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Dear Committee:

My name is Joanna Schwartz. I am a law professor at UCLA, and have spent my academic career studying qualified immunity. My research has included analysis of almost 1200 police misconduct lawsuits filed across the country, interviews and surveys of dozens of attorneys who represent plaintiffs in these cases, studies of the amount plaintiffs have been paid in civil rights lawsuits in dozens of jurisdictions, the ways in which these payments are budgeted for and paid, and the frequency with which individual officers are held personally responsible for settlements and judgments entered against them. Based on this research, I strongly believe that qualified immunity should be greatly limited or eliminated altogether.

Qualified immunity protects officers from liability—even if they have violated the Constitution—so long as there is no prior court decision with nearly identical facts. The doctrine was initially described in 1967 as a "good faith" defense—when officers violate the Constitution but believe that they are following the law. But in 1982, the Supreme Court changed the definition of qualified immunity—the officer's subject intent was deemed unreasonable, and officers were protected by qualified immunity so long as they did not violate "clearly established law." In the intervening years, the Supreme Court has defined "clearly established" law with more and more particularity, such that the law is not clearly established unless the Supreme Court or a court of appeals has ruled nearly identical conduct to be unconstitutional. Just a month after George Floyd was killed, Dallas police officers were granted qualified immunity after sitting on a man's back and neck for over 14 minutes until he died. It is well established that it is unconstitutional to use fatal force against someone who is not resisting. But these officers were granted qualified immunity because no officer had used fatal force against a nonresisting person in just that way before.

People argue qualified immunity is necessary to protect officers from personal financial liability. But I studied police misconduct lawsuit settlements and judgments in 81 law enforcement agencies across the country—including Boston—and found that police officers virtually never pay anything from their pockets in these cases.

People argue cities might go bankrupt if qualified immunity is eliminated and they have to indemnify their officers. But my research shows liability costs make up well less than one percent of most governments' budgets. In my study, I found that police misconduct payouts amounted to 0.17% of Boston's budget.

People say qualified immunity is necessary to protect officers from liability when they make good faith mistakes, and that courthouses would be flooded with frivolous claims absent the defense. But the

Supreme Court has instructed that officers do not violate the Constitution when they make reasonable mistakes.

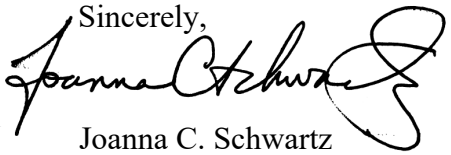
People say officers will be too timid while doing their jobs if they don't have qualified immunity. But everyone who has studied the issue has found that the threat of being sued is not among most officers' top ten thoughts when doing their jobs.

Eliminating qualified immunity would simply mean that courts would stop denying relief to people whose constitutional rights have been violated just because there is no prior court decision on point. And it would stop sending the message that, in Justice Sotomayor's words, police can "shoot first and think later."

I have made these arguments in greater detail in seven law review articles about qualified immunity, totaling nearly one thousand pages. But I digested these arguments in a series of blog posts for Reason.com in September 2019 (https://reason.com/volokh/2019/09/16/imagining-a-world-without-qualified-immunity-part-i/). I have reproduced those posts here, with hyperlinks to the relevant studies.

I would be very happy to discuss any of these issues with the Committee in further detail.

Sincerely,



Joanna C. Schwartz

Imagining a World Without Qualified Immunity, Part I

What impact would abolishing qualified immunity have on civil rights litigation, police misconduct, and government accountability? In an article forthcoming in *Columbia Law Review* and excerpted here throughout the week, I offer my predictions.

Qualified immunity shields government officials from financial liability, even if they have violated the Constitution, so long as they have not violated "clearly established law." According to the Supreme Court, the law is only clearly established if a prior decision has held very similar facts to be unconstitutional. Officers are entitled to qualified immunity even if they have engaged in clear misconduct, and even if they knew what they were doing was wrong.

Every year, courts across the country grant government officials qualified immunity in decisions that describe tragic facts and outrageous behavior; in them, defendants who have searched homes without probable cause, stolen property in police custody, fabricated evidence, and used excessive force are shielded from liability.

