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Qualified Immunity and Federalism All the Way Down

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<https://escholarship.org/uc/item/4qr044p1>

Journal

109 Georgetown Law Journal 305 (2020)

Author

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Publication Date

2020-07-01

Qualified Immunity and Federalism All the Way Down

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In Qualified Immunity and Federalism, Aaron Nielson and Chris Walker argue that the federalism dimensions of qualified immunity counsel the Supreme Court against reconsidering the doctrine. They argue, in essence, that (1) the Court's qualified immunity doctrine is a powerful shield against civil rights actions seeking damages; (2) state and local governments have essentially guaranteed indemnification to officers in reliance on that shield; (3) eliminating qualified immunity would increase filings and payouts in civil rights cases so significantly that it would cause real upheaval in state and local governments; and (4) any adjustment to qualified immunity's protections, therefore, should come from the states or Congress—not the Court. I agree with Nielson and Walker that insufficient attention has been given to the federalism dimensions of qualified immunity, and I applaud their work mapping states' indemnification statutes. But truly appreciating the federalism dimensions of qualified immunity—and § 1983 more generally—requires taking account of a whole range of federal, state, local, and nongovernmental people, rules, and practices that do not make an appearance in Nielson and Walker's article.

In this Article, I offer an alternative account of the relationship between qualified immunity and federalism that takes federalism all the way down to the local and nongovernmental people, rules, and practices that shape, administer, and constrain § 1983 doctrine on the ground. Viewing qualified immunity and indemnification statutes in the context of the civil rights ecosystems in which they operate makes clear that (1) qualified immunity is not the impenetrable shield to liability that Nielson and Walker suggest; (2) state indemnification statutes were not crafted in reliance on qualified immunity; (3) states' and localities' indemnification provisions do not guarantee indemnification but, instead, give officials significant discretion to craft indemnification policies and determine whether individual officers should be indemnified; and (4) eliminating qualified immunity would impact the dynamics of civil rights litigation—more significantly in some parts of the country than in others—but would not have ruinous consequences for state and local governments.

* Professor of Law, UCLA School of Law. © 2020, Joanna C. Schwartz. Many thanks to Aaron Nielson and Chris Walker for their generous and thought-provoking engagement regarding their article and this response. This Article also benefitted greatly from comments by Ann Carlson, Beth Colgan, James Pfander, Richard Re, Dan Schwartz, and Stephen Yeazell. Finally, many thanks are due to Hannah Pollack and Bryanna Walker for excellent research assistance, and to the editors of *The Georgetown Law Journal* for excellent editorial assistance.

Moreover, to whatever extent eliminating qualified immunity impacts state and local government operations, officials can use various tools at their disposal (including but not limited to indemnification policies and decisions in individual cases) to restore balance in qualified immunity's absence. This more nuanced story about the federalism dimensions of qualified immunity weakens Nielson and Walker's reliance argument.

The Court has expressed willingness to reconsider qualified immunity in light of evidence that the doctrine does not achieve its intended policy goals. This Article shows that reliance concerns should not prevent the Court from doing so.

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INTRODUCTION

Qualified immunity is on the chopping block. Courts, congresspeople, advocacy groups, and commentators across the ideological spectrum—myself included—have called on the Supreme Court to do away with qualified immunity or greatly limit the defense.¹ Lower court opinions, law review articles, and amicus briefs submitted to the Court have argued that qualified immunity bears little resemblance to its common law roots, fails to achieve its policy goals of shielding government officials from the costs and burdens of liability, and undermines government accountability.² Even members of the Court have suggested that it is time to reconsider the doctrine.³

1. For a description of criticisms of qualified immunity by courts, commentators, and advocacy groups, see Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 311–12 (2020). Calls to end qualified immunity multiplied following the killing of George Floyd by Minneapolis Police Officer Derek Chauvin, with congresspeople, protestors, commentators, newspaper editorial boards, and athletes calling for the elimination of the defense. For a sample of these recent calls to end qualified immunity, see Editorial, *Congress Must Reopen the Courts to People Whose Rights Are Violated by Police*, WASH. POST (June 21, 2020, 8:30 AM), https://www.washingtonpost.com/opinions/congress-must-reopen-the-courts-to-people-whose-rights-are-violated-by-police/2020/06/19/b449a6a2-b0b2-11ea-856d-5054296735e5_story.html; Jamie Ehrlich, *More than 1,000 Professional Athletes Ask Congress to End Police Immunity*, CNN POLITICS (June 10, 2020, 3:33 PM), <https://www.cnn.com/2020/06/10/politics/qualified-immunity-congress-athletes-brady-wentz-brees/index.html> [<https://perma.cc/RH9S-9JCS>]; Editorial, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html>; Press Release, Ayanna Pressley, Member, House of Representatives, Reps. Pressley, Amash Introduce Bipartisan Legislation to End Qualified Immunity (June 4, 2020), <https://pressley.house.gov/media/press-releases/reps-pressley-amash-introduce-bipartisan-legislation-end-qualified-immunity> [<https://perma.cc/2QMM-T82R>]; Eric Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, ATLANTIC (June 17, 2020, 10:35 AM), <https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/>; and Jay Schweikert, *Police Immunity Highlighted by George Floyd Protestors Must End, and Officers Must Pay*, NBC NEWS (June 15, 2020, 2:27 PM), <https://www.nbcnews.com/think/opinion/police-immunity-highlighted-george-floyd-protestors-must-end-officers-must-ncna1225281> [<https://perma.cc/E2XS-2QZ6>].

