh Circuits, each had only one such case; in the Fifth Circuit, there were thirteen cases identified; and the Ninth Circuit had two such cases.[102] These results are striking for at least

100 *See supra* Section I.C.

101 *See* COMM. ON PATTERN JURY INSTRUCTIONS, *supra* note 61.

102 In the remainder of the circuits, there were no cases in which a court-approved instruction on qualified immunity was confirmed.

two reasons. First, although every circuit but the Fifth expresses doubt about instructing juries on the substance of the qualified immunity defense,[103] the Fifth Circuit is not the only jurisdiction in which qualified immunity instructions were proposed and adopted. Second, although most circuits express openness toward resolving disputed factual questions related to qualified immunity through special interrogatories, many circuits do not do so in practice.

E. Instructions on Burden of Proof/Persuasion

Among the cases in which the jury was instructed as to qualified immunity or the jury was asked to answer special interrogatories geared toward assisting the trial court in resolving qualified immunity, each instruction was coded for whether the burden of proof was placed on the plaintiff, the defendant, or unspecified. Given that the burden of proof generally falls upon the plaintiff, it might be assumed that where the jury instructions did not identify the party that bears the burden of proof, juries assumed that it fell on the plaintiff.[104] Table 5 describes how the burden of proof was allocated, if at all, in the fifty-three cases in which a qualified immunity instruction and/or special interrogatories were adopted or proposed.

TABLE 5. BURDEN OF PROOF, INSTRUCTIONS ADOPTED OR PROPOSED

Instruction/Special Interrogatory	Burden on Defendant	Burden on Plaintiff	Burden Unspecified
QI, No Special Interrogatories	3	15	9
Special Interrogatories, No QI	2	0	20
QI and Special Interrogatories	1	1	2
Total	6	16	31

Once again, there also is a large variation among the circuits. The Fifth Circuit accounts for thirteen of the sixteen cases in which the burden was explicitly placed on the plaintiff. Yet the Second Circuit, which has explicitly held that the burden of proof for qualified immunity rests with defendants,[105] accounted for sixteen cases in which the burden of proof in the instructions was unspecified.

F. Outcome and Qualified Immunity Instructions

Finally, as there is a longstanding assumption in the literature that qualified immunity, when raised at trial, operates as a substantial barrier to suc-

103 *See supra* Section I.C.

104 *Cf.* Bradshaw v. Heckler, 810 F.2d 786, 789 (8th Cir. 1987) ("We have held consistently that where the Secretary fails to acknowledge the burden of proof one way or another, it must be assumed that the burden improperly remained on the claimant.").

105 *See supra* note 58 and accompanying text.

cess, outcomes at trial were coded and sorted according to whether a qualified immunity instruction and/or special interrogatories were included in the jury instructions. Table 6 shows that, when considering all cases that went to trial, the presence of a qualified immunity instruction, but not a special interrogatory, is associated with a decreased plaintiff success rate.

TABLE 6. CASE OUTCOME, BY JURY INSTRUCTION

Instruction/Special Interrogatory	Defense Verdict	Plaintiff's Verdict	Settled During or After Trial
QI, With or Without Special Interrogatories	22 (78.4%)	4 (14.3%)	2 (7.2%)
Special Interrogatories, No QI	11 (50%)	11 (50%)	0 (0%)
No QI, No special interrogatories	111 (73%)	39 (25.6%)	2 (1.3%)
Total	144 (71.3%)	54 (26.7%)	4 (2%)

Table 7 focuses only on cases in which a court-approved instruction was confirmed, and suggests an even stronger association between a decreased plaintiff success rate and the presence of a qualified immunity instruction.