Courts, commentators, and organizations across the ideological spectrum are calling on the Supreme Court to abolish or severely limit qualified immunity. Presidential candidates Julián Castro, Bernie Sanders, and Elizabeth Warren have made limiting or eliminating qualified immunity part of their platforms. And, despite the Court's apparent enthusiasm for qualified immunity, several sitting justices have indicated they are open to rethinking the doctrine.

Justice Sotomayor, sometimes joined by Justice Ginsburg, has criticized the Court's qualified immunity decisions for undermining government accountability by "sanctioning a 'shoot first, think later' approach to policing." And in *Ziglar v. Abbasi*, Justice Thomas criticized the doctrine for straying from its common law foundations and recommended to his colleagues that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."

Although the Court has yet to accept Justice Thomas's invitation, it seems like only a matter of time until it does. Petitions for certiorari in qualified immunity cases are now regularly invoking Justice Thomas's language in *Ziglar*. The ACLU, the Cato Institute, and the Law Enforcement Action Partnership, among others, have submitted multiple amicus briefs to the Supreme Court, urging it to reconsider the defense. On October 1, the Supreme Court will consider a petition for certiorari in one of these cases—Baxter v. Bracey. Whether or not the Court grants cert. in *Baxter*, there is every reason to believe this coalition of critics will continue to bring their arguments to the Court.

If the Court does decide to take a closer look at qualified immunity, it will find compelling reasons to greatly restrict or abolish the defense. The Court originally justified qualified immunity as drawn from common law defenses available when Section 1983 became law, and now justifies the doctrine as necessary to shield government defendants from the costs and burdens of litigation in insubstantial cases. But, as critics have shown, qualified immunity doctrine bears little resemblance to defenses available when Section 1983 became law, undermines government accountability, and is both unnecessary and

ill-suited to shield government defendants from the burdens and distractions of litigation. (I set out these arguments in a series of posts on *Reason* last year.)

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions. But the Court may fear how constitutional litigation might change if they take the type of dramatic action compelled by the record. The Court has repeatedly described qualified immunity as critically important to government officials and "society as a whole," suggesting a fear that restricting or eliminating the doctrine will do significant harm. To date, the strongest defenses of qualified immunity have been various predictions that the world would be worse off without it: Plaintiffs would file many more frivolous suits, plaintiffs would recover much more money against government defendants, and these suits and costs would threaten individual defendants' pocketbooks, bankrupt local governments, chill officer behavior on the street, and discourage people from accepting government jobs. Faced with these bleak prognoses, the Court may be reluctant to reconsider qualified immunity doctrine, despite its many flaws.

I don't share these concerns. Of course, it is impossible to know for certain what impact eliminating or restricting qualified immunity might have. But, while these bleak prognoses have been made fleetingly and without empirical support, my views about a post-qualified immunity world are informed by the most comprehensive examination to date of the role qualified immunity plays in Section 1983 litigation—including a study examining the dockets in almost 1200 federal civil rights cases filed in five federal districts over a two-year period, surveys of almost 100 attorneys who represented plaintiffs in these cases, and in-depth interviews of thirty-five of these attorneys—in conjunction with my studies of police indemnification practices and government budgeting for settlement and judgment costs. All empirical studies have limitations, and these studies are no exception. But they present the most comprehensive picture to date of the role qualified immunity plays in constitutional litigation and therefore offer the best starting place to begin imagining constitutional litigation in a world without qualified immunity.

In an article forthcoming in Columbia Law Review, excerpted here this week, I set out several predictions that differ in important ways from conventional wisdom: plaintiffs' and defendants' litigation success rates would remain relatively constant; the overall cost and time associated with litigating constitutional claims would decrease; more civil rights lawsuits would be filed, but other considerations would continue to discourage attorneys from filing insubstantial cases; and settlements and judgments would continue to have a limited impact on officers' and municipalities' dollars and decisionmaking.

If my predictions are correct, abolishing qualified immunity would make litigation more efficient, increase the number of suits filed, and shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority. But eliminating qualified immunity would not dramatically increase the rate at which plaintiffs prevail; open the floodgates to meritless lawsuits; or alter government indemnification and budgeting practices that dampen the effects of lawsuits on officers' and officials' decisionmaking.