2. See Schwartz, *supra* note 1 (describing these arguments).

3. See, e.g., Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (recommending that, “[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence”); Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (criticizing qualified immunity for “sanctioning a ‘shoot first, think later’ approach to policing”).

Aaron Nielson and Chris Walker agree with some common criticisms of qualified immunity.⁴ But—in their most recent article, published in this same Issue of *The Georgetown Law Journal*—they argue that federalism principles counsel the Court against swinging the axe.⁵ Nielson and Walker’s argument goes something like this: The Supreme Court’s qualified immunity doctrine creates an extremely strong shield for government defendants. States have essentially guaranteed indemnification to officers through statutes crafted in reliance on qualified immunity’s existence. If the Supreme Court does away with qualified immunity, the increase in § 1983 liability would overwhelm the indemnification systems that states and localities have created. Stare decisis is particularly strong when there has been reliance on a judicial decision. Accordingly, any change to qualified immunity should come not from the Court but from Congress or the states. If states are unhappy with the strength of the Court’s qualified immunity jurisprudence, they can increase protections for plaintiffs by expanding state law causes of action.

I agree with Nielson and Walker that insufficient attention has been given to the federalism dimensions of qualified immunity. I commend Nielson and Walker for doing the hard work of mapping one overlooked aspect of this terrain—state indemnification statutes. But their article suffers for viewing qualified immunity and state indemnification statutes in isolation. Truly appreciating the federalism dimensions of qualified immunity—and § 1983 more generally—requires taking account of a whole range of federal, state, local, and nongovernmental people, rules, and practices that do not make an appearance in Nielson and Walker’s article. If we are going down this road, we should go all the way.

My prior work offers a provisional map with which to begin this journey. As I have observed, whether a person sues for a violation of their constitutional rights, whether they prevail in their case, what amount they are awarded if successful, and whether they ever recover that award all depend on what I call the *civil rights ecosystem* in which the case arose.⁶ Civil rights ecosystems are made up of a connected and interactive collection of people (including plaintiffs’ attorneys, state and federal judges, state and federal juries, and defense counsel); legal rules and remedies (including state tort law, § 1983 doctrine and defenses, and damages caps); and informal practices (which can include litigation, settlement, and

4. See, e.g., Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 236 n.37 (2020) [hereinafter Nielson & Walker, *Qualified Immunity and Federalism*] (suggesting that Congress could limit immunity for some types of officers, allow consideration of officers’ subjective intent, or define what “clearly established” law means); *id.* at 248 n.127 (arguing that lower courts sometimes misapply qualified immunity, leading to egregious results); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 52 (2015) [hereinafter Nielson & Walker, *The New Qualified Immunity*] (arguing that the Supreme Court should “require lower courts—both trial and appellate courts—to give reasons for exercising (or not) their *Pearson* discretion to reach constitutional questions”).

5. See generally Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4.

6. See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020) (defining civil rights ecosystems, and explaining their effects on civil rights litigation).

indemnification decisions).⁷ These federal, state, local, and nongovernmental people, rules, and practices combine in different ways to create dramatically different civil rights ecosystems around the country. As a result, a civil rights case that might garner a six-figure settlement in Philadelphia might never be filed if it arose in Houston.⁸

State indemnification statutes and qualified immunity doctrine unquestionably constitute *part* of these civil rights ecosystems. But Nielson and Walker's discussion of qualified immunity—which focuses almost exclusively on the Supreme Court's decisions—fails to take account of the ways in which decisions by lower court judges, city attorneys, plaintiffs' attorneys, and juries determine the impact of the doctrine on the ground. Similarly, Nielson and Walker's discussion of state indemnification statutes underplays the roles of local government officials, union representatives, plaintiffs' attorneys, and community advocates in crafting local indemnification policies and making indemnification decisions in individual cases. In the words of Heather Gerken, Nielson and Walker's argument suffers for failing to take their account of federalism “all-the-way-down” to the local and nongovernmental practices and actors that shape, administer, and constrain both areas of § 1983 doctrine and practice.⁹

Nielson and Walker surely recognize that the dynamics of civil rights litigation are more complex than they have described. But keeping things simple strengthens their argument that the Supreme Court should not revisit qualified immunity—and examining federalism all the way down weakens it. As I explain in this Article, taking account of the complexities of civil rights ecosystems reveals that (1) qualified immunity is not the impenetrable shield to liability that Nielson and Walker suggest;¹⁰ (2) states' indemnification statutes are best understood as passed in response to the increased threat of government officials' legal liability in the 1970s and 1980s—not passed in reliance on the protections of qualified immunity;¹¹ (3) states have not guaranteed officers indemnification but, instead, give significant discretion to government officials in crafting indemnification policies and determining whether individual officers should be indemnified;¹² and (4) eliminating qualified immunity would impact the dynamics of civil rights litigation—more significantly in some parts of the country than others—but would not have

7. *Id.* at 1548.

8. *See id.* at 1540–42.

9. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010) (arguing that federalism should focus on the sphere of local and nongovernmental rules and actors where “power dynamics are fluid; minority rule is contingent, limited, and subject to reversal by the national majority; and rebellious decisions can originate even from banally administrative units”). For other federalism scholarship that explores the relationship between federal, state, and local people, rules, and practices, *see, for example*, Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) and Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

10. *See infra* Part I.

11. *See infra* Part II.