TABLE 7. CASE OUTCOME, BY JURY INSTRUCTION, COURT-APPROVED INSTRUCTIONS ONLY

Instruction/Special Interrogatory	Defense Verdict	Plaintiff's Verdict	Settled During or After Trial
QI, With or Without Special Interrogatories	15 (88.2%)	2 (11.8%)	0 (0%)
Special Interrogatories, No QI	5 (38.5%)	8 (61.5%)	0 (0%)
No QI, No Special Interrogatories	95 (71.4%)	37 (27.8%)	1 (0.8%%)
Total	115 (74.1%)	39 (25.2%)	1 (0.7%)

There is an even stronger association with success when one considers only the presence or absence of a qualified immunity instruction. Of the 162 cases in which there was a trial and in which the presence or absence of a qualified immunity instruction could be confirmed, the plaintiff prevailed in approximately eleven percent of cases in which a qualified immunity instruction was given, compared to thirty-one percent of cases in which a qualified immunity instruction was not provided. In other words, the presence of a qualified immunity instruction is associated with a plaintiff's success rate that is about one third that of cases in which no such instruction was given.

This relationship is even more suggestive when one considers only cases involving Fourth Amendment claims. In Fourth Amendment cases where no qualified immunity instruction was given, the plaintiff prevailed about thirty-three percent of the time (30 out of 89 trials). The plaintiff prevailed only about nine percent of the time (1 out of 11 trials) where a qualified immu-

nity instruction was given. There was no similar relationship in Fourth Amendment cases based on the presence or absence of special interrogatories—where no interrogatories were given, there was a plaintiff verdict about twenty-five percent of the time, as compared to a fifty-eight percent win rate for plaintiffs when special interrogatories were submitted.

Finally, if one focuses instead on cases in which court-adopted instructions allocate burdens of proof, the potential relationship with case outcome is stark. Table 8 shows that there were no cases in which plaintiffs succeeded at trial where a court-adopted instruction placed the burden of proof explicitly on the plaintiff to rebut qualified immunity. In other words, the only cases in which a plaintiff prevailed at trial where there were court-adopted instructions on qualified immunity or special interrogatories are those cases in which the court gave no instructions on who carried the burden of persuasion.

TABLE 8. CASE OUTCOME BY ALLOCATION OF BURDEN OF PROOF, COURT-APPROVED INSTRUCTIONS

Party with Burden of Proof	Defendant Verdict	Plaintiff Verdict
Defendant	2	0
Plaintiff	12	0
Unspecified	6	11

IV. IMPLICATIONS

The first major implication from these data is that, consistent with what empirical research has suggested about other aspects of qualified immunity, the impact of the defense at trial does not appear consistent with what has been the scholarly assumption. Qualified immunity has been described as a potent defense at trial, with many commentators assuming that the presence of the defense makes it that much harder for plaintiffs to achieve success at trial.[106] Moreover, commentators have also assumed that juries will play a significant role in assessing disputed issues of fact that relate to the qualified immunity defense.

The data presented here suggest that, in fact, qualified immunity rarely plays a significant role in jury trials. Instructions on qualified immunity and/or special interrogatories were proposed or adopted in fewer than a quarter of cases that resulted in a jury trial. If one looks to cases in which only a court-approved instruction could be confirmed, only about ten percent of cases were located with instructions on qualified immunity, with an additional approximately seven percent of cases found in which special interrogatories alone were given to the jury.[107]

The overall picture this paints is one in which qualified immunity rarely, if ever, plays a role in jury trials of civil rights claims. At the same time, it is

106 *See supra* notes 86–87 and accompanying text.

107 *See supra* Table 2.

apparent that the role of qualified immunity varies significantly according to circuit of origin. The Fifth Circuit lies at one extreme, in which juries were instructed on qualified immunity (with and without special interrogatories) well over half of the time (in eleven out of sixteen trials for which court-approved instructions were available). In the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, by contrast, there were no trials in which juries were instructed on qualified immunity or special interrogatories. Qualified immunity instructions were extremely rare in the Second and Ninth Circuits as well—in the Second Circuit, instructions on qualified immunity were given in one out of twenty cases, while in the Ninth Circuit, qualified immunity instructions were provided in two out of forty-two cases.[108]

The distinct experience in the Fifth Circuit should not be surprising, given that the Fifth Circuit is the only court, with its model jury instructions, to explicitly approve of instructing the jury on the qualified immunity defense.[109] More surprising perhaps is that in other circuits, which disapprove of qualified immunity instructions but embrace the concept of special interrogatories, special interrogatories are rarely, if ever, used.

