THE INTRACTABILITY OF QUALIFIED IMMUNITY

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Introduction

The federal common law doctrine of qualified immunity, a key feature of American civil rights law, protects public officials from damages lawsuits unless their conduct violates "clearly established . . . constitutional rights of which a reasonable person would have known."[1] The Supreme Court designed the doctrine to strike a balance between the desire to permit individuals to enforce their constitutional rights by suing government officials for damages and the need to alleviate the perceived burdens on those officials and the government in responding to such claims.[2] As the rich body of literature[3] in this area illustrates, qualified immunity presents fascinating and complex legal theory questions. At the same time, disputes about its proper implementation reflect its enormous significance for practitioners in routine civil rights litigation. Indeed, it is fair to say that the doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges, and litigators for half a century.[4]

This Essay offers an internal critique of qualified immunity law that explains why these problems remain intractable and why, unfortunately, there is little hope for resolution of the doctrine's central dilemmas, short of either abandoning immunity or making it absolute.[5] The Essay breaks down its discussion of qualified immunity into three distinct, but related, categories, and argues that the challenges presented within each category are diffi-

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

2 *Id.* at 813–14.

3 *See infra* notes 23–24.

4 Qualified immunity's origins can be reasonably traced to the Supreme Court's decision in *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967).

5 *See infra* text accompanying notes 17–19.

cult, if not impossible, to overcome. First, it addresses what can best be described as qualified immunity's foundational jurisprudential tensions. Embedded in the doctrine are several first-level legal theory problems that can be identified and discussed, but for which there are ultimately no "right" answers. These tensions can be seen, for example, in the operationalization of the doctrine as an open-ended reasonableness standard rather than a bright-line rule, the conceptual challenge of distinguishing pure questions of law from mixed questions of law and fact, and the appropriate level of generality at which "clearly established constitutional rights" are articulated. Indeed, as the latter question suggests, the very meaning of constitutional rights underlies all conversations about qualified immunity.

These theoretical and doctrinal tensions are, in turn, translated into real practical challenges for judges and litigators, especially at the federal district court level, who struggle to implement a doctrine that suffers from serious administrability problems. Among these problems are continuing disputes over the degree to which discovery is permissible prior to resolving immunity claims, the coherent implementation of supposedly transsubstantive summary judgment procedures, and the continuing consumption of substantial resources by the adjudication of qualified immunity claims.

Finally, the Essay addresses qualified immunity from a public policy perspective, arguing that meaningful reform of the doctrine is impeded in part because of these previously identified tensions, which as suggested are not amenable to easy resolution. Reform is also made more difficult because of insurmountable epistemological problems about how the doctrine operates on the ground. Notwithstanding the emergence of excellent, recent empirical work by several legal scholars, the doctrine likely will remain entrenched in its current form because of the Supreme Court's reluctance to consider empirical data in revising rules of constitutional enforcement coupled with Congress's lack of political will. The legal community can continue to argue about qualified immunity at the margins, but should not reasonably expect any transformation of the doctrine's basic structure over its next fifty years.

I. QUALIFIED IMMUNITY LAW

Damages claims against public officials are an important, though by no means the only, aspect of our constitutional enforcement scheme.[6] Such actions permit plaintiffs to be compensated for their injuries and deter public officials from engaging in unconstitutional conduct. For a number of reasons, constitutional tort claims became more widely available throughout the 1960s and 1970s.[7] This expansion in the number of claims generated

6 Such claims may be brought against most state and local officials pursuant to 42 U.S.C. § 1983 (2012), and against federal officials under the authority of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392–97 (1971) (recognizing damages actions against federal officials in their personal capacity for the violation of Fourth Amendment rights).

7 This was the product of a number of different factors, including the expansion of the meaning of under color of state law in *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on*

increasing concerns that many of these lawsuits were frivolous and that defending them imposed both societal and individual costs.

In a series of decisions, the Supreme Court identified three categories of such costs. First, it found that imposing financial liability on officials who might not understand the nuances of constitutional doctrine, particularly when most are not legally trained, would be unfair.[8] Second, the Court argued that officials would hesitate when required to act if they were concerned that their actions could subject them to a lawsuit, thus creating a problem of "overdeterrence."[9] Finally, the Court found that, although official defendants could still prevail on the merits, even being subject to the burdens of the judicial process would cost them time, distract them from their jobs, and require them to incur litigation expenses.[10]

Thus, before having to defend a constitutional tort claim on the merits, official defendants could assert qualified immunity as an affirmative defense. The process for adjudicating qualified immunity claims was heavily dictated by the Court's identification of the problems with constitutional tort suits. To avoid the burdens of litigation, the Court established a procedure that it believed would allow disposition of immunity claims at the earliest possible stage of litigation. Thus, the Court suggested that defendants could seek resolution of their qualified immunity claims on summary judgment and that trial courts should not permit discovery prior to deciding such claims.[11] Though the Court has had to back away from that approach somewhat, as discussed below, the immunity issue is basically designed to be resolved well before trial.

The Court has also specified the appropriate legal standard for resolving qualified immunity claims. It directed that:

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immu-

other grounds by Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978), application of constitutional rights provisions to state and local governments through the Fourteenth Amendment's incorporation doctrine, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (extending use of the exclusionary rule to state courts), and the recognition of a damages action against federal officials for constitutional violations, *Bivens*, 403 U.S. at 392–97. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2 (6th ed. 2012) (citing statistics about the rapid growth in § 1983 litigation after *Monroe*). *But see* Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889 (2010) (arguing that through a number of different doctrinal moves the Court has substantially diminished the scope of constitutional enforcement since *Monroe*).

8 *See* Wood v. Strickland, 420 U.S. 308, 319–22 (1975).

9 Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (1982).

10 *Id.* at 814.

11 *Id.* at 818.

> nity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.[12]

Thus, qualified immunity operates essentially as an ignorance-of-constitutional-law defense for public officials, though that defense does not apply if the law is clearly established.

Moreover, the Court's decisions establishing qualified immunity as a federal common law defense have, for all intents and purposes, been unanimous.[13] Though the Court has decided numerous qualified immunity cases in the past decades, the basic structure of the doctrine is unchanged.[14] Rather than providing substantive development that advances the understanding of this area of the law, many of the Court's decisions in recent years merely tinker at the margins of the doctrine[15] or summarily reverse lower court decisions that are not, in its view, sufficiently protective of public officials.[16] Thus, the essential architectural features of qualified immunity law have remained quite stable, which is why the analysis in this Essay focuses on doctrine as fundamentally shaped in *Harlow*.

While the Court's explanations of the policy and procedure for applying qualified immunity seem reasonable on the surface, the law's implementation reflects substantial theoretical and pragmatic tensions that have remained problematic. As I discuss below, this is because these issues are largely embedded in the doctrine's architecture, making them not only prob-

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12 *Id.* at 818–19 (footnote omitted).

13 *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967). Justice Douglas dissented in *Pierson*, but not on the qualified immunity issue. *Id.* at 558 (Douglas, J., dissenting) (arguing that judges should not be entitled to absolute immunity). Chief Justice Burger dissented in *Harlow*, but on the ground that the President's closest aides should be protected by absolute, rather than qualified, immunity. *Harlow*, 457 U.S. at 822 (Burger, C.J., dissenting).

14 Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 494 (2011) (observing that the qualified immunity standard "has remained relatively untouched in recent decades" since the Court's decision in *Harlow*). The only major change to the doctrine since *Harlow* has been the short-lived requirement that courts decide the merits question before addressing the immunity question, with the hope that this would result in greater development of the substantive law. *See* Saucier v. Katz, 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009). For an argument that qualified immunity and constitutional innovation can coexist in a post-*Pearson* world, see James E. Pfander, Essay, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

15 *See, e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002) (holding that plaintiffs need not identify precedents with materially similar facts to demonstrate that the law was clearly established); Crawford-El v. Britton, 523 U.S. 574 (1998) (holding it improper for courts to impose heightened evidentiary burden on plaintiffs in unconstitutional motive cases where the defendant asserted qualified immunity on summary judgment); Richardson v. McKnight, 521 U.S. 399 (1997) (holding that guards employed by private companies operating prison under contract with the state may not assert qualified immunity).

16 Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (noting that many of the Court's recent immunity decisions are per curiam summary reversals of lower court decisions denying officials qualified immunity); *see also* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 (2016).

lematic, but also intractable. What follows is an internal critique of the doctrine's design and administrability. By internal critique, I refer to critical analysis of the doctrine's structure within the parameters of its basic premises.[17] That is, my arguments take the legitimacy of the doctrine's premises at face value, but maintain that the doctrine creates substantial internal tensions and may sometimes even undermine its own goals. In contrast, others might level different sorts of external critiques. One example of an external critique might be from a Critical Legal Studies perspective: namely, that the doctrine is really just an instrumental tool to protect powerful government actors while providing the illusion that citizens can enforce their constitutional rights.[18] A very different type of external critique could be that the doctrine cannot be understood wholly internally because it is simply one piece of a larger question about the optimal scheme of constitutional enforcement. Two prominent and thoughtful expositors of this latter external critique are Richard Fallon and John Jeffries, who have frequently reminded us that qualified immunity must be assessed and critiqued not in isolation, but against the broader matrix of constitutional enforcement mechanisms.[19] These observations about immunity scholarship are quite insightful, and in other work I have followed that lead.[20] For the purposes of the present analysis, however, my critique remains for the most part internal, while acknowledging that immunity law is but a part of a larger remedial structure.