12. *See infra* Part III.

ruinous consequences for state and local governments.¹³ Moreover, to whatever extent eliminating qualified immunity *does* impact state and local government operations, officials can use various tools at their disposal (including but not limited to indemnification policies and decisions in individual cases) to restore balance in qualified immunity's absence. If I am right, then Nielson and Walker's reliance-based stare decisis argument loses force.¹⁴

That is a lot of information to digest all at once, so I have made a table reflecting our contrasting points of view:

Nielson and Walker's point of view:	My point of view:
(1) The Supreme Court's qualified immunity doctrine creates an extremely strong shield for government defendants.	(1) The Supreme Court's qualified immunity doctrine has a more limited, nuanced, and geographically varied effect on filings and payouts than Nielson and Walker suggest.
(2) States passed indemnification statutes in reliance on qualified immunity.	(2) States passed indemnification statutes in response to the increased threat of government officials' legal liability in the 1970s and 1980s—not in reliance on qualified immunity's protections.
(3) State indemnification statutes have guaranteed indemnification to officers.	(3) State indemnification statutes give local governments significant discretion to craft indemnification policies and determine whether officers should be indemnified.
(4) If the Supreme Court modifies or eliminates qualified immunity, the resulting increase in liability would cause "real upheaval" for state and local governments. ¹⁵	(4) Modifying or eliminating qualified immunity may impact the dynamics of litigation—in some parts of the country more than others—but would not dramatically increase payouts, threaten governments' fiscal stability, or overdeter officers and officials.

13. See *infra* Part IV.

14. I do not engage in depth with other stare decisis arguments that Nielson and Walker have made in defense of qualified immunity. But, as I have previously stated, I am convinced by Will Baude that qualified immunity should not be treated as a "purely statutory doctrine" for stare decisis purposes, and by Scott Michelman that there are compelling reasons to overrule this precedent even if it is understood as statutory. See Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1833 (2018) (quoting William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 81 (2018)) (citing Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2007 (2018)). Moreover, as I explain *infra* notes 118–32 and accompanying text, the Court's repeated adjustments to qualified immunity doctrine suggest that stare decisis has more limited power in this area of the law.

15. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 285.

The Supreme Court has repeatedly indicated its willingness to reconfigure qualified immunity to better achieve the doctrine's intended policy goals—balancing interests in vindicating plaintiffs' rights with interests in shielding government officials from insubstantial suits. Over the past several decades, the Court has repeatedly adjusted qualified immunity doctrine—in ways large and small—with the aim of better achieving these goals.¹⁶ Now, in light of evidence that qualified immunity undermines government accountability without shielding most officials from the costs and burdens of litigation—and in the midst of our ongoing, national conversation about police violence and reform—the Court should follow Justice Thomas's recommendation that it reconsider its qualified immunity jurisprudence again.¹⁷ If it does, and takes seriously available evidence of qualified immunity's failures, the Court could take any number of actions—it could return qualified immunity to its common law origins, relax the standards necessary to overcome the defense, or do away with the defense altogether.¹⁸ Viewing federalism all the way down shows that, if the Court does reconsider qualified immunity, the doctrine's goals can be achieved by the state, local, and nongovernmental people, rules, and practices that already shape the scope of § 1983.

I. QUALIFIED IMMUNITY'S POWER

Nielson and Walker assert that qualified immunity “regularly shields government officials from monetary liability when they violate others’ constitutional rights” and causes people whose rights have been violated “regularly [to] go without a federal remedy.”¹⁹ The Supreme Court and numerous other commentators appear to agree.²⁰ This claim is important to Nielson and Walker's argument because it explains why states might rely on the Supreme Court's doctrine when crafting their indemnification statutes. But neither the Court nor Nielson and Walker have offered empirical support for this claim. In fact, all available evidence suggests that the impact of qualified immunity on civil rights cases is less extreme, more nuanced, and more geographically variable than Nielson and Walker contend. As I show in this Part, qualified immunity's power over civil rights cases is mediated by the ecosystems in which these cases arise and varies

16. See *infra* notes 118–32 and accompanying text (describing these doctrinal shifts).

17. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment).

18. For further discussion of these options, see *infra* notes 250–57 and accompanying text.

19. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 231.

20. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (explaining that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (explaining that the Supreme Court's recent qualified immunity decisions have “created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights”); see also Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–7 (2017) (describing this assumption as held by Supreme Court Justices, legal scholars, and commentators).

by region. Although eliminating qualified immunity would have important real-world effects, viewing qualified immunity as one part of a broader civil rights ecosystem demonstrates that eliminating the doctrine would not result in the “massive” upheaval that Nielson and Walker predict.²¹

A. QUALIFIED IMMUNITY IN CIVIL RIGHTS ECOSYSTEMS

Available evidence shows that a small portion of civil rights cases are dismissed on qualified immunity grounds. In a study of almost 1,200 § 1983 actions filed in five federal districts around the country, I found that fewer than four percent were dismissed on qualified immunity grounds.²² When Nielson and Walker reviewed this research, they raised what they described as “minor quibbles” with various aspects of my methodology and the way in which I framed my findings.²³ But even when they reconsidered the data with what they described as an “aggressive framing” that supported their view,²⁴ the take-home point remained the

21. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 293.