There are some possible explanations for this, all of which would require further research to evaluate. First, it may be that in the run of cases, trial judges consider the facts central to a plaintiff's claim to overlap so closely with the facts relevant to qualified immunity that submitting special interrogatories to juries is considered duplicative or potentially confusing. In these cases, judges may simply be disregarding the Supreme Court's admonition that there is such a thing as a "reasonably unreasonable" officer.[110] Indeed, it may be that lower courts are acting consistently with the views espoused by Justice Ginsburg, concurring in the judgment in *Saucier*, when she declared that, where summary judgment on qualified immunity is inappropriate, the jury's resolution of the merits of a Fourth Amendment violation will necessarily resolve any claim to qualified immunity.[111]

Second, it may be that lower courts are treating qualified immunity "solely" as an immunity from suit, and not as a defense to liability. On this theory, courts may conclude that, having rejected qualified immunity arguments at earlier stages of the case (summary judgment or in motions to dis-

108 In both the Second and Ninth Circuits, juries were occasionally given special interrogatories but not qualified immunity instructions—in four out of twenty cases in the Second Circuit and in two out of forty-two trials in the Ninth Circuit.

109 *See supra* note 101 and accompanying text.

110 In *Anderson v. Creighton*, 483 U.S. 635, 643 (1987), for example, the Court rejected the argument that "[i]t is not possible . . . to say that one 'reasonably' acted unreasonably." The Court confirmed this understanding in *Saucier v. Katz*, 533 U.S. 194, 203 (2001), *rev'd on other grounds*, Pearson v. Callahan, 555 U.S. 223 (2009). Even in the Eighth Amendment context, in which some appellate courts have suggested that *Saucier* may be less relevant, the Court has suggested that the qualified immunity inquiry may be different from the merits, because after the Court decided that the prisoner stated an Eighth Amendment claim, it proceeded to consider whether the defendants acted reasonably under the circumstances. *See* Hope v. Pelzer, 536 U.S. 730, 741–46 (2002).

111 *See Saucier*, 533 U.S. at 216 (Ginsburg, J., concurring in judgment).

miss), once trial has commenced, there is no role for the defense to play. Again, however, this would be inconsistent with the Supreme Court's guidance to lower courts.[112]

Third, lower courts may just conclude that it is simply too confusing to instruct juries on qualified immunity or special interrogatories.[113] Consider the following language from one of the rare cases in which a court approved a qualified immunity instruction:

> It is McFarland's burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case. . . . If, after considering the scope of discretion and responsibility generally given to corrections officers in performing their duties and after considering all of the circumstances of this case as they would have reasonably appeared to the defendant at the time the defendant supervised McFarland at the poultry farm, you find that McFarland failed to prove that no reasonable officer could have believed that McFarland's work at the poultry farm was lawful, then the defendant is entitled to qualified immunity, and your verdict must be for the defendant on those claims.[114]

The jury found for the defendant in the case, although it did not appear to base its decision on a resolution of the qualified immunity defense.[115] Nonetheless, had the jury been required to decide whether the plaintiff "failed to prove that no reasonable officer could have believed" that defendant behaved lawfully, one might anticipate the likelihood of jury confusion.