II. Qualified Immunity's Foundational Jurisprudential Tensions

H.L.A. Hart would have loved qualified immunity. One could easily imagine that his famous illustration of legal rules through a hypothetical "No Vehicles in the Park" ordinance might today be supplanted by a philosophical examination of what counts as a "clearly established constitutional right."[21] Had his Supreme Court nomination been confirmed, Robert Bork, in turn, would likely have considered qualified immunity to be a main course in his "intellectual feast."[22] Indeed, qualified immunity has captured the

17 *See* Ronald Dworkin, Taking Rights Seriously 279–90 (1978).

18 For general background, see Mark Kelman, A Guide to Critical Legal Studies (1987).

19 *See* Fallon, *supra* note 14; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 208 (2013); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991).

20 *See* Chen, *supra* note 7, at 889 (suggesting that "examining the existence and operation of alternative constitutional remedies across different contexts offers important insights about the architecture of federal constitutional enforcement").

21 H.L.A. Hart, The Concept of Law 125–27 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994). *See generally* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. Rev. 1109 (2008).

22 Responding to a Senator asking why he wanted to be on the Supreme Court, Judge Bork stated that "it would be an intellectual feast," 1 *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings on S.1011 Before the S. Comm. on the Judiciary*, 100th Cong. 854 (1989), which critics used to suggest that he would be

attention of a significant number of legal scholars and been the focus of some of the richest federal courts scholarship of the past generation.[23] An equally impressive new generation of scholarship, many of whose authors are contributing to this issue, is rapidly emerging.[24]

It is no wonder that legal theorists have been captivated by qualified immunity. It is, as Winston Churchill once famously said of Russia, "a riddle wrapped in a mystery inside an enigma."[25] This is so because qualified immunity has presented us with several foundational jurisprudential questions that are in part responsible for the seemingly endless confusion about its application and effectiveness. From a theoretical perspective, these choices present interesting questions about what it means for a public official to violate a person's constitutional rights, or what rights mean under an immunity regime. In addition, there is a certain amount of path dependency associated with the Court's decisions about these issues. The choice to articulate qualified immunity as a standard rather than a rule, to define it as a question of law rather than a mixed question of law and fact, and to identify (but not really address) the proper level of generality at which a clearly established right is stated, have all had serious effects on the doctrine's administrability. That is, the problems identified in this Part led inevitably to the problems discussed in Part III.

A. Standards over Rules

There are three possible approaches to immunity for public officials in constitutional tort cases. First, we could have no immunity at all; defendants in each case could defend themselves on the merits of the plaintiff's claim that they violated the Constitution (as, of course, they are still entitled to do

highly proficient technically, but ultimately lacking in compassion and sensitivity. *See* Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 833 n.6 (1990).

23 *See, e.g.*, David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497 (1992); Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187 (1993); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913 (2015); Fallon & Meltzer, *supra* note 19; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115; Jeffries, *supra* note 19; John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U. L.Q. 221 (1984); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

24 *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405 (2012); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015); Alexander A. Reinert, *Screening out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

25 THE YALE BOOK OF QUOTATIONS 152 (Fred R. Shapiro ed., 2006).

under present law if they are found not to have any immunity).[26] Second, there could be absolute immunity for all officials in all cases. That is, we could simply abolish constitutional tort actions. The Court has already established that some officials, such as judges, prosecutors, and legislators, are entitled to absolute immunity, at least when they are carrying out the central functions of those offices.[27] These first two categories would be bright-line immunity rules. In contrast, the Court has chosen a third path, articulating qualified immunity as an open-ended legal *standard*. As we will see, that decision embedded many of the principal difficulties with the doctrine.

The dilemma of whether legal directives should be articulated as categorical rules or broad standards is an age-old topic of legal theory.

> A rule is a legal directive that is relatively precise and dictates a determinate result based on the existence of certain predetermined factors. . . . In contrast, a standard is a relatively open-ended directive that defines broad criteria under which a decisionmaker may draw a conclusion in a particular case, depending upon how and to what extent the criteria are satisfied in those circumstances.[28]

A full elaboration of the debate is well beyond the scope of this Essay, but each form of legal directive is widely understood to have both virtues and flaws.[29] At the risk of vastly oversimplifying the discourse, hard rules are said to offer more predictability and constrain decisionmakers' discretion by limiting their ability to make arbitrary or biased decisions, while softer standards are supposed to provide more fairness and substantive equality by allowing decisionmakers to be flexible and account for individual circumstances in their decisions, promoting greater justice.[30] Standards also, in theory, promote accountability of decisionmakers by requiring them to explain in detail the reasons for their decisions.[31]

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26 Qualified immunity would have to be abolished if it is unlawful, as Professor Baude has suggested, Baude, *supra* note 24, though other doctrines and rules might take its place to address the policies it is understood to advance.

27 In reality, the universe of possibilities is slightly larger. For example, all officials might be permitted to assert qualified immunity in some circumstances (e.g., when sued for making decisions they have no time to deliberate over) but not others. Or, as I suggest below, the law might grant absolute immunity to some categories of officials and no immunity to others. For the purposes of developing this framework, I bracket these possibilities.

28 Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 282 (1995) (footnotes omitted).

29 For background reading in this area, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); *see also* Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG (Sept. 6, 2009, 9:40 AM), http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html.

30 *See* Chen, *supra* note 28.

31 *See id.* at 291.

Implementation of a standard by definition requires case-by-case adjudication of each application of the law, and this is certainly true of qualified immunity. The Court's decision to articulate qualified immunity as a standard "seems to be supported by a classic argument for standards: its open-ended nature empowers the decisionmaker to take into account all relevant considerations,"[32] thereby promoting substantively just outcomes.

> Of course, standard-like immunity directives are subject to the conventional critiques of standards as well. . . . A decisionmaker with a decidedly pro-government bias can recharacterize virtually all constitutional violations as within the realm of what a "reasonable official" might have thought to be legal. The expected response to this critique, however, would be that the qualified immunity standard forces the decisionmaker to explain the reasons for his decision, thus promoting a discussion of relevant factors and exposing the decision to scrutiny after-the-fact.[33]

Thus, the qualified immunity standard can be seen as promoting substantive justice in the form of individualized decisionmaking and deliberation, as well as accountability for decisionmakers. These would seem to comport with the stated policy goals of qualified immunity to protect officials who make reasonable, but mistaken, judgments about the constitutionality of their conduct, while allowing plaintiffs to pursue claims for officials' egregious unconstitutional acts.

But there are also unseen consequences to the standard-like qualified immunity test. When courts apply the qualified immunity standard to constitutional directives that are also articulated as standards, such as the Fourth Amendment reasonableness test, it undermines the benefits of articulating *substantive constitutional doctrine* in the form of standards, which are that they also promote deliberation, fairness, and accountability.[34] But when the immunity standard is stacked on top of the liability standard, those benefits may be lost. As I have described this phenomenon, "[t]he qualified immunity standard creates a layer of balancing that occurs before the decisionmakers ever reach the substantive deliberation of constitutional doctrine. With the decisionmaking process one step removed from the substantive standards, the deliberation that occurs under the immunity standard is over *immunity* balancing, not over constitutional questions."[35]

The doctrinal consequence of this stacking is that none of the values we associate with substantive constitutional standards are advanced.[36] Fairness for the parties is supposed to be achieved through context-specific decisions about whether the Constitution has been violated. Deliberation about that decision has intrinsic value and also makes judges accountable for their decisions in either direction. But immunity balancing replaces constitutional balancing, thus altering the liability determination, obscuring deliberation

32 *Id.* at 293.

33 *Id.*

34 *See id.* at 307–19.

35 *Id.* at 316–17.

36 There are practical consequences as well, which are discussed *infra* Part IV.

about the underlying substantive decision, and insulating judges from accountability for their constitutional decisions (by allowing them to explain that even if the official violated the plaintiffs' rights, immunity considerations preclude the case from proceeding to the merits).[37]

This is a serious challenge to defending qualified immunity, particularly in an age when constitutional doctrine is usually articulated in the form of balancing tests. The challenge might be addressed by one type of rule-based immunity that divided public officials into two categories, one protected by absolute immunity and the other having no immunity. For example, one could make the argument that law enforcement officers have greater access to legal training and advice from legal counsel, and should therefore be expected to have a stronger understanding of the law than other public officials, such as school teachers. Accordingly, we might imagine a system in which law enforcement officials would have no immunity and teachers would enjoy absolute immunity. Under that structure, the distorting effect of immunity decisions would not arise. Suits against teachers would be dismissed and litigation against police officers would be adjudicated on the merits. In that scenario, the underlying substantive constitutional standards that apply to the police would be applied in each case, serving the goals of individualized determinations and articulated reasoning of judges' decisions, which constitutional standards are supposed to promote.