These predictions should offer some comfort to justices on the Court who might fear that doing away with qualified immunity could somehow jeopardize policing or "society as a whole." But these predictions should also temper the optimism of those who believe that doing away with the doctrine will usher in a new age of government accountability. Eliminating qualified immunity would increase access to the courts, clarity about the law, and transparency about the conduct of government officials, but it

would not fundamentally shift dynamics that make it difficult for plaintiffs to redress constitutional violations and deter official misconduct.

Over the next four days, I will explain the bases for these predictions, and then offer some thoughts about how they should guide next steps by the Court and qualified immunity's critics. See you tomorrow.

Imagining a World Without Qualified Immunity, Part II

Absent qualified immunity, the rate at which plaintiffs win would remain about the same.

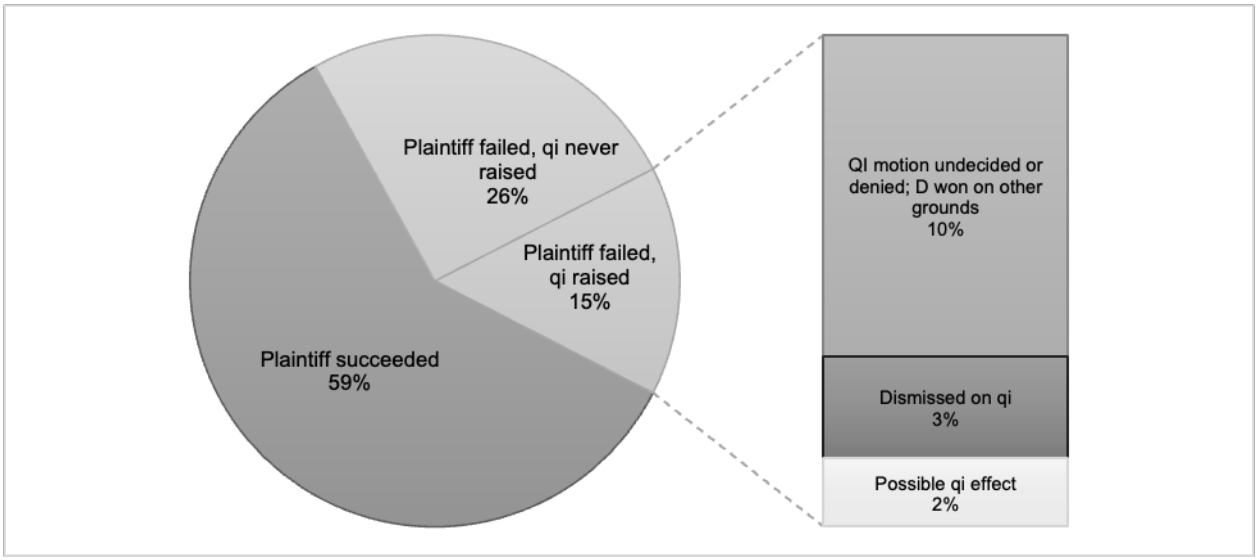
This week, in excerpts from a forthcoming article, I am offering several predictions about a post-qualified immunity world. Today, I explain why plaintiffs' rate of success in civil rights cases would not dramatically change.

This prediction will likely surprise most commentators and courts, who appear to believe that most civil rights cases are dismissed on qualified immunity grounds and that eliminating qualified immunity would dramatically increase the frequency with which civil rights plaintiffs win. But those who hold this view overlook the fact that most civil rights cases that are dismissed fail for reasons other than qualified immunity.

When I studied 1183 civil rights cases filed in five federal districts around the country, I found just thirty-six that were dismissed on qualified immunity grounds. Another 431 cases were dismissed for a variety of other reasons: some were dismissed as frivolous by the court before the defendant ever received the complaint; some were dismissed at the motion to dismiss or summary judgment stages on grounds other than qualified immunity; and some were dismissed following defense verdicts at trial. For every case in my dataset dismissed on qualified immunity grounds, another twelve failed for other reasons. Although there is regional variation in the frequency with which qualified immunity is raised, granted, and dispositive, qualified immunity was not the most common reason for dismissal even in the districts most sympathetic to the defense.

Of course, qualified immunity can cause a plaintiff to fail even if it isn't formally the reason the case is dismissed. The claims a jury would find most sympathetic could be dismissed on qualified immunity grounds, leading to a defense verdict at trial. Or the cost of defending against a qualified immunity motion might use up all of a plaintiff's resources, and cause her to abandon her case.