22. See Schwartz, *supra* note 20, at 45. Nielson and Walker contend that there is empirical disagreement about the frequency with which qualified immunity causes case dismissals and that “empirical disagreements bolster the case for stare decisis.” Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 286 n.327. In support of this contention, they point to a recent Reuters study finding that “police won 56% of cases in which they claimed qualified immunity from 2017 through 2019.” *Id.* (quoting *Six Takeaways from Reuters Investigation of Police Violence and ‘Qualified Immunity’*, REUTERS (May 8, 2020, 12:06 PM), <https://www.reuters.com/article/us-usa-police-immunity-scotus-snapshot/six-takeaways-from-reuters-investigation-of-police-violence-and-qualified-immunity-idUSKBN22K1AM> [<https://perma.cc/6W3V-VD7W>]). But Reuters examined only court decisions published on Westlaw. In contrast, I examined the dockets of all cases filed between 2011 and 2012 and court decisions in those cases, regardless of whether they were published. See Schwartz, *supra* note 20, at 19–25 (describing study methodology). In fact, I found that “[r]elying on Westlaw would have significantly reduced the number of qualified immunity opinions in my dataset”—only 48.8% of the qualified immunity decisions that I reviewed in my docket dataset were available on Westlaw. *Id.* at 20 n.65. Moreover, by focusing only on published opinions referencing qualified immunity, the Reuters study does not capture cases in which defendants raised qualified immunity but the court decided the motion on other grounds, or cases in which the motion was never decided—which, in my study, amounted to 172 (39.1%) of the 440 qualified immunity motions filed. See *id.* at 36 tbl.6. If one looks only at the 268 qualified immunity motions in my dataset in which the district court issued a ruling that discussed qualified immunity, defendants prevailed in whole or part in 129 (48.1%) of these motions—a finding consistent with the Reuters study, which found that 44% of qualified immunity motions were granted between 2005 and 2007 and that 57% of qualified immunity motions were granted between 2017 and 2019. See *id.* (calculating the success rates of motions where qualified immunity was denied, granted in part, granted in full, or granted in the alternative); Andrew Chung, Lawrence Hurley, Jackie Botts, Andrew Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/G5DW-SLCG>]. Accordingly, I do not believe that the Reuters study is evidence of empirical disagreement on the frequency with which qualified immunity motions are granted. Moreover, the only other study that has examined case dockets to understand the impact of qualified immunity reached conclusions consistent with mine. See Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 tbl.4 (2010) (finding that qualified immunity led to just two percent of *Bivens* case dismissals over a three-year period).

23. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1877–80 (2018).

24. See *id.* at 1880 (“[O]fficials sought qualified immunity in two in five cases in the sample, and courts only denied such qualified immunity [completely] in three in ten instances when it was sought.”).

same: qualified immunity closes the courthouse doors to filed cases²⁵ far less frequently than the Supreme Court's—and Nielson and Walker's—dramatic language about qualified immunity suggests.²⁶

Qualified immunity does not regularly shield government officials from liability because of the civil rights ecosystems in which the doctrine operates. Consider all of the federal, state, local, and nongovernmental people, rules, and practices that must combine to achieve the result the Court—and Nielson and Walker—assert is commonplace. First, plaintiffs' counsel must decide to sue individual officers for damages under § 1983—as opposed to bringing a claim against the municipality, a claim for injunctive relief, or a claim under state law.²⁷ Then, defense counsel must decide to bring a dispositive motion—instead of settling or proceeding to discovery or trial.²⁸ Defense counsel must decide to raise qualified immunity in that dispositive motion—instead of or in addition to the many arguments that defendants might raise in a motion to dismiss, motion for summary judgment, or motion for judgment as a matter of law.²⁹ The district court must then decide to grant the motion—and decide to grant it on qualified immunity grounds.³⁰ (Or, if the district court denies the motion, defendants must decide to appeal—as opposed to settling or proceeding to the next stage of litigation—and the court of appeals must reverse.³¹) And the decision granting qualified immunity must end the case—which is impossible if the plaintiff's complaint includes claims that cannot be dismissed on qualified immunity grounds or if the defendant did not move to dismiss all claims for which qualified immunity was an available defense.³²

In a subsequent article, I examined the extent to which qualified immunity might have played an informal role in the resolution of other cases in the dataset. *See* Schwartz, *supra* note 1, at 330–31. Of the 431 cases in the dataset that failed—meaning were dismissed without payment—for reasons other than qualified immunity, I concluded that there were only a few in which eliminating qualified immunity could have changed the disposition of the case. *See id.* at 330–37. I additionally concluded that, absent qualified immunity, plaintiffs might more frequently decline settlements in favor of trial. *See id.* at 335. Given the frequency with which plaintiffs lose at trial, some of these plaintiff “successes” (settlements) might turn to “failures” (defense verdicts) absent qualified immunity. *Id.*

25. For discussion of qualified immunity's effects on case-filing decisions, see *infra* notes 43–51 and accompanying text.

26. For a few examples of this dramatic language, see *supra* notes 19–20 and accompanying text.

27. For further discussion about how qualified immunity may influence case-selection decisions, see *infra* notes 43–51 and accompanying text. Of the 1,183 § 1983 cases in my dataset, defendants could raise qualified immunity in 979—the others were dismissed *sua sponte* by the court before defendants could respond, were brought solely against municipalities, or sought injunctive or declaratory relief, so qualified immunity could not be raised. *See* Schwartz, *supra* note 20, at 27.

28. *See* Schwartz, *supra* note 20, at 34 (finding that defendants across the five districts in the study filed motions to dismiss in 462 (47.2%) of the 979 cases in which qualified immunity could be raised).