In the absence of bifurcating immunity in this way, the problem of immunity balancing appears to be inherent under any regime in which immunity is "qualified." There is really no other manner in which immunity could be implemented without turning to absolute immunity or abolishing immunity altogether. The former would eliminate all constitutional tort actions, which directly conflicts with the constitutional enforcement scheme endorsed by Congress (§ 1983) and the Court (*Bivens*). The latter would devalue the Court's concerns about fairness, overdeterrence, and social costs, at least in the absence of major overhauls to constitutional tort law, such as making government employers strictly liable for their employees' constitutional torts.[38]

37 For a much more elaborate description of this complex issue, see Chen, *supra* note 28, at 309–19.

38 Or perhaps no reform is needed at all, because as Joanna Schwartz has persuasively demonstrated, police officers are routinely indemnified for their official actions. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936 (2014) ("Between 2006 and 2011, in forty-four of the seventy largest law enforcement agencies across the country, officers paid just .02% of the dollars awarded to plaintiffs in police misconduct suits."). If this were true for all public officials, many of the arguments in favor of qualified immunity would disappear. *See* Fallon, *supra* note 14, at 497 ("[I]t might be desirable to reconsider current doctrines that largely shield governments from direct liability for their officials' wrongs, especially if empirical studies were to establish that government employers routinely indemnify their officials anyway."). One scholar has argued, however, that even if indemnity is widespread, qualified immunity is justified by a distinct public policy rationale. Larry Rosenthal suggests that immunity allows government employers to limit the expenditure of resources on training and supervision of individual officials to ensure com-

The standards over rules question is not intractable in the sense that the law could be no other way. As suggested earlier, qualified immunity could be articulated as a bright-line rule. But then it would no longer be qualified. Thus, the adoption of this open-ended legal standard is embedded in the way in which the Court thinks about qualified immunity––as a vehicle for early disposition of constitutional tort cases.

B. Questions of Law over Mixed Questions of Law and Fact

A key to the Supreme Court's development of constitutional tort law has been its unbending insistence that the issue of qualified immunity––whether an official's conduct violated clearly established constitutional rights of which a reasonable person would have known––is a pure question of law.[39] Of course, this determination is essential to the Court's procedural framework, which demands that trial courts resolve immunity claims on summary judgment.[40] It is the reason the Court directs trial courts to deny discovery before resolving immunity claims. It is a central premise to the Court's ruling that public officials whose qualified immunity claims are denied by the trial court may seek an interlocutory appeal even though that ruling is not a final judgment.[41] It is also a completely unrealistic understanding of how the doctrine operates on the ground in the vast majority of cases.[42]

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pliance only with clear and established legal rules. Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856–57 (2007) ("Given the expense and uncertain efficacy of training and supervision directed at unsettled questions of constitutional law, it is doubtful that the diversion of scarce public resources from other public purposes toward endeavoring to minimize errors in these unsettled areas of law—or toward the payment of judgments and other legal costs when a court concludes that a public official has erred in such a context—is justifiable."). As I argue in Part V *infra*, there are limits to the value of additional empirical research on qualified immunity as a basis for reform.

39 *See* Elder v. Holloway, 510 U.S. 510, 515–16 (1994); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This was not always the case. Prior to its decision in *Harlow*, the Court sometimes referenced the need for a factual record to determine an official's entitlement to qualified immunity. *See* 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, 33–36 (1997). Moreover, this was not exclusively because the test prior to *Harlow* required examination of the official's subjective good faith. *Id.* at 33 ("The central difficulty with *Harlow*'s approach is that it obscures the inherent role that facts play in all qualified immunity claims, not simply those involving an inquiry into subjective good faith.").

40 *Harlow*, 457 U.S. at 818.

41 *See Mitchell*, 472 U.S. at 524–26 (applying the collateral order exception to trial court decisions denying qualified immunity).

42 As the Court has recognized, in cases involving a fundamental factual dispute about whether an incident ever occurred, it is impossible to resolve the immunity claim. *See* Johnson v. Jones, 515 U.S. 304, 316–17 (1995) (rejecting interlocutory appellate jurisdiction on a qualified immunity claim when the parties disputed the factual issue of whether defendants even touched the plaintiff).

Qualified immunity's application requires the determination of whether a reasonable public official, at some point in the past, would have understood her conduct to have violated a plaintiff's "clearly established" constitutional right.[43] As I have observed in my prior work:

> [A]ll qualified immunity inquiries are inevitably fact-dependent, at least in part, because the reasonableness of a government official's conduct must be evaluated with reference to some set of facts. Courts can assess whether a particular act violates a "clearly established" right only by comparing the existing case law to an undisputed description of that act. Entitlement to qualified immunity, therefore, must be viewed as a mixed question of law and fact.[44]

To be sure, there are some circumstances in which qualified immunity can be resolved as a pure legal question, as when the plaintiff asserts a fanciful claim to a previously unrecognized right that is patently frivolous—such as a plaintiff who claims that a police officer's denial of her request for peanut M&M candies during interrogation violated her right to due process. Setting aside such cases, which are presumably quite rare, facts are virtually always an essential prerequisite for adjudicating qualified immunity. Because most constitutional rights, again, are articulated as general open-ended standards, the post hoc assessment of whether they have been violated during a particular interaction between the public official and a citizen necessitates application of the law to some set of facts.

Admittedly, the fact-dependency problem may be less acute when immunity claims are addressed and resolved at the pleading stage, rather than on summary judgment. There, the courts are obliged to accept the plaintiff's allegations as true, and determine the applicability of qualified immunity based on those sets of facts. But that only circumvents the problem of which set of facts to examine, not the dilemma that fact disputes, fairly evaluated, should often preclude qualified immunity resolutions. First, at the pleadings stage, it may be possible for plaintiffs to plead facts sufficient to avoid an early immunity determination.[45] Second, because the adjudication of constitutional rights frequently requires multifactored, context-specific analysis, many constitutional claims are likely to involve complex fact scenarios that require the disputes to last well past the pleading stage.

The Court's treatment of qualified immunity as a legal question underscores the difference between an adjudication on the merits and the disposition of an immunity defense. Judicial resolution of any type of legal claim

43 *Harlow*, 457 U.S. at 818.

44 Chen, *supra* note 39, at 6–7 (footnote omitted).

45 This may be more possible in some contexts than others. *See* Schwartz, *supra* note 24, at 24. At one point, lower courts attempted to address this barrier to early resolution by imposing heightened pleading standards in civil rights cases. Chen, *supra* note 39, at 79–82. Though the Court initially appeared to reject that possibility, *see* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), its more recent cases have demonstrated skepticism about the notice pleading standard more generally.

requires a mixture of legal and factual analysis. Constitutional rights are no different. Each instantiation of a right takes place with a predetermined set of background legal principles, which are then applied to the circumstances of a case as determined by a fact finder. Qualified immunity technically separates the right (whether the official violated the plaintiff's constitutional rights) from the remedy (whether the official's conduct violated clearly established rights of which a reasonable person would have known). This move allows the Court to identify the latter question as a purely legal one because its resolution occurs in a pretrial procedure rather than at trial. But, for the reasons I have already stated, this is nothing but jurisprudential sleight-of-hand.[46] Even the Court has implicitly conceded the conceptual problems with its position, declaring qualified immunity to be an "*essentially* legal question."[47]

Like the standards/rules question, the Court's declaration that qualified immunity is a pure question of law is not the only path to crafting the doctrine. The Court could properly identify qualified immunity as a mixed question of law and fact. But doing so would be in serious tension with its explicit goals of early disposition and its choice of summary judgment as the proper procedural vehicle for doing so.

C. Narrower over Broader Levels of Generality

Even taking at face value the legal fiction that qualified immunity is a pure question of law, the doctrine faces a third legal theory problem related to how the parties and the court frame the legal right at issue. To determine whether an official's conduct violated a clearly established constitutional right, there must be an actual articulation of that right. But as the Court has acknowledged, the level of generality at which that right is stated will materially alter the qualified immunity determination.[48]

Defining a clearly established right requires a close examination of precedent, but previous judicial decisions may articulate the right that is being enforced in broad or narrow terms. Broad statements of the law are unhelpful in this context. A prior holding that "warrantless searches of drawers in a private office violate the Fourth Amendment in the absence of exigent circumstances" gives very little context by which to judge later police conduct. Does it matter whether the police officer was legally present in the office in the first instance? Or whether the search was being conducted pursuant to a lawful arrest at that office? What about whether the drawer, or for that matter, the room in which the drawer was located, was locked? Whether the police were searching for drugs or a ticking bomb? Because of the num-

46 As I have previously argued, this is part of a larger project by the Court to alter ordinary summary judgment procedure to facilitate early termination of qualified immunity claims by allocating decisionmaking to judges instead of juries. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 262–67 (2006).