But there are only a few cases in my dataset in which qualified immunity could have caused plaintiffs to fail in these ways. In 68% of the cases that were dismissed on grounds other than qualified immunity, defendants never raised the qualified immunity defense. In another 22% of the cases, defendants raised qualified immunity as one of several arguments at the motion to dismiss or summary judgment stages, and courts dismissed plaintiffs' claims on other grounds. In 4.4% of the cases, defendants raised qualified immunity at some point during litigation, lost those motions in their entirety, and then prevailed at trial. So, in almost 95% of the cases dismissed on grounds other than qualified immunity, it appears that qualified immunity did not play even an informal role in the plaintiffs' failures.



That leaves us with a total of 60 cases that were dismissed without payment to plaintiff where the result could conceivably be different absent qualified immunity: the 36 cases dismissed on qualified immunity grounds; 11 cases that ended in defense verdicts after qualified immunity motions were granted in whole or part; and 13 cases that were dismissed as a sanction or for failure to prosecute after a qualified immunity motion was filed. Assuming, for the sake of argument, that plaintiffs would have succeeded in all 60 cases in a world without qualified immunity, plaintiffs' success rate would only increase about five percentage points—from 57.7% to 62.8%—across the districts in my study.

But I am skeptical that the dispositions in most of these cases would change. In all but one of the cases formally dismissed on qualified immunity grounds, courts found that the plaintiffs had not met their burden regarding the constitutional claim or made clear they were skeptical about the cases' underlying merits. Even without qualified immunity, most or all of these cases would have been dismissed because the courts would have found plaintiffs failed to satisfy their burdens of pleading and proof.

Now consider the 11 cases where some claims were dismissed on qualified immunity grounds, and then defendants won at trial. It is impossible to know what the juries in these cases would have decided had they been able to evaluate all the claims and evidence. But plaintiffs in my docket dataset usually lost at trial—regardless of whether qualified immunity was raised. Plaintiffs' attorneys I interviewed and surveyed reported that juries are often more sympathetic to government defendants, and more likely to believe officers at trial. Several attorneys I interviewed predicted that more cases would go to trial in a world without qualified immunity, but that jurors' skepticism about civil rights plaintiffs' claims meant that they would not prevail more often.

Finally, consider the 13 cases dismissed as a sanction or for failure to prosecute. Three were dismissed because counsel failed to comply with court orders after defendants' qualified immunity motions were denied or granted in part on other grounds. In none of these cases is there any indication qualified immunity played a role in their dismissal. Another nine were brought by *pro se* plaintiffs who failed to respond to motions or comply with court orders—but *pro se* plaintiffs usually lose, whether or

not qualified immunity is raised. For all of these reasons, most plaintiffs in my dataset whose cases were dismissed without payment would not have had better luck in a world without qualified immunity.

So far, I have focused on the cases in which plaintiffs lost. But eliminating qualified immunity could also influence the outcomes of cases in which plaintiffs succeeded. One would assume that most plaintiffs in my dataset who were able to negotiate a settlement or win at trial would be able to succeed in these same ways were qualified immunity eliminated. But eliminating qualified immunity might sometimes cause plaintiffs to decline settlements in favor of trial.

Approximately 17% of qualified immunity motions and 34% of interlocutory and final appeals in my dataset were never decided, presumably because the cases settled while the motions were pending. These settlements may have been motivated by the plaintiffs' uncertainty about how the qualified immunity motions and appeals would be decided. Were qualified immunity abolished, plaintiffs might decide to take more cases to trial. But, as I have explained, defendants win the vast majority of cases that go to trial and attorneys believe jurors are hostile to these cases. So, if cases that would have otherwise settled would go to trial absent qualified immunity, at least some of those plaintiff "successes"—settlements—might turn into failures after trial.

For reasons I will explain on Thursday, eliminating qualified immunity would likely result in more civil rights cases filed. But these additional cases would likely have a similar success rate as cases filed today. Plaintiffs would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary reasons cases get dismissed. And there is no reason to believe that the additional cases filed in a world without qualified immunity would be better able to overcome those obstacles than the pool of cases filed today.