Finally, it may be that defense counsel are simply making the strategic decision not to request instructions on qualified immunity or special interrogatories. There are examples in the dataset in which a court invites defendants to submit special interrogatories, and the defense counsel decline to propose them. Defense counsel may be concerned about jury confusion. In jurisdictions which would allocate the burden of proof to the defense, defense counsel may be leery of distracting the jury from what might be effective arguments about plaintiff's failure to prove her case. Or, defense counsel may adhere to an entrenched practice that has not been displaced by doctrinal openings. In the Second Circuit, for example, the City of New York routinely proposes that special interrogatories be given to the jury, but other institutional defendants do not appear to have that practice.[116]

In other words, despite the Supreme Court's enthusiasm for qualified immunity, other relevant actors who operationalize Supreme Court doctrine

112 The Court has stated as far back as *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), that qualified immunity "is an *immunity from suit* rather than a mere defense to liability," but it has never suggested that, as a result it, is unavailable at trial.

113 *Cf. supra* Sections I.B, I.C.

114 *See* Jury Instruction C-4, McFarland v. Brooks, No. 4:14-cv-00090, 2016 WL 1091096 (N.D. Miss. Jan. 18, 2017).

115 The verdict form in *McFarland* indicates that the jury found that the plaintiff did not establish the defendant's deliberate indifference. Verdict Form at 1, *McFarland*, 2016 WL 1091096. The jury did not proceed to answer whether the defendant was entitled to qualified immunity. *Id.*

116 *See supra* note 42 and accompanying text.

may not share that enthusiasm, for a variety of reasons. This is not inconsistent with empirical observations that have been made about how qualified immunity operates outside of the trial context—it is more rarely invoked than one would expect given the trends in Supreme Court doctrine and the perceived strength of the defense.[117]

There is also something to be learned, however, from those cases in which the defense is raised at trial, either through instructions or special interrogatories. First, despite the attention that scholars and appellate courts have paid to the question of burdens of proof and persuasion, jury instructions on qualified immunity are far from uniform in allocating burdens. In most cases, no burden at all is specified.[118] And where a burden is specified, it is usually placed on the plaintiff. Although there is good reason to believe that, to the extent fact-based qualified immunity defenses are being raised, the burden of proof and persuasion should be placed on the defendant,[119] this is rarely the case at trial.[120]

At the same time, when juries are instructed on qualified immunity (or given special interrogatories), plaintiffs are more likely to lose at trial. Indeed, plaintiffs never prevailed at trial in cases in which a qualified immunity instruction was given and the burden was explicitly placed on the plaintiff (though one should be cautious about drawing too much in conclusion from this, for the total number of cases is small). This would seem to suggest that the qualified immunity defense may have some impact on trial outcome, although caution is in order.

Most importantly, it is not obvious from reviewing verdicts that juries are ultimately resting their decision on qualified immunity. In many cases, they simply are finding no constitutional violation and therefore never even turning to questions of qualified immunity. Perhaps, as others have suggested,[121] just being instructed on the defense makes juries more likely to find defendant's conduct reasonable or lawful, but one would want to explore outcomes further to confirm this result.

Conclusion

This is the first empirical study to investigate the role that qualified immunity plays in jury trials. It shows that, on one hand, qualified immunity rarely is the subject of jury deliberations but that, on the other hand, when it

117 *See, e.g.*, Schwartz, *supra* note 2.

118 *See supra* Table 4.

119 *See supra* notes 74–78 and accompanying text.

120 The Supreme Court has recently given strong indications that, at least at trial, the burden of proving the defense rests on defendants. Notably, in *Ortiz v. Jordan*, one of the few cases in which the Court reviewed a qualified immunity trial, when discussing the officers' entitlement to immunity, the Court noted that the defendants "produced no evidence" for one of their factual contentions, suggesting that at least at trial, the burden of proof rests on defendants invoking the qualified immunity defense. 562 U.S. 180, 191 n.9 (2011).

121 *See supra* note 66 and accompanying text.

is, it appears to have an outward impact on outcomes. Both findings raise significant questions about how qualified immunity operates on the ground. The general infrequency with which the defense is raised suggests that courts and litigants do not see the defense as typically appropriate for jury resolution. The potential impact that it may have on outcomes, however, suggests that in those cases where it is deemed appropriate, it can be outcome determinative.