47 Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis added).

48 *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987).

ber of potential factual variables, in applying the holding from the precedent to a later case in which an officer is sued for damages after conducting a warrantless search, it is difficult to determine whether the later officer violated a clearly established constitutional right.

A broad statement, such as the hypothetical holding described above, would establish the right at such a broad level of generality that virtually all searches of office drawers would violate a clearly established right. As Justice Scalia observed in *Anderson v. Creighton*:

> [I]f the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.[49]

And, of course, the right could be stated at even broader levels of abstraction that would have the same effect, as in "it is clearly established that police officers may not violate the Fourth Amendment," or "it is clearly established that no public official should violate the U.S. Constitution."

Conversely, if the precedent is read as establishing the right at a very narrow level of generality, the law will rarely if ever be clearly established. A precedent that says that "when a police officer lawfully enters a private office with the owner's consent and engages in a warrantless search of unlocked drawers in pursuit of a small packet of cocaine and there is strong reason to believe that evidence will be destroyed by the search's subject if the police do not act immediately" defines the clearly established right only in a narrow set of cases with parallel facts. If that is the level of generality at which we understand constitutional rights to be defined, few if any searches will ever violate clearly established constitutional rights because each search will present the courts with a unique set of factual circumstances. The Court expressly does not require that rights be defined this narrowly, either.[50]

The same issue presents itself with defining rights in many other areas of constitutional doctrine. Take, for example, a constitutional tort claim on behalf of an executed prisoner's estate challenging a botched execution by lethal injection as a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. Assuming that the officials responsible for the execution assert qualified immunity, stating the established right at a broad level of generality would offer them no protection, because all officials should be on notice that the Constitution clearly establishes a right to be free from cruel and unusual punishment. But stating the right at a narrow level of generality, given the sheer number and combination of factors that can affect a

49 *Id.*

50 *See id.* at 640.

lethal injection execution, would mean that the law can never be clearly established, meaning that the plaintiff's estate could never prevail.[51]

While the Court has shown that it is aware of this dilemma, it has nonetheless done little to clarify the appropriate level of generality at which the clearly established right must be articulated. Indeed, its attempts at addressing this are patently incomplete and unsatisfactory. Looking again to its decision in *Anderson*, the Court stated:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The *contours of the right must be sufficiently clear* that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[52]

If we conceptualized narrow and broad articulations of a right on a continuum, it would not be possible to identify precisely how far along on that spectrum the "contours of the right" would be sufficiently clear such that immunity does not attach. The problems with this unresolved dilemma are manifest. If the idea of qualified immunity is to put public officials on reasonably fair notice of what conduct clearly violates the Constitution, instructing them that they must understand the "contours" of a right is uniquely unhelpful. The same goes for federal judges who are adjudicating qualified immunity claims.

To be sure, the Court has tried to further refine the *Anderson* contours test, but not in enlightening ways. In *Hope v. Pelzer*,[53] the Court reviewed a § 1983 claim by an inmate who alleged that prison guards violated his constitutional right to be free from cruel and unusual punishment when they twice handcuffed him to a hitching post, once for a period of seven hours, providing him with very little water and no bathroom breaks.[54] The Eleventh Circuit affirmed the dismissal of the suit based on the guards' qualified immunity claim, reasoning that relevant precedents must not be mere "abstractions," but must be "materially similar" to the circumstances of the case at hand.[55] The Supreme Court reversed, holding that the caselaw that puts officials on notice that their conduct is unconstitutional need not involve materially similar facts, but that officials are expected to understand that fairly analogous factual scenarios can clearly establish the law and that the reasoning of relevant precedents can help define the contours of the law

51 *See, e.g.*, Estate of Lockett *ex rel.* Lockett v. Fallin, 841 F.3d 1098 (10th Cir. 2016). The author discloses that he was one of the lawyers representing the plaintiff in the appeal in this case.

52 *Anderson*, 483 U.S. at 640 (emphasis added) (citation omitted).

53 536 U.S. 730 (2002).

54 *See id.* at 733–35.

55 Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

even where the specific holdings do not.[56] Although the Court's decision in *Hope* might provide some clarification of what constitutes clearly established constitutional rights, it is not sufficiently precise in defining where on the narrow/broad continuum the qualified immunity standard should be located. It is a decision that provides a relative, but not absolute, answer to the levels of generality question.

But not only is the Court's guidance unhelpful for defendants and judges, it also leaves open the possibility that judges will apply the *Anderson* contours standard in a manner that is heavily influenced by their own normative values about what officials ought to know and when they ought to be held accountable. This underscores the standard-like nature of qualified immunity, and may lead to highly inconsistent decisionmaking, perhaps even more so than if these judges were permitted to decide such cases on the merits rather than through the abstraction of the qualified immunity doctrine. Moreover, even in an ideal world, we could not hope for a more specific answer to the levels of generality problem, because that is in the nature of defining not rights, but whether and when the law considers those rights to be clearly established. As long as qualified immunity is articulated under the *Harlow* standard, this problem will persist.

* * *

As I discuss next, not only are these three legal theory problems intractable, but they also dictate the adjudication of the doctrine by courts and litigants and create a distinct set of implementation challenges.

III. Qualified Immunity's Administrability Problems

If qualified immunity has been a legal theorist's dream, it has been a nightmare for litigators and judges who confront its implementation on a routine basis. Precisely because the Court has (at least putatively) resolved the previously discussed jurisprudential issues in the manner described, it has produced a body of law that creates serious administrability problems. That is, the problems identified in this Part are highly path dependent because they are a product of the Court's doctrinal choices discussed in the previous Part. These are problems most likely to be experienced at the trial level, and the Supreme Court either has no idea that the structure it has put in place creates these problems or chooses to willfully disregard them.[57] Indeed, ask

56 *Hope*, 536 U.S. at 742–43; *see also* United States v. Lanier, 520 U.S. 259 (1997).

57 At a Federal Judicial Center training on qualified immunity that I taught for federal trial judges and magistrates several years ago, I noted that none of the Justices on the Supreme Court at that time had experience as a trial judge, an observation that I speculated had at least some impact on the poor formulation of the qualified immunity doctrine. Since that time, the Court now has one former trial judge, Justice Sotomayor, who has at least demonstrated more sensitivity to the fact-dependent nature of some immunity decisions. *See* Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1281–82 (2017) (Sotomayor, J., dissenting from the denial of certiorari).

a federal district judge what he or she thinks about qualified immunity and most will respond with a chuckle or an eye roll.

A. Developing Coherent Summary Judgment Procedures I—The Discovery Problem

Recall that in *Harlow*, the Supreme Court suggested that the proper way to dispose of qualified immunity claims was for defendants to move for summary judgment. The Court stated that the trial judge could easily dispose of the case on summary judgment because "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."[58] Conversely, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[59]

As discussed previously, however, the question of whether an official violated someone's clearly established constitutional rights can almost never be answered in a factual vacuum. Whatever the existing precedent holds, it typically must be applied to *some* version of the facts. If the Court directed these decisions to be made on the pleadings, then the relevant set of facts would be the ones presented by the plaintiff, and the resolution could take place on a motion to dismiss.[60] But when cases are disputed on summary judgment, the parties ordinarily have gathered evidence that can be presented to the trial court in a form that, for the moving party, must demonstrate the absence of a genuine issue of material fact.[61] As previously discussed, however, the Court directed from early on in the evolution of qualified immunity law that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed."[62]

As I have discussed at greater length in previous work, some sort of discovery is essential before resolving most qualified immunity claims.[63] Indeed, the Court started to somewhat relax its categorical bar to discovery in qualified immunity cases in *Anderson v. Creighton*. There, the Court seemed to embrace a two-step approach, one on the pleadings, without discovery, and one on summary judgment, with some discovery when the parties'

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

59 *Id.* at 818–19.

60 Courts must accept as true the plaintiff's factual allegations when resolving a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002), though those facts must be more than conclusory and must state a claim that is "plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

61 The typical summary judgment procedure presumes that the parties have conducted discovery, which as discussed below, the Court discourages.

62 *Harlow*, 457 U.S. at 818. The Court has consistently reemphasized that one of the goals of qualified immunity is to protect public officials from having to undergo discovery. *See* Ashcroft v. Iqbal, 556 U.S. 662, 685–86 (2009).