Imagining a World Without Qualified Immunity, Part III

Eliminating qualified immunity would decrease the average cost, complexity, and time spent adjudicating civil rights cases.

The Supreme Court has written that "the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." The Court presumably believes, then, that eliminating qualified immunity would increase litigation burdens on defendants. But, as I explain in a forthcoming article, excerpted here, all available evidence suggests qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised—and that eliminating qualified immunity would decrease the average cost, complexity, and time spent adjudicating civil rights cases.

Litigants and courts spend money and time on qualified immunity in four different ways. First, they spend time and money researching, briefing, writing, arguing, and deciding motions raising qualified immunity. Defendants are entitled to qualified immunity unless a plaintiff can prove the constitutional violation was obvious, or can point to a factually similar case from their circuit or the Supreme Court, or a consensus of factually similar cases, that would put the defendant on notice that his conduct was unlawful. So, for a plaintiff effectively to respond to a qualified immunity motion, she must research

factually similar cases holding defendants' conduct unconstitutional, and then must brief and argue the motion.

Second, litigants spend money and time on appeals of qualified immunity denials. Unlike most other arguments raised in civil rights cases, defendants are entitled to immediate ("interlocutory") appeals of qualified immunity denials. Attorneys must take time to research, brief, and argue oppositions to interlocutory appeals, and courts of appeals must take time to consider and decide the appeals.

Third, cases can be suspended while qualified immunity motions and appeals are pending. In my study, I found defendants received formal discovery stays—lasting 152 days, on average—in almost six percent of the cases in which qualified immunity was raised at the motion to dismiss stage. Interlocutory appeals were pending for 441 days on average before being decided.

Fourth, apart from the costs and time associated with individual qualified immunity motions, litigants and courts must learn about and stay abreast of the law. Qualified immunity is considered a particularly complex area of civil rights law—what John Jeffries has called "a mare's nest of complexity and confusion." The Supreme Court has offered unclear and shifting guidance about which courts' decisions can clearly establish the law, and how factually similar prior precedent must be to clearly establish the law. Litigants and courts report dedicating significant time and resources to understanding the intricacies of the doctrine.

Qualified immunity increases the cost, complexity, and time associated with civil rights litigation in each of these ways. But qualified immunity might still be shielding government defendants from the burdens of discovery and trial if the motions are raised early—before defendants engaged in discovery—and granted, foreclosing further litigation of the case. Among 1183 federal civil rights cases I examined, neither is true. Defendants most often raised qualified immunity at summary judgment, after litigants had already participated in discovery. And just 8.6% of defendants' qualified immunity motions resulted in the dismissal of plaintiffs' cases. In the remaining 91.4% of motions, the parties and courts took the time and money to research, brief, argue and decide the qualified immunity defense without disposing of the cases.

Qualified immunity motions and appeals might not even save litigants time in the rare event that they are dispositive. Thirty-six cases in my dataset were dismissed on qualified immunity grounds. Courts in 35 of those 36 cases held that plaintiffs also had failed to meet their burden of pleading or proof, or expressed skepticism about the merits of plaintiffs' claims. Absent qualified immunity, it appears that most or all of those 35 cases would have been dismissed on other grounds. If so, the time taken to research and brief qualified immunity in these thirty-five cases was unnecessary.

In one of the 36 cases dismissed on qualified immunity grounds, the court held that a jury could have found the plaintiff's constitutional rights were violated, but granted qualified immunity because those rights were not clearly established. In a world without qualified immunity, the case might have gone to trial. Did qualified immunity save the parties time in this case? Not likely. Civil rights trials—which, in my dataset, were almost always completed within a few days—take far less time than qualified immunity motions and appeals take to resolve.

Some have suggested that qualified immunity might streamline litigation in another way—by encouraging plaintiffs' attorneys to settle early, while a qualified immunity motion is pending or threatened. But several plaintiffs' attorneys I interviewed held the opposite view—they believe that qualified immunity delays settlement because defendants do not engage in meaningful settlement negotiations until after summary judgment motions raising qualified immunity have been decided. My

study of almost 1200 civil rights cases suggests that both views may sometimes be correct—some cases settled while qualified immunity motions were pending, and approximately the same number settled after qualified immunity motions were denied. So qualified immunity may hasten settlement in some cases, but it may delay settlement in others.