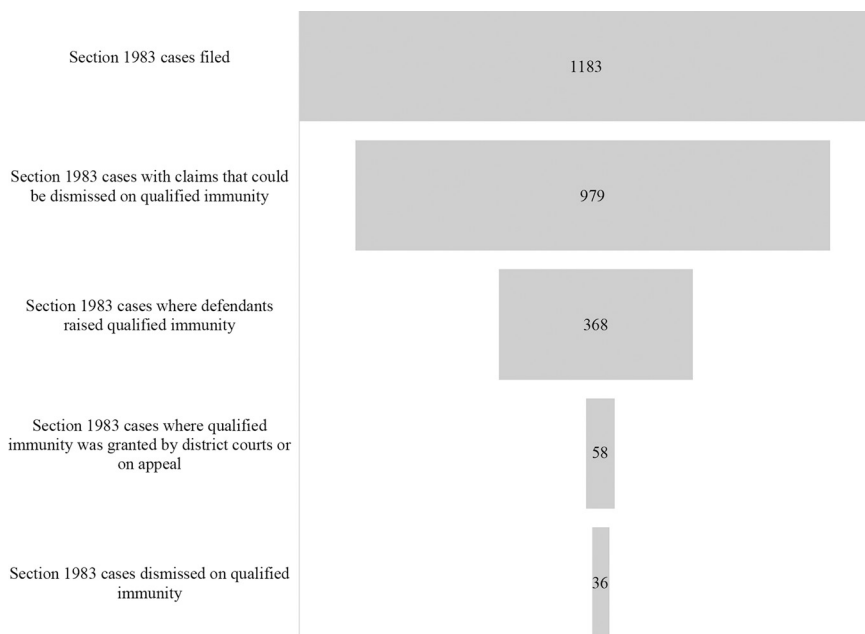
29. *See id.* at 34–35 (finding that defendants across the five districts in the study raised qualified immunity in 437 motions—in 33.3% of their motions to dismiss and 75.7% of their summary judgment motions).

30. *See id.* at 43–44 (reporting that fifty-three qualified immunity motions were granted in full).

31. *See id.* (reporting forty-one interlocutory appeals and five reversals).

32. *See id.* (reporting thirty-eight dismissals on qualified immunity grounds). *But see* Schwartz, *supra* note 1, at 328 (revising the total count of qualified immunity dismissals to thirty-six).

As this description makes clear, the power of qualified immunity over filed cases depends on decisions by federal judges, local government officials, and nongovernment actors. These decisions are made against the backdrop of a variety of federal and state laws that allow plaintiffs to assert causes of action invulnerable to qualified immunity and allow defendants to move to dismiss claims on grounds other than qualified immunity. As this graphic illustrates, the interaction of these various actors significantly limited qualified immunity's impact on the 1,183 cases in my study.



The power of qualified immunity is also subject to additional, less obvious influences. For example, the ability of plaintiffs' attorneys to avoid dismissal on qualified immunity grounds—either by structuring their cases to make them invulnerable to qualified immunity or by defeating motions when they are filed—may depend on the strength and savvy of the local plaintiffs' bar.³³ Defense counsel's decisions to settle or contest a claim may depend not only on the legal or factual strength of the case but also on political pressures from any number of local and nongovernmental sources—city hall, advocacy groups, or the police union, to name a few. And, as Nielson and Walker have previously shown, a judge's assessment of a defendant's qualified immunity motion turns on the political affiliation of the appointing president, as well as the region of the country in

33. See Schwartz, *supra* note 6, at 1557–59, 1577–79 (describing regional variation in the plaintiffs' bar).

which the judge sits.³⁴ In fact, as I describe in the next Section, the interaction of *all* of these factors vary depending on region.

B. QUALIFIED IMMUNITY AND REGIONAL VARIATION

As Nielson and Walker have found, circuit judges in different parts of the country vary in the frequency with which they find constitutional violations and grant qualified immunity.³⁵ Circuits differ not only in their qualified immunity grant rates and the frequency with which they announce constitutional violations but also in their interpretation of various aspects of the qualified immunity defense, including the definition of clearly established law, which party bears the burden of proof, and whether qualified immunity is a question of law or fact.³⁶

My study of district court qualified immunity decisions reveals similar regional variation.³⁷ In the Southern District of Texas, 9.2% of police misconduct cases filed during my study were dismissed on qualified immunity grounds.³⁸ In the Eastern District of Pennsylvania, fewer than one percent of cases filed were dismissed because of qualified immunity.³⁹ Regional differences in judges' receptivity to qualified immunity motions may also impact the frequency with which government attorneys raise the defense in their briefs. For example, in Philadelphia—which is in the Eastern District of Pennsylvania—plaintiffs' attorneys report that courts are unlikely to dismiss cases on qualified immunity grounds; unsurprisingly, then, defense counsel tend not to waste their time filing these motions.⁴⁰ In contrast, in Houston—which is in the Southern District of Texas—plaintiffs' attorneys report that courts are more willing to grant

34. See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 Emory L.J. 55, 101–10 (2016) [hereinafter Nielson & Walker, *Strategic Immunity*]; Nielson & Walker, *The New Qualified Immunity*, *supra* note 4, at 39–49.

35. See Nielson & Walker, *Strategic Immunity*, *supra* note 34, at 97–98 (examining circuit court decisions and finding that, with respect to the frequency with which circuits recognize new constitutional violations in their qualified immunity decisions, the Fifth Circuit, Sixth Circuit, and Ninth Circuit “all differ dramatically from the national average . . . by a statistically significant margin” (quoting Nielson & Walker, *The New Qualified Immunity*, *supra* note 4, at 41)).