63 *See* Chen, *supra* note 39.

accounts conflict.[64] Of course, the parties' accounts of the facts are frequently going to differ, which suggests that discovery will often be required, and necessarily permitted. Reviewing lower-court decisions on this question reveals that discovery is not uncommon.[65]

Although under *Anderson* any discovery allowed must pertain to the qualified immunity issue and not to other aspects of the case, because immunity is intertwined with the merits question, the scope of discovery is likely to be pretty similar to what it would look like if there were discovery on the merits.[66] Thus, any efficiencies gained by the Court's procedural model likely are unrealized in most cases. If discovery is conducted in most qualified immunity disputes, there will unavoidably be substantial costs.[67]

My larger point is that this outcome is substantially directed by the jurisprudential choices discussed in the previous part. First, the articulation of the qualified immunity test as a standard rather than a rule makes the inquiry highly individualized and fact specific. "Reasonableness tests are the epitome of open-ended, context-sensitive legal directives."[68] The qualified immunity reasonable official analysis therefore enhances the chance that discovery will be required. In contrast, absolute immunity determinations, which follow a more rule-like structure, are frequently adjudicated without discovery.[69] Thus, in important ways, defining qualified immunity as a standard was at cross-purposes with the Court's desire to allow rapid and early disposition of constitutional tort claims.

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64 As Justice Scalia wrote:

> [I]t should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.

Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (citation omitted).

65 *See, e.g.*, Thomas v. Kaven, 765 F.3d 1183, 1196 (10th Cir. 2014) (remanding qualified immunity claim for discovery necessary to develop facts to be considered in substantive constitutional balancing test).

66 If there are other issues in the case that relate not to the merits but to other questions, such as whether the government may be held liable as an entity under *Monell*, discovery on those issues may in some circumstances be barred until the immunity question is resolved. *See* Clarett v. Suroviak, No. 09 C 6918, 2011 WL 37838, at *1 (N.D. Ill. Jan. 3, 2011).

67 It is possible, as the anecdotal evidence collected by Professor Blum from her interviews of defense attorneys suggests, that qualified immunity at least limits discovery costs even if it does not eliminate them. Blum, *supra* note 16, at 1888 n.23. Because the immunity and merits questions are completely intertwined, however, there must be limits to this effect.

68 Chen, *supra* note 28, at 291.

69 Chen, *supra* note 46, at 235–36.

In contrast, the Court's framing of qualified immunity as a pure question of law is designed to permit prompt resolution on summary judgment without discovery. The problem with this is that, as previously argued, as much as the Court *calls* qualified immunity a pure legal determination, it cannot magically make that so. As the Court began to reluctantly acknowledge in *Anderson*, many, if not most, qualified immunity issues will turn on factual questions, which will require discovery.

Finally, the narrower the level of generality at which the relevant constitutional right is stated, the more likely discovery will be necessary. If immunity claims were measured against a more general set of principles established by precedents, there would be less need for more specific factual development in the current case. But as discussed above, narrow framing of the relevant precedent increases the importance of factual congruity—whether a reasonable official would recognize that her conduct violates clearly established constitutional law is highly determined by comparing the facts of her scenario to the facts of the relevant cases that define the scope of that right.

Thus, the manner in which the Court has structured the doctrine is in direct tension with its desire to avoid or minimize the amount of discovery involved.

B. Developing Coherent Summary Judgment Procedures II—Burdens of Persuasion

Virtually compelling the need for discovery is not the only paradoxical procedural outcome produced by the Court's doctrinal choices about qualified immunity. As some scholars have pointed out, another widely overlooked reason the qualified immunity doctrine is extremely complex is that it does not account for the fact that the appropriate summary judgment procedure is dependent on which party bears the burden of persuasion on the relevant factual issues.[70] But fully comprehending this problem first requires taking a step back.

The Court has described qualified immunity as an affirmative defense.[71] Like other affirmative defenses, then, qualified immunity can be waived.[72] In describing the appropriate procedure for resolution of qualified immunity defenses, however, the most the Court has said is that the defendant bears the burden of *pleading* qualified immunity.[73] Civil procedure law, however, requires that in adjudicating a summary judgment motion, the trial court must first determine which party would bear the burden of *persuasion* at trial

70 Chen, *supra* note 39, at 57; David J. Ignall, *Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 207 (1994); Kinports, *supra* note 23, at 634–42; 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, 136 (2007).

71 Gomez v. Toledo, 446 U.S. 635, 640 (1980).

72 *Id.* ("It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful.").

73 *Id.* at 640–41.

on the facts underlying the relevant legal claim (that is, the claim on which summary judgment is sought).[74] If the moving party bears the burden of persuasion, one standard applies; if the moving party is seeking summary judgment on a legal claim for which the nonmoving party bears the burden of persuasion, a very different procedural standard applies.[75] With most affirmative defenses, the defendant bears the burden of persuasion with regard to material facts necessary to prove that defense.[76] If that defendant moves for summary judgment on the basis of that defense, she must

> demonstrate that even viewing the facts in the light most favorable to the plaintiff, no reasonable jury could find for the plaintiff on the [affirmative defense]. Because the relevant burdens of persuasion are allocated differently, the defendant's burden is much higher to achieve summary judgment on an affirmative defense than it is simply to defeat the plaintiff's case-in-chief. Because most conventional affirmative defenses generally involve a factual component, the burdens of persuasion and the associated burdens on summary judgment would be similar in other contexts as well.[77]

The allocation of these evidentiary burdens on summary judgment are well understood in the context of typical causes of action and affirmative defenses.[78] But if we have learned anything, it is that qualified immunity is not a typical defense. Once again, the doctrinal choices the Court has made about the doctrine's articulation place qualified immunity on a collision course with the law of civil procedure, and to experienced practitioners and judges, with common sense.

First, once again, because qualified immunity is articulated as an open-ended reasonableness standard, its application is highly likely to be fact bound. To the extent it is fact bound, the parties would have to present to the trial court their competing versions of the facts in a manner that advances their legal claims. But unlike other affirmative defenses, the identical facts are likely to be relevant both to the plaintiff's constitutional tort claim and the defendant's qualified immunity claim. Thus, to proceed on the case-in-chief in a Fourth Amendment excessive force claim, the plaintiff's case will turn on whether she can bear the burden of persuasion of demonstrating that the officer's conduct violated the standard established in *Graham v. Connor*.[79] *Graham* requires application of a general reasonableness standard that considers "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and

74 Chen, *supra* note 39, at 57.

75 *Id.*

76 *Id.* at 94–95.

77 *Id.*

78 *Id.* (describing how summary judgment procedure burdens apply to a run-of-the-mill common-law battery claim).

79 490 U.S. 386 (1989).

whether he is actively resisting arrest or attempting to evade arrest by flight."[80]

The defendant's qualified immunity defense (as well as the merits defense) will turn on these exact same facts, though through the lens of whether the officer's conduct violated "clearly established" rights under the *Graham* standard and its subsequent interpretations by other courts. If the defendant bears the burden of persuasion on proving the facts underlying the qualified immunity claim, as stated above, that defendant would have to demonstrate that "viewing the facts in the light most favorable to the plaintiff, no reasonable jury could find for the plaintiff" on the qualified immunity defense.[81]

Rather than addressing this admittedly difficult procedural question, the Supreme Court has never resolved this issue in the almost thirty-five years since it directed courts to use summary judgment to resolve qualified immunity claims. Legal scholars have called upon the Court to clarify these burdens for nearly a generation. Indeed, Professor Kit Kinports identified the burden of persuasion issue as one of qualified immunity's "unanswered questions" in 1989, yet the Court has still mysteriously not heeded that call.[82] Perhaps this is so because it is simply too hard—because the doctrine is fundamentally confusing on this point.[83]

Thus, instead of addressing this dilemma, the Court has chosen to avoid it through its own doctrinal moves. As I have previously argued, one move might simply be to distort summary judgment burdens; to effectively hammer a square peg into a round hole.[84]

Another way the Court has found to elude confronting this relatively basic question of summary judgment procedure is by assuming away the facts. Unlike other affirmative defenses, which are ordinarily at least partly based

80 *Id.* at 396. As Professor Blum points out, excessive force claims under the *Graham* standard have presented particularly thorny qualified immunity issues. Blum, *supra* note 16, at xx; *see also* 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 (1989) (discussing similar problems before *Graham* was decided).

81 Chen, *supra* note 39, at 95.

82 Kinports, *supra* note 23.

83 As Professor Alexander Reinert has pointed out in his contribution to this issue, an increasing number of lower courts have attempted to address the burden of persuasion issue, though primarily in the actual trial context. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018). This still leaves open the question of how such burdens should work when translated to the summary judgment context.

84 Chen, *supra* note 39, at 86 & n.540 (arguing that lower courts' distortion of summary judgment burdens in qualified immunity cases conflicts with conventional understanding that summary judgment procedures are transsubstantive); *see also* Blum, *supra* note 16, at 1918–19 (noting that "[b]oth trial and appellate courts, as well as the Supreme Court itself, continue to ignore the ordinary rules of summary judgment when deciding or reviewing motions based on qualified immunity"); John C. Jeffries, Jr., Essay, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 287–88 (2000) ("In effect, the [*Harlow*] Court adopted a special rule of summary judgment to take account of the peculiar litigation incentives in constitutional tort cases.").

on critical factual assertions, qualified immunity is, at least nominally, a question of law.[85] Thus, the Court's pronouncement that qualified immunity is a pure legal question can be viewed as a way of escaping its responsibility to clarify the procedural technicalities in this field. And by overlooking the fact-bound nature of the defense, it also gives latitude to lower courts to circumvent ordinary summary judgment procedure.