Doing away with qualified immunity would eliminate the need to spend time and money bringing, defending against, and deciding qualified immunity motions and interlocutory appeals; eliminate lengthy delays while motions and appeals are pending; and make irrelevant a complex, uncertain, and shifting area of the law. Most qualified immunity motions are denied, only adding to the cost of litigation. Even if some cases that would have settled or been dismissed because of qualified immunity instead go to trial, eliminating the defense may still be the most efficient course because trials are often quicker and less complex than qualified immunity motion practice and appeals. Although qualified immunity is intended to reduce litigation burdens, doing away with qualified immunity may actually decrease the average time, complexity, and cost of civil rights cases.

Imagining a World Without Qualified Immunity, Part IV

Were qualified immunity eliminated, the total number of civil rights cases would likely increase, but attorneys would continue to have strong incentives not to file insubstantial cases.

The Supreme Court intends for qualified immunity doctrine to shield government officials from the costs and burdens associated with insubstantial litigation. Some have suggested that the doctrine may achieve this goal by discouraging plaintiffs from ever filing insubstantial cases. If so, eliminating qualified immunity might open the floodgates to frivolous suits. But those holding this viewing overlook two critically important features of civil rights litigation: plaintiffs' attorneys' strong incentives to decline weak cases, and the many other barriers to relief in these cases. Attorneys would likely file more civil rights cases absent qualified immunity, but there would be no massive influx of frivolous cases.

Plaintiffs' attorneys generally accept civil rights cases on contingency, with an agreement that they can seek reasonable attorneys' fees under Section 1988 if the plaintiff prevails. Congress intended that the availability of attorneys' fees would create financial incentives for plaintiffs' attorneys to bring civil rights cases, including cases with limited recoverable damages. But the Supreme Court's narrow construction of what it means to prevail in civil rights cases means that plaintiffs are generally entitled to fees only if they win at trial. If a case is settled, the lawyer's fee will usually be a percentage of the settlement award. If the plaintiff loses, the attorney bears the entire cost of litigation.

This arrangement means plaintiffs' attorneys have strong incentives to accept cases they believe they will win (so that the attorney is not shouldered with the costs of litigation), and that are likely to result in large damages awards (so that the attorney can be assured adequate compensation if the case resolves in plaintiff's favor before trial).

As a result, plaintiffs' attorneys are extremely selective about the cases they accept and report declining the vast majority of cases they consider. Vulnerability to motion practice and dismissal on qualified immunity is one consideration some attorneys take into account. But attorneys report considering a wide variety of factors related to a case's costs, risks, and potential rewards—including whether judge and jury will be sympathetic to the plaintiff, the strength of the evidence supporting the plaintiff's claims, whether the evidence will establish a constitutional violation, the cost of litigating the

case, and the amount of recoverable damages. Eliminating qualified immunity would do away with one challenge that increases the cost, risks, and complexity of these cases. But these other barriers to relief would remain, and lawyers would continue to be very selective in the cases that they accept.

With that said, eliminating qualified immunity would likely result in more lawsuits being filed. One attorney I interviewed reported that the challenges associated with qualified immunity had caused him to stop filing any civil rights cases. And it may be that many more attorneys file few civil rights cases or stop bringing such cases altogether because of qualified immunity and other barriers to relief. Without qualified immunity, more attorneys might be willing to accept civil rights cases, and attorneys who already accept civil rights cases might devote a larger percentage of their docket to this area of practice.

Eliminating qualified immunity would also likely encourage attorneys to file some types of claims more frequently. One-third of the attorneys I interviewed reported declining certain types of cases because of qualified immunity, including cases alleging novel constitutional violations, cases concerning certain types of claims—like false arrest claims—where the qualified immunity standard is particularly difficult to overcome, and cases where low potential damages do not offset the potential costs of litigating qualified immunity motions and appeals. Without qualified immunity, attorneys would be less concerned about bringing these types of claims.

But even if eliminating qualified immunity changed attorneys' calculation of risk and reward and increased their willingness to consider taking certain cases, attorneys' case selection decisions would still be made against the backdrop of their contingency fee arrangements and the many other challenges associated with bringing these cases.