36. See John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 858–59 (2010) (discussing variation in circuits' definition of clearly established law); Charles R. Wilson, “Location, Location, Location”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447–48 (2000) (same); see also Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071–77 (2018) (describing circuit variation in which party bears the burden of proof and whether juries can consider qualified immunity at trial). For these reasons, I disagree with Nielson and Walker's characterization of qualified immunity as providing a “uniform backdrop” for state law, Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 285, and with their assertion that “the test for qualified immunity is the same throughout the United States,” *id.* at 236.

37. See Schwartz, *supra* note 20, at 46 tbl.12 (examining district court decisions in five districts across the country, including the Southern District of Texas and the Eastern District of Pennsylvania).

38. *Id.*

39. *Id.*

40. See Schwartz, *supra* note 6, at 1566–68, 1575–76 (describing the role that qualified immunity plays in civil rights suits in Philadelphia).

qualified immunity, and government attorneys raise the defense more often.⁴¹ But even in the jurisdictions with judges most sympathetic to the qualified immunity defense—such as Houston—cases are dismissed far less often on qualified immunity grounds than they are on other grounds.⁴²

C. QUALIFIED IMMUNITY AND ATTORNEYS' CASE-SELECTION DECISIONS

Discussion thus far has focused on the role qualified immunity plays in filed cases. But qualified immunity plays a similarly nuanced and regionally specific role in attorneys' case-selection decisions. When I surveyed and interviewed plaintiffs' attorneys around the country, I found that qualified immunity is one of many factors that plaintiffs' attorneys consider when deciding whether to accept a case.⁴³ Some attorneys reported declining cases they considered vulnerable to dismissal on qualified immunity grounds—including cases with low damages (where the costs of litigating qualified immunity made the cases economically infeasible to take) and cases where no prior precedent clearly established the law.⁴⁴ But the majority of attorneys who I interviewed reported that qualified immunity alone does not regularly cause them to decline cases. Some attorneys remarked that qualified immunity concerns do not cause them to decline cases because the chances that a motion will be granted depend on the judge hearing the case (who is not determined until after the case is filed).⁴⁵ Other attorneys structure cases in ways that minimize the impact of the defense—by, for example, including state law claims, claims against the municipality, and claims for injunctive relief that cannot be dismissed on qualified immunity grounds.⁴⁶ In these ways, other aspects of civil rights ecosystems can limit qualified immunity's impact on attorneys' case-selection decisions.

The impact of qualified immunity on the case-selection decisions of plaintiffs' attorneys may also vary by region. To return to the earlier comparison, qualified immunity motions are far more often made and granted in Houston than in Philadelphia. It should come as no surprise, then, that a plaintiffs' attorney who I interviewed who practices in the Eastern District of Pennsylvania views qualified

41. See *id.* at 1569–71, 1575–76 (describing the role that qualified immunity plays in civil rights suits in Houston).

42. Of the twenty-five cases filed by plaintiffs against Houston and its officers during my two-year study period, plaintiffs received compensation in five cases. *Id.* at 1579. Of the remaining twenty cases, five were dismissed on qualified immunity grounds at the motion to dismiss stage or the summary judgment stage. See Joanna C. Schwartz, *Cases Filed Against Houston and Its Officers, 2011–2012* (Mar. 2020) (unpublished spreadsheet) (on file with author). The remaining fifteen were dismissed at the motion to dismiss or summary judgment stages on other grounds (five cases), voluntarily dismissed without payment to the plaintiff (three cases), dismissed by the court for failure to prosecute (four cases), or dismissed following a jury verdict in defendants' favor (three cases). *Id.*

43. See generally Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101 (2020) (exploring qualified immunity's effect on decisions of plaintiffs' attorneys to bring civil rights suits against police).

44. See *id.* at 1144–47.

45. See *id.* at 1141.

46. See *id.* at 1140–41.

immunity as “more of an ‘annoyance’ than an actual threat,”⁴⁷ whereas an attorney I interviewed who practices in the Southern District of Texas was so discouraged by the threat of dismissal on qualified immunity grounds that he stopped bringing civil rights cases altogether.⁴⁸

I also found significant regional variation in the number of attorneys who regularly bring civil rights cases. In the Southern District of Texas, only one attorney entered six or more appearances in police misconduct cases during my two-year study period; in the Eastern District of Pennsylvania, by contrast, fifteen attorneys entered six or more such appearances during that same period.⁴⁹ Comparing attorney appearances in cases against police officers in Houston and Philadelphia—which have similarly sized police departments—the regional disparity is even starker. Forty attorneys brought three or more suits against Philadelphia and its officers during my two-year study period; no attorneys brought three or more suits against Houston and its officers during that same period.⁵⁰ And there is reason to believe that this regional variation is caused in part by qualified immunity because attorneys reported that the challenges of learning and navigating around the defense—along with other aspects of the civil rights ecosystem that make it difficult for plaintiffs to prevail—caused attorneys to reduce the number of civil rights cases that they accept or to end their civil rights practices entirely.⁵¹

D. QUALIFIED IMMUNITY’S “REAL-WORLD EFFECTS”

To say that qualified immunity plays a nuanced, contingent, and regionally distinct role in civil rights litigation is not, however, to suggest that qualified immunity “does not have meaningful real-world effects”⁵² or that the world would look no different without it. Instead, as I have argued in more detail elsewhere, eliminating qualified immunity would do several important things.⁵³