If qualified immunity were truly a pure legal question, then judges need not bother with the intricate details of summary judgment procedure. Indeed, as I have written about extensively, evidentiary burdens do not even make sense in the context of adjudication of a supposedly purely legal question.[86] But no matter what the Court *calls* qualified immunity, it is a defense that almost always turns on some questions of fact. Once that is conceded, as it must be, summary judgment cannot be applied properly without determining which party bears the burden of persuasion on immunity-related facts. This is a fundamental gap in the doctrine and many courts simply gloss over its resolution, if they even notice it at all.[87] For if the Court were to recognize qualified immunity as a mixed question of law and fact, it would have to confront the still unresolved issue of evidentiary burdens. As long as it maintains its own blinders on the role of facts, however, the Court will never see the need to allocate burdens in a coherent manner.

Finally, the Court's attempt to define the level of generality at which a clearly established constitutional right must be articulated also contributes to the problems in identifying the appropriate evidentiary burdens under qualified immunity. Again, the narrower the level of generality at which the law requires the articulation of constitutional rights, the more likely the issue is to be fact sensitive; the more likely the issue is fact sensitive, the more it must be viewed as at least a mixed question of law and fact. And if qualified immunity is a mixed question, then facts must be considered on summary judgment, requiring the formal assignment of evidentiary burdens.

C. Qualified Immunity's Costs

Qualified immunity is putatively designed to reduce the significant social costs associated with constitutional tort claims against public officials. As the Court asserted in *Harlow*:

> [I]t 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. These social costs include the expenses of litigation, the

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

86 Chen, *supra* note 39, at 91 (criticizing lower courts for failing to "acknowledge that a burden of persuasion on a question of *law* may be nonsensical").

87 *See, e.g.*, Sheets v. Mullins, 287 F.3d 581, 586 (6th Cir. 2002) (appearing to assign burden of proof on factual issues relating to qualified immunity claim to the plaintiff); Johnson-El v. Schoemehl, 878 F.2d 1043, 1048 (8th Cir. 1989) (appearing to assign burden of "proof" to the defendant on legal elements of qualified immunity claim).

> diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.[88]

Thus, the Court's emphasis on procedures that facilitated early termination of such litigation was driven by its supposition both that frivolous claims are frequent, and that the attendant tangible and intangible costs of civil rights litigation are substantial.

As illustrated in the previous Parts, however, the goal of early and easy disposition of these claims must be contrasted with reality. The Court has developed a doctrine that, in fact, entails a set of pretrial procedures that often necessarily requires fairly involved discovery and insufficiently clear summary judgment rules that are actually nonsensical in the context of what is really a mixed question of law and fact. These doctrinal choices have accordingly resulted in a process under which litigation of qualified immunity claims, rather than the cases' merits, has become the main event of constitutional tort litigation. While there is no single, systematic, statistical account of the amount of qualified immunity litigation, attempts to measure its frequency suggest the tentative conclusion that it consumes an enormous amount of resources from parties, courts, and society.[89] It is certainly possible that, on balance, more defendants still prevail on summary judgment, thus saving substantial trial costs, but it is equally likely that the administration of the immunity defense itself imposes substantial costs on the parties, the courts, and society.[90] The accurate assessment of the value of qualified immunity must account for the relative, rather than absolute, cost savings to defendants.

This creates a host of what I have called "secondary burdens" that are produced *by* qualified immunity, rather than alleviated because of it.[91] Assessing the extent of these burdens' costs relative to any costs saved by pretrial granting of qualified immunity claims would be an important step in assessing whether the doctrine actually serves the goals that the Court insists it achieves. But perhaps the hope that empirical evidence will influence the Court's decisions in this area is overly optimistic, as I address in the next Part.

The realization of qualified immunity's costs might be worth it if there were a comparable systemic benefit to the defense. One such benefit might be the shaping of substantive constitutional doctrine through judicial decisions, as the Court once required in *Saucier v. Katz*.[92] There, the Court directed lower courts adjudicating qualified immunity claims to first decide

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88 *Harlow*, 457 U.S. at 814 (footnote omitted).

89 *See id.*

90 Indeed, some empirical research into these costs would be greatly beneficial to enhancing our understanding of qualified immunity's effectiveness. *But see infra* Part V (arguing that the Court is not likely to be receptive to empirical data on reforming the doctrine).

91 Chen, *supra* note 39, at 99 (defining secondary burdens as "the social costs specifically generated by the litigation of the qualified immunity defense"). For a much more detailed account of the secondary burdens thesis, see *id.* at 98–103.

92 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).

whether a defendant violated a constitutional right (the merits question) before deciding that a defendant was nonetheless entitled to qualified immunity because that right was not clearly established at the time of his conduct.[93] In this manner, the Court suggested, substantive constitutional doctrine would evolve without burdening public officials, because those decisions would stand as precedent on the merits question even while dismissing the suit on the immunity question.[94] Because the Court has now abandoned the so-called order-of-battle requirement, that advantage no longer exists, or at least does not occur as frequently.[95]

IV. Public Policy Considerations and the Dim Prospects for Reform

Thus far, I have examined qualified immunity from a purely internal perspective.[96] My critique of the law assumes that the Court's claims about the policy goals of promoting fairness for public officials, minimizing overdeterrence of socially useful official conduct, and reducing the social costs produced by constitutional tort litigation are at least plausible reasons for denying plaintiffs the opportunity to litigate their civil rights claims on the merits. Instead, I have focused on the notion that the Court's implementation of qualified immunity through its decisions, to a large degree, creates a jurisprudentially confusing set of principles while simultaneously impeding the prompt resolution of claims (and perhaps even prolonging the litigation of constitutional tort claims) that the Court has always promised. Given these doctrinal and procedural problems, there is good reason to believe that qualified immunity needs serious reconsideration.

But as I have already suggested, the problems I have identified are deeply embedded in the doctrine's structure and inherent in the Court's desire that this type of immunity be "qualified." For instance, there is no way to convert qualified immunity into a legitimately pure legal question without completely and radically altering what we mean by rights—that is, rights could only exist in the abstract, not in the instantiations of particular dis-

93 *Id.* at 207–08.

94 *See id.* This assumes that such a merits decision would not be an unconstitutional advisory opinion. *Compare* Chen, *supra* note 46, at 257 n.173 (raising serious questions about this problem), *and* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 920 (2005) (raising serious concerns about this problem of advisory opinions), *with* John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403 (1999), *and* Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 Geo. Mason L. Rev. 53 (2008).

95 *See Pearson*, 555 U.S. 223. Assessing the relative value of the *Saucier* order-of-battle requirement and the post-*Pearson* regime, however, assumes that lower courts adhered strictly to the *Saucier* requirement in the years between those two decisions. Some have observed skepticism about whether lower courts did so. Even when *Saucier* was the law, there is some evidence that lower courts failed to strictly adhere to the merits-first rule. *See generally* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 Pepp. L. Rev. 667 (2009).

96 *See supra* text accompanying notes 17–20.

putes. But classifying qualified immunity as a legal question butts up against the levels-of-generality problem, for only rights defined at the highest level of generality can be completely devoid of factual nuance.

Perhaps we could break out of this dilemma if there were sound policy reasons either to depart from or stick to this structure. In this final Part, I address some of the reasons that reform is unlikely to be forthcoming, making the previously identified problems not only doctrinally intractable, but institutionally resistant to change.

A. Epistemological Problems—The Promise and Limits of Empirical Research

Legal scholars have pointed out for decades that the Court built qualified immunity doctrine around a set of assumptions about the behavior of public officials in anticipation of the potential exposure to constitutional tort suits that is without any empirical foundation.[97] Thus, for example, the notion that, in the absence of qualified immunity, public officials will be chilled in their behavior such that they will not perform their duties even where it would be beneficial to do so, is based on a number of assumptions, including that: such officials know about their potential exposure to litigation; they are similarly aware that qualified immunity will provide them with broad protection; the availability of (and knowledge about) a government-funded defense lawyer and indemnification for liability would not alter their calculations; and their sense of civic duty or the need to act during a short time frame would not override any of these concerns.

Perhaps public officials think about liability and lawsuits, perhaps they do not. Perhaps even if they think about it, it does not alter their behavior. We now know that at least police officers are widely indemnified,[98] and if that is true for other public officials, maybe that is enough to ensure that officials may act freely.[99] But maybe constitutional tort suits burden public officials not solely because of the prospect of monetary liability, but because of the psychological burdens of litigation and the related fear that their professional reputations may be damaged even if they win and even if the government pays if they lose. The prospect of defending a lawsuit, whether frivolous or well founded, probably seems highly unappealing to the average person.[100]

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97 Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 94–97 (1989); Fallon, *supra* note 14, at 500; Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369, 389–90 & nn.89–90 (1989); Nahmod, *supra* note 23, at 248; Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 282.