An attorney considering whether to accept a case with a novel constitutional claim would no longer be discouraged by the fact that she cannot point to another factually similar case on point, but might decline the case if the facts are not egregious or there is no video or witness to support the plaintiff's story. An attorney considering whether to accept a case with low recoverable damages would not have to litigate qualified immunity in the district court or on appeal, but would still recognize that, unless the case goes to trial and she can recover fees pursuant to Section 1988, her payment will be limited to a portion of the plaintiff's small settlement. And, even in a world without qualified immunity, attorneys might continue to conclude it would be wiser to spend the majority of their time on personal injury or medical malpractice cases than on civil rights claims, given jurors' perceived predisposition in favor of government officials.

Eliminating qualified immunity would likely increase the number of civil rights cases filed somewhat. But, even in a world without qualified immunity, attorneys would still have strong incentives to file successful civil rights cases, and many barriers to relief would still remain in these cases that would inform attorneys' case selection decisions. For these reasons, a lawyer with whom I spoke predicted that there would be "a fairly small number" of cases he would decline today but accept in a world without qualified immunity. Attorneys would still consider civil rights litigation to be less reliably remunerative than personal injury, medical malpractice, or work for paying clients. And those that do decide to bring civil rights cases would continue to reject the vast majority of cases that came their way.

Imagining a World Without Qualified Immunity, Part V

Absent qualified immunity, government indemnification and budgeting would continue to dampen the effect of lawsuits on government decisionmaking—but eliminating the defense could exert other pressures on government to improve.

This week, in excerpts from a forthcoming article, I have made several predictions about how civil rights litigation would function without qualified immunity. Today I offer my final predictions about the impact eliminating qualified immunity would have on government misconduct and accountability.

The Supreme Court and some commentators believe that the threat of being sued and the imposition of damages liability overdeter officers, discourage people from entering government service, and threaten government budgets. This is presumably why the Court has repeatedly emphasized the importance of qualified immunity to government officials and "society as a whole." But those holding this view both overstate the deterrent effects of lawsuits and overestimate the ability of qualified immunity to protect against the dangers they describe.

The Supreme Court has written that the threat of liability puts government officers in an impossible position—an officer must "choose between being charged with dereliction of duty if he does not arrest when he has probable cause" or "be[] mulcted in damages if he does." But studies have shown that "the possibility of being sued does not play a role in the day to day thinking of the average police officer." Contrary to the Supreme Court's fear that police fret overmuch about the possibility of being sued while making split-second decisions, available evidence suggests that the threat of legal liability rarely enters most officers' minds when they are doing their job.

One might view these studies as evidence that qualified immunity is working—protecting officers from the threat of legal liability so that they can work without distraction—and that eliminating qualified immunity would force officials into making these types of difficult decisions more often. But there are other likely explanations for officers' indifference to the threat of legal liability unrelated to qualified immunity that would presumably continue to exist in a world without the defense. As I have found, law enforcement officials infrequently pay for their defense counsel and virtually never contribute to settlements and judgments entered against them. And although government officials unquestionably dislike being sued, police officials report a number of other concerns on officers' minds—including high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment and reduced retirement benefits—that make it difficult to hire and retain officers. These other factors likely explain officers' current inattention to the threat of being sued while on the job and would presumably continue to exist in a world without qualified immunity.

Commentators have also expressed concern that eliminating qualified immunity would cause litigation costs to increase, and so would threaten municipal budgets. Setting aside what effect eliminating qualified immunity would have on payouts, this argument relies on an inaccurate view of lawsuit budgeting. While many municipalities are under financial strain, lawsuit costs are not usually the culprit. Although there are isolated stories of small towns and villages that have gone bankrupt or had to disband their police departments after large awards, available evidence indicates that liability costs are no more than 1% of most government budgets, and that lawsuit payouts usually have little or no direct financial impact on the budget of the agency that employs the defendant officials.

Against this backdrop, what impact could eliminating qualified immunity have on officer and official decisionmaking? Although there is no reason to believe eliminating qualified immunity would change government indemnification or budgeting practices, or non-litigation pressures on government officials, eliminating qualified immunity might lead to changes in constitutional litigation that could influence government behavior in several important ways.

As I explained in posts earlier this week, because qualified immunity increases the cost, complexity, and risk associated with civil rights litigation, eliminating qualified immunity might encourage plaintiffs' attorneys to file more cases, and might encourage plaintiffs to take their cases to trial more often. Plaintiffs' success rate is unlikely to increase—jurors' sympathies for government defendants mean that plaintiffs would continue to lose regularly at trial. But there would be more cases filed, more trials, and more plaintiff victories in absolute terms. And those trials would focus on what should be the central issue in these cases—whether officers exceeded their constitutional authority.

More lawsuits and trials could also influence officer behavior in a more indirect way—through the disclosure of information about government behavior. Complaints, discovery, motion practice, and trial can bring to the surface valuable information about government behavior previously unknown to the public—and sometimes unknown to the government entities whose employees are implicated in the suit. This additional information can inform government officials about areas of concern, and can heighten political pressures on them to make personnel, policy, or training adjustments.

Eliminating qualified immunity could also make the scope of constitutional law clearer. Qualified immunity creates legal uncertainty because courts can grant qualified immunity without deciding whether the constitutional right in question was violated. Absent qualified immunity, courts would more regularly announce the law. As Judge Browning has observed, line officers are unlikely to study these circuit and Supreme Court decisions, or compare the situation they are confronting on the job to the facts or holding of a prior case. But, in the past, when the Supreme Court or circuit courts have announced new legal requirements—or clarified what the law does not require—police departments have incorporated the substance of those rulings into their policies and trainings.

In addition, eliminating qualified immunity would do away with the slow but steady stream of district, circuit, and Supreme Court decisions finding that plaintiffs' constitutional rights have been violated, but insulating defendants from liability because a prior decision did not clearly establish the law. These decisions deny what is often the best available relief to plaintiffs who have been grievously wronged by government actors, and send a troubling message to government officials that they can violate the law with impunity. By eliminating qualified immunity, courts would no longer send this message in this way.

Eliminating qualified immunity is unlikely to change widespread indemnification and budgeting practices that shield line officers and policymakers from the financial consequences of lawsuits. But eliminating qualified immunity may increase pressure on officials to change their policies and trainings, providing clearer guidance about the legal standards these policies and trainings should contain, and dampen the message that government officials can violate constitutional rights without consequence. It is difficult to measure the impact these adjustments would have, but there is reason to believe they could, at least to some degree, reduce the frequency of constitutional violations and improve government behavior.

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The Supreme Court has repeatedly emphasized the importance of qualified immunity to "society as a whole," suggesting justices may fear how constitutional litigation would function absent qualified immunity. This week, I have offered several predictions that should quell these concerns. Absent qualified immunity, plaintiffs' and defendants' litigation success rates would remain relatively constant; the average cost, time, and complexity associated with litigating constitutional claims would decrease; attorneys would continue to have strong incentives to decline insubstantial cases; and indemnification and budgeting practices would continue to shield most government agencies and officials from the financial consequences of damages awards.

If we take the Supreme Court at its word—that its qualified immunity jurisprudence is motivated by an interest in shielding government officials from the burdens of suit in insubstantial cases, and avoiding overdeterrence of officers and officials—the Court need not fear doing away with qualified immunity, and need not craft another protection to put in its place. Given the multiple doctrinal, institutional, and bureaucratic shields that protect government defendants from suit, discovery, trial, damages awards, and overdeterrence, eliminating qualified immunity will not fundamentally disrupt the functioning of government or society as a whole. Each of these shields will continue to exist absent qualified immunity and will continue doing qualified immunity's intended work.

For these same reasons, doing away with qualified immunity will not be the silver bullet that critics of qualified immunity hope. Eliminating qualified immunity is probably the biggest single step that the Supreme Court or Congress could take to reduce government misconduct and improve accountability. Yet, in qualified immunity's absence, there would remain multiple other substantive and procedural barriers to relief, judges and juries predisposed in favor of government defendants and against civil rights plaintiffs, and local government practices that dampen the deterrent effect of civil rights suits on officers and officials. Eliminating qualified immunity will not address these barriers to relief and reform. But eliminating qualified immunity will prompt several significant shifts in civil rights litigation—it will clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority. Eliminating qualified immunity should, therefore, be understood as a preliminary—but important—step toward greater accountability and deterrence.