First, eliminating qualified immunity would decrease the cost, risk, and complexity of civil rights litigation.⁵⁴ Lawyers would no longer need to brief the qualified immunity motions that, today, require them to scour Westlaw for cases where courts have held virtually identical conduct to be unconstitutional.⁵⁵ Because defendants have a right to immediately appeal qualified immunity denials, civil rights attorneys must be prepared to litigate in both the trial court and on appeal, and must be prepared for the possibility that their case will be delayed by a year or more while that appeal is pending; eliminating qualified immunity (and, thus, interlocutory appeals of qualified immunity denials) would put an end to

47. Schwartz, *supra* note 6, at 1567.

48. Schwartz, *supra* note 43, at 1147–48.

49. *Id.* at 1150.

50. See Schwartz, *supra* note 6, at 1577–78; Schwartz, *supra* note 42.

51. Schwartz, *supra* note 43, at 1148–50.

52. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 286.

53. For further discussion of each of these predictions, see Schwartz, *supra* note 1, at 360–63.

54. See Schwartz, *supra* note 1, at 338–44 (describing this prediction).

55. See *id.* at 338–40.

these challenges.⁵⁶ And eliminating qualified immunity would end the risk that a plaintiff will spend years pursuing discovery and defending against qualified immunity in the trial court and on appeal only to have the case dismissed on qualified immunity grounds—a possibility that weighs heavily on the minds of plaintiffs’ attorneys even in jurisdictions where qualified immunity is infrequently granted.⁵⁷ And this concern makes sense: because plaintiffs’ attorneys usually take civil rights cases on contingency—meaning they recover a percentage of their clients’ recovery if they win but recover nothing if they lose—years spent on a dismissed case can amount to losses of tens of thousands of dollars’ worth of uncompensated time.⁵⁸

Second, the decreased costs and risks associated with civil rights litigation might encourage more attorneys to accept civil rights cases—and might encourage attorneys already accepting civil rights cases to expand the number and types of cases that they bring.⁵⁹ Attorneys who I have interviewed report that the challenges of understanding qualified immunity—a complex and quickly shifting doctrine—may discourage some attorneys from ever bringing civil rights cases.⁶⁰ Other attorneys, who practice primarily in other areas of the law, may bring one or two civil rights cases, lose on qualified immunity, and then decide never to bring a civil rights case again.⁶¹ Eliminating qualified immunity would, thus, remove one formidable barrier to entry into civil rights practice. Because eliminating qualified immunity would reduce the cost and risks of civil rights litigation, it might also encourage attorneys to accept cases with smaller possible recoveries.⁶² Some of the most pernicious problems in policing—including, for example, unconstitutional stops and frisks—usually involve minimal compensable damages.⁶³ Low damages will still be a disincentive for attorneys to bring these cases on contingency, but eliminating qualified immunity will make these types of cases more economically feasible to take.

56. *See id.* at 340–41.

57. *See* Schwartz, *supra* note 43, at 1127 (describing attorneys’ concerns about the risk of dismissal on qualified immunity grounds after years of litigation).

58. *See* Schwartz, *supra* note 1, at 345–47 (describing plaintiffs’ attorneys contingency fee arrangements).

59. *See id.* at 344–51 (describing the impact of eliminating qualified immunity on attorneys’ case-selection decisions).

60. *See* Schwartz, *supra* note 43, at 1121 (describing the investment of time necessary for attorneys to understand qualified immunity doctrine).

61. *See id.* at 1148–49 (describing attorneys who have stopped accepting civil rights cases after suffering dismissals on qualified immunity grounds).

62. *See id.* at 1146.

63. *See id.* at 1146–47 (explaining that qualified immunity makes attorneys less inclined to bring low damages cases, including false arrests). For a discussion of the impact of stop and frisk, see, for example, CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 1 (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> [<https://perma.cc/WW5G-6LU7>] (concluding, based on a series of interviews, that the impact of stops and frisks “can be devastating and often leave behind lasting emotional, psychological, social, and economic harm”).

Third, eliminating qualified immunity might mean that more cases would go to trial.⁶⁴ This is in part because some cases that would have been dismissed on qualified immunity grounds could proceed.⁶⁵ It is also in part because plaintiffs who regularly accept settlements while qualified immunity motions and appeals are pending—presumably for fear that the motions will be granted—may be less inclined to accept these settlement offers in a world without qualified immunity and go to trial instead.⁶⁶ Today, defendants win the majority of civil rights cases that go to trial, and the same would likely be true if qualified immunity were eliminated.⁶⁷ But more trials would mean more transparency about police practices, would allow more plaintiffs their day in court, and would focus more attention on what should be the critical issues in these cases—whether government officials exceeded their constitutional authority.⁶⁸

Fourth, ending qualified immunity would mean that courts' rulings in civil rights cases would offer more clarity about the scope of constitutional rights.⁶⁹ Today, judges can grant qualified immunity motions without ruling on the merits of plaintiffs' constitutional claims.⁷⁰ Absent qualified immunity, courts' decisions would focus on the scope of the Constitution—not whether there was a prior court decision with virtually identical facts.⁷¹ This additional constitutional clarity could help guide police department policies and trainings, and begin dialogue with other branches of government and the public at large about the scope of constitutional protections.⁷²

Finally, ending qualified immunity would end the slow but steady stream of decisions shielding government defendants from liability simply because there was not a prior, factually similar case holding such conduct

64. See Schwartz, *supra* note 1, at 335.

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.* at 357–58.

69. See *id.* at 317–26.

70. See *id.* at 318–19.

71. Nielson and Walker assert that the doctrine has “significant consequences for public policy within a polity, including within a state’s borders,” Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 259, because the Supreme Court’s qualified immunity decisions have addressed substantive rights, including

how to balance speech with safety interests at rallies and protests, . . . how to balance a student’s right to be free from unlawful searches with efforts to ensure that all students receive a quality education in a safe environment[,] . . . using force when third parties are at risk, how to ensure government transparency without violating individual privacy, and how far governments can go to make communities safer when weapons are at issue,

id. at 258 (citations omitted). Although qualified immunity was raised in these cases, these decisions should not be characterized as resulting from qualified immunity—rather it is the Court’s interpretation of the substantive constitutional rights in these cases that have “significant consequences for public policy within a polity.” *Id.* at 259. Indeed, I predict that without qualified immunity there would be more such decisions because courts could not grant qualified immunity without ruling on the substance of plaintiffs’ constitutional claims. See Schwartz, *supra* note 1, at 319.

72. See Schwartz, *supra* note 1, at 319.

unconstitutional.⁷³ As Justice Sotomayor has explained, these types of decisions “sanction[] a ‘shoot first, think later’ approach to policing”⁷⁴ and suggest that government officials can violate people’s rights without consequence. These decisions may also lead to what Monica Bell has described as “legal estrangement” by victims of government misconduct who interpret these decisions as saying that their rights do not matter.⁷⁵ Ending qualified immunity would stop the courts from sending these messages in this way.

Eliminating qualified immunity can have all of these “real-world effects” without resulting in an increase in filings and liability so dramatic that it would require “massive” changes to state and local laws.⁷⁶ Although more civil rights lawsuits will likely be filed, other aspects of civil rights ecosystems will protect against such extreme effects. Today, civil rights cases are far more often dismissed on grounds other than qualified immunity, and those other barriers to relief would remain in a world without the defense.⁷⁷ These other barriers to relief will also guard against a deluge of “frivolous and distracting” suits being filed, as some defenders of qualified immunity fear.⁷⁸ Plaintiffs’ attorneys who accept cases on contingency and recover nothing if their clients lose would continue to have strong incentives to accept only cases with significant damages and convincing evidence of wrongdoing.⁷⁹ And other barriers to relief in civil rights cases would continue to discourage attorneys from accepting weaker cases.⁸⁰

* * *

Nielson and Walker repeatedly assert that qualified immunity is an extremely strong protection for government officials.⁸¹ Their claims about the strength of qualified immunity are critically important to their argument that state indemnification statutes are passed in reliance on the doctrine and that state and local governments would experience massive upheaval were the defense limited or eliminated. Ending qualified immunity would have important effects. But viewing qualified immunity in the context of the civil rights ecosystems in which the doctrine operates demonstrates that Nielson and Walker’s claims about the power of qualified immunity are substantially overstated.

73. For more discussion about the frequency with which those opinions are issued, see *supra* note 22 and accompanying text.

74. *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

75. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066–67 (2017).

76. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 286, 293.

77. See Schwartz, *supra* note 20, at 10 (finding, in a study of five districts, that only 3.9% of cases in which qualified immunity could be raised were dismissed on qualified immunity grounds).

78. Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019).

79. See Schwartz, *supra* note 1, at 344–51 (observing that the contingency fee model—along with attorneys’ views that judges and juries are hostile to civil rights claims, among other considerations—create strong incentives for attorneys to accept only the strongest cases).

80. *Id.* at 349–51.

81. See, e.g., Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 231.

II. STATES' RELIANCE

Nielson and Walker contend that states have passed indemnification statutes in reliance on strong qualified immunity protections.⁸² This supposed reliance underpins their contention that qualified immunity should not be reconsidered by the Supreme Court: the Court has held *stare decisis* is particularly strong “when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision” because “overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.”⁸³ Nielson and Walker argue that, “[t]o the extent that state laws and contracts around the country may exist—or, no less importantly, may exist in their current form—only because of qualified immunity,”⁸⁴ reversing qualified immunity decisions would be a dramatic step to take. But, as I describe in this Part, the timing, structure, and legislative history of state indemnification statutes do not indicate that they were passed in reliance on the protections of qualified immunity. Instead, they appear to have been passed in response to the perceived threat of rising officer liability. In addition, because the Court has repeatedly adjusted the power of the qualified immunity defense—and available evidence suggests that those adjustments have impacted the success of qualified immunity motions—states have not acted “against a backdrop of decades of consistent cases from the Supreme Court,”⁸⁵ further weakening their reliance claims.

A. STATES' CONCERNS ABOUT OFFICER LIABILITY

Nielson and Walker's reliance argument appears to rest in part on timing—most indemnification statutes were enacted after “the rise of qualified immunity.”⁸⁶ It is indisputable that most state indemnification statutes were passed after qualified immunity was created by the Supreme Court. But it does not follow that state indemnification statutes were passed in reliance on the qualified immunity defense.⁸⁷ We do not know what was on all state legislators' minds in the 1970s

82. *See id.* at 236. Nielson and Walker's state survey of indemnification statutes reveals the wide variety of ways in which states have structured indemnification obligations and the varying degrees of flexibility that