98 Schwartz, *supra* note 38.

99 *Cf.* Fallon, *supra* note 14, at 496.

100 Schuck, *supra* note 97, at 285–86. Whether the foreseeability of such suits against public officials is higher than with private citizens, and whether that has an effect on that concern one way or the other, is also an open question.

These sorts of epistemological questions seem to be a substantial barrier to engaging with any meaningful reform. Empirical data, therefore, is one way out of the intractable doctrinal and procedural problems of qualified immunity, at least in theory. I think it is indisputable that more empirical data about several constitutional remedies questions could lead to a better understanding about the optimal rights enforcement regime.

And there may be some hope. A number of legal scholars have engaged in empirical research about qualified immunity in recent years, substantially enriching the body of knowledge about the doctrine's implementation. Much of the available empirical work has focused on the implications of the *Saucier* order-of-battle issue discussed above. Professor Nancy Leong, for example, carefully studied whether the *Saucier* regime promoted more decisionmaking on substantive constitutional law (which was the Court's explicit goal), concluding that while courts did decide the merits question first in many cases, thereby "creating" more precedent, they tended to narrow rather than expand substantive constitutional doctrine.[101] Two other studies conducted and published by law students also focused on federal court decisions to examine the impact of the *Saucier* regime, reaching conclusions that differed from Professor Leong's and each other's.[102] More recently, Professors Aaron Nielson and Chris Walker studied the impact of *Pearson*'s overruling of *Saucier*, concluding among other things that allowing district courts discretion to decide the merits issue or the immunity issue first may have a stagnating function impeding the development of constitutional law, may distribute law-pronouncing influence unevenly in favor of circuits whose judges more frequently decide the merits question first, and may have an asymmetric effect on constitutional doctrine because of the overlap between judges' ideologies.[103]

In addition to these studies, Professor Joanna Schwartz's excellent work has examined the scope of government indemnification of police officers and determined that it is nearly universal.[104] If the same could be shown for other public officials who are frequently sued for constitutional torts, it could substantially influence our thinking about the necessity for official immunity.[105] In a more recent paper, Professor Schwartz has reported that, based on data from her examination of 1183 § 1983 cases in five different federal districts, qualified immunity rarely serves its asserted purpose of early termi-

101 Leong, *supra* note 95.

102 *See* Leong, *supra* note 95, at 69 (finding that qualified immunity was denied in 14% to 32% of cases studied); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in only 32% of cases studied).

103 *See* Nielson & Walker, *supra* note 24, at 6.

104 Schwartz, *supra* note 38, at 946–47.

105 *Cf.* Fallon, *supra* note 14, at 496.

nation of civil rights cases.[106] She found that among the cases in her data set, "just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds."[107] These findings conflict with the work of some other scholars, who found public officials' success on qualified immunity claims to be significantly higher.[108]

Using my own prior work as a test case, we can see that, assuming the published findings are valid, empirical data can both contradict non-empirically-based assumptions and validate them. The work of those who have concluded that a substantial percentage of cases are dismissed on qualified immunity calls into question my earlier claims that the defense frequently does not serve the Supreme Court's goals of early termination.[109] More positively (for me), Professor Schwartz's work appears to validate, at least anecdotally, my prior assertions that dismissal of qualified immunity claims should be difficult because the doctrine requires "inherently . . . nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context."[110] Her data found that "courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds."[111] The point here is neither to diminish nor glorify my own scholarship, but to suggest that empirical data can make the work of both courts and scholars better. The Supreme Court's assertions about human behavior should be no less vulnerable to empirical challenge.

Notwithstanding cause for optimism with the emergence of empirical work, there are also reasons to believe that such work has important limits. First, some of the most foundational questions about the effect of immunity remain unstudied, and therefore unanswered. As mentioned above, we still have no data on the costs of constitutional tort suits compared to the costs of litigation over qualified immunity, but there is no obvious way to approach

106 Schwartz, *supra* note 24, at 9 (noting that recently, the Court's justification for the qualified immunity doctrine has been to "protect government officials from nonfinancial burdens associated with discovery and trial").

107 *Id.* at 10.

108 *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 146 (1999); Leong, *supra* note 95, at 690; Sobolski & Steinberg, *supra* note 102, at 551. *But see* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

109 Hassel, *supra* note 108; Leong, *supra* note 95, Sobolski & Steinberg, *supra* note 102.

110 Chen, *supra* note 46, at 230.

111 Schwartz, *supra* note 24, at 54 & n.132. In a recent case, the Ninth Circuit held that the dispute over the facts underlying the defendant's immunity claim were so sharp that the case must go to trial—an ironic result given that immunity's role is to facilitate early disposition. *See* Hughes v. Kisela, 862 F.3d 775 (9th Cir. 2016), *cert. granted, rev'd, and remanded*, 138 S. Ct. 1148 (2018) (per curiam). As observed by Justice Sotomayor in her dissent, the Supreme Court's summary reversal of that decision appears to conflict with ordinary summary judgment principles. *Kisela*, 138 S. Ct. at 1155 ("Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.").

an empirical project to examine this. There is still only limited evidence about public officials' understanding of the constitutional limits on their authority, awareness about constitutional tort suits, and knowledge of both immunity and indemnification.[112] One barrier may be that it would be both difficult and expensive to gather the necessary data. Another impediment might be that even empirical evidence about these questions may not be universally applicable. For example, police officers may have different levels of knowledge and awareness about all these issues than, say, school board members.[113]

A distinct challenge to empirical research on qualified immunity is that some questions may be unanswerable or unsusceptible to study because the data are unavailable or unable to be gathered. The best example of a question that is important but difficult to study is the number of constitutional tort claims that are not filed because of skepticism about the difficulty of overcoming qualified immunity or concerns about the increased litigation costs associated with what is likely to be a protracted battle over immunity, including time-consuming interlocutory appeals even if the defense is defeated initially. Although there has been some preliminary work examining this question, it is thus far anecdotal rather than systemic.[114] That is, we can only fully understand qualified immunity's effectiveness if we know how close it comes to actually accomplishing the balance between rights enforcement and burdens on public officials. Perhaps my thoughts about the value added of future empirical research are far too cynical, and as Professor Schwartz has suggested, we should not allow the perfect to be the enemy of the good in this realm of policy assessment.[115] But that does not mean that these are not serious limitations.

A third problem with empirical data is whether, even if available, it will be a useful tool for reform. To be meaningful, it must be incorporated into decisionmaking either by the Supreme Court or by Congress. If neither institution takes such data seriously or uses it to implement reform, the prospects for substantial modification of qualified immunity remain low. I address these concerns in the final two subsections.

B. Problems of Institutional Competence

Even assuming the research community could compile a robust set of data on many of the important questions about qualified immunity, it is far from clear that such data would be embraced by the Supreme Court as a

112 *But see* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1819 n.138 (2018) (citing to studies).

113 *Cf.* Wood v. Strickland, 420 U.S. 308 (1975).

114 Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011) (reporting that some plaintiffs' attorneys have decided not to pursue claims because of the anticipation of qualified immunity defenses). Professor Schwartz has also begun studying qualified immunity's effect on attorneys' case selection. *See* Schwartz, *supra* note 112, at 1831–32.

115 Schwartz, *supra* note 24, at 76.

basis for reforming the doctrine. First, the Court might question the reliability of any data presented to it, which would likely be in the form of empirical evidence introduced in the trial court proceedings by the plaintiff's counsel or, more likely, through its presentation in amicus briefs. Without an independent way to validate the empirical data, the Court might be skeptical about its value and unpersuaded because it believes the data are skewed through advocacy. The Supreme Court is not, and does not represent itself to be, a peer reviewer of academic studies. At the same time, when it relies on data provided, say, in an advocacy group's amicus brief, it might be important for reasons of institutional legitimacy to do some validation of the information.[116]

Second, the Court might conclude that data is more appropriately viewed as a "legislative fact" than a judicial one, and that such evidence is better directed at Congress to support legislative reform.[117] Indeed, there are legitimate arguments to suggest that the policy of civil rights remedies should be addressed through legislative reform rather than judicial decision. The Court's development of qualified immunity can be criticized as entirely policy based,[118] and therefore more susceptible to legislative debate.

Finally, even if the Court were to accept the validity of empirical studies, it is possible that it will misconstrue or misinterpret the data. And this is a legitimate concern without regard to normative positions about how qualified immunity should be modified. As a recent study by the investigative journalism website *ProPublica* found, even when the Court relies on empirical data—data that may profoundly shape its decisions and holdings—it sometimes relies on data that are inaccurate.[119] There are certainly other instances in which the Court has relied on studies or data that raise serious questions about its capacity to objectively assess the implications of such data on its decisionmaking.[120] This is perhaps not so much a critique of the insti-

116 Building on an older proposal by Professor Kenneth Culp Davis that the Supreme Court create an institutional equivalent of the Congressional Research Service, Professor John Pfaff recently suggested that the Justices ought to have a group of technical advisors to help them better understand empirical evidence. John Pfaff, Opinion, *The Supreme Court Justices Need Fact-Checkers*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/opinion/supreme-court-justices-factcheckers.html. To review Professor Davis's original proposal, see Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986).

117 *See* Davis, *supra* note 116.

118 *See* Chen, *supra* note 46, at 267.

119 Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.

120 *Compare* Williams v. Florida, 399 U.S. 78, 101–02 (1970) (relying on studies suggesting that varying the size of juries does not alter juries' capacity to serve their critical functions as a basis for rejecting a defendant's claim that the Sixth Amendment requires twelve-member juries), *with* Alisa Smith & Michael J. Saks, *The Case for Overturning* Williams v. Florida *and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 463–68 (2008) (summarizing empirical research that contradicts the information that the Court relied on in *Williams*).

tution as it is an argument that there are limits to the value of empirical data as an influencer of Supreme Court decisionmaking.

This is not to say that all sound legal decisionmaking, whether by the courts or legislatures, must have irrebuttable factual support. Indeed, as the Court once candidly acknowledged, "[f]rom the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions."[121] While it seems like that proposition should not apply where there are provable assumptions, the Court's ability or willingness to consume and incorporate empirical research may be somewhat limited.

C. Lack of Political Will

Finally, to the extent that remedial reform for constitutional enforcement ought to originate in the legislature rather than the Court,[122] there are structural and political impediments that diminish the prospect of any sort of meaningful legislative reform concerning qualified immunity. Thus, even if there existed an empirically-based path to reform, it is unclear that the availability of such data would compel Congress to amend § 1983 or codify a *Bivens* cause of action that would substantially modify the currently available scope of immunity.

Notwithstanding the proliferation of high-profile police shootings, particularly of unarmed African-American men in recent years,[123] amendments to civil rights laws are unlikely to be on the radar of lawmakers of either major political party. First, there is not much historical evidence that Congress pays that much attention to the major civil rights statute under which constitutional tort claims are brought, 42 U.S.C. § 1983.[124] There have been only two material changes to § 1983 since its enactment, one to add liability to officers acting under color of District of Columbia law,[125] and one to essentially codify absolute judicial immunity.[126] There have occasionally been efforts to amend § 1983 to extend respondeat superior liability to local government units when their agents or employees violate the Constitution, but none have succeeded.[127]

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121 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

122 *See* Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333, 1383 (2010) (criticizing the Court's decisions limiting official liability for constitutional violations as exceeding its judicial role and treading into areas that are more appropriately addressed by Congress).

123 Jacqueline Howard, *Black Men Nearly 3 Times as Likely to Die from Police Use of Force, Study Says*, CNN (Dec. 20, 2016), https://www.cnn.com/2016/12/20/health/black-men-killed-by-police/index.html.

124 42 U.S.C. § 1983 (2012).

125 Act of December 29, 1979, Pub. L. No. 96–170, 93 Stat. 1284.

126 Federal Courts Improvement Act of 1996, Pub. L. No. 104–317, § 309(c), 110 Stat. 3847, 3853.

127 *See, e.g.*, Civil Rights Improvements Act of 1977, S. 35, 95th Cong. (1977).

Second, measures to expand federal civil rights law tend to be highly controversial, with beneficiaries likely to be diffuse and lacking in resources and opponents having both strong incentives to oppose such amendments and interest groups with the resources to readily mobilize their constituencies.[128] Typically, where there is no natural constituency to organize around, or where the benefits of such organization are small to any one member of that constituency, it is harder to mobilize support. Civil rights plaintiffs are not a natural constituency in the same way as other identity groups, and indeed, one might not anticipate being interested in the plight of civil rights plaintiffs until an event occurs that violates one's rights. Thus, it is harder to pressure politicians to take action to benefit a large, but diffuse, group of people.[129] There have, of course, been critical exceptions to this,[130] and perhaps I am far too cynical about the prospects for legislative refinement of qualified immunity, but the historical record and the general understanding about interest group politics suggest that this is probably the case.[131]

But perhaps the biggest impediment to statutory civil rights reform is a nonlegal one. Elected officials are simply unlikely to have the political will to move important expansive civil rights legislation through Congress. And this is not true only in the present political climate. Coupled with the challenges to organizing efforts for such reform to pressure legislators to address the problem, these political impediments leave little hope that qualified immunity's problems will be addressed through the legislative process.

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Before concluding, a couple of reasonable limitations of this Essay's arguments should be acknowledged and addressed. First, as discussed earlier, the claims presented here, especially those in Parts II and III, are wholly internal critiques. None of the discussion here focuses on any other aspect of constitutional enforcement other than damages actions against public officials, which can be an overly narrow way to examine the broader structure of rights.[132] One response to this is that I am not suggesting that qualified immunity's many flaws necessarily lead to the conclusion that the larger constitutional rights regime is insufficiently robust. It can be conceded that other mechanisms for enforcing those rights are more important or more effective than constitutional torts without diminishing my internal critique. Qualified immunity is self-contradictory and problematic even if other aspects of the rights enforcement scheme are effective. At most, this potential critique suggests that my claims are incomplete, not that they are wrong.

128 ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE (2013).

129 *See id.*

130 *Id.* at 260–61 (discussing advocacy behind the successful enactment of the Americans with Disabilities Act).

131 For a much more optimistic view of the possibilities of congressional reform of § 1983, see Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. ON C.L. & C.R. 29 (2010).

132 *See supra* note 18 and accompanying text.

Second, my thesis is based on what I identify as three central dichotomies within qualified immunity doctrine—the choice between an immunity rule and an immunity standard; the characterization of immunity as a question of law or a mixed question of law and fact; and the decision to frame a preexisting right at broad or narrow levels of generality. Each of these questions could easily and fairly be said to lie on a continuum, rather than to be pure binary choices, something I expressly recognized in the levels-of-generality discussion. The articulation of legal directives can, of course, be more rule-like and more standard-like, but I do not believe this undermines my more basic point, which is that the more standard-like the articulation of immunity, the more difficult it is to implement in the manner that the Supreme Court has directed. The matter of pure legal questions versus mixed questions, I believe, is a little more binary. There truly are such things as pure legal questions (as in my peanut M&Ms example, above). Within what we might call mixed questions of law and fact, however, there is certainly a range of how many factual questions are involved.[133] In any event, this does not rebut my main point, which is that facts are embedded in most qualified immunity determinations, which makes summary judgment, properly understood, an unlikely vehicle for pretrial resolution. So, too, with my argument about levels of generality. Even if these lie on a continuum for each constitutional right, the narrower the level of generality, the more fact-bound the immunity determination.

A critique that is perhaps somewhat harder to address is that in my effort to expose qualified immunity's fundamental tensions, I am asking too much. No legal regime or set of doctrinal tools is perfect. It could be said that qualified immunity is simply an imperfect mechanism created by the Court to accomplish a greater social good, which is to allow public officials to be held accountable only when they engage in the most egregious types of unconstitutional conduct, but otherwise freeing them to go about their work in an uninhibited and socially productive manner. Maybe qualified immunity is an example of pure judicial pragmatism that can be argued to be mostly, if not uniformly, successful on its own terms. In response to this, I would maintain that even accepting that we should take qualified immunity on these terms, it is still a failure. My claims here and in my prior work are that qualified immunity is internally contradictory even as a pragmatic doctrine. The Court's decisions shaping the basic doctrine establish a standard that is difficult to comprehend, in tension with its own explicit goals, and so burdensome to adjudicate that it may well outweigh the benefits it seeks to achieve. If there existed any real prospects for revision or refinement through judicial decision or congressional action, perhaps the legal system could be freed from qualified immunity's tangles, but as I argue here, there do not.

133 For an extensive examination of the law/fact distinction in qualified immunity, see Chen, *supra* note 46, at 264–67.

CONCLUSION

This Essay has shown that even after decades of extensive public debate in the pages of the federal reporters and law reviews, the challenges presented by qualified immunity are stubbornly persistent. The prospects for disengaging the qualified immunity doctrine from its own theoretical and pragmatic trappings are dim. This is so largely because, consciously or not, the Supreme Court has shaped the doctrine and directed lower courts to implement it in ways that conflict with the Court's stated objectives. Perhaps this is because many Justices have a limited understanding of how pretrial litigation works at a granular level. This might lead the Court to believe that qualified immunity can do more than it actually can, given the constraints of the federal civil procedure rules.

There is a great deal of path dependency at work here. Qualified immunity doctrine is shaped by the Court's decisions about foundational jurisprudential questions. Its implementation is shaped by those doctrinal choices. The result is a doctrine that struggles under the weight of its own internal contradictions. And because those earlier decisions are inherent to the concept of "qualified" immunity, they are intractable. If qualified immunity doctrine is accordingly stuck, there are few prospects for major reforms that might alleviate the burdens that the doctrine has created. Empirical research, while extremely valuable, cannot offer all the answers. Even if it could, there are reasons to believe that neither the Court nor Congress would embrace such data and use it as the basis for meaningful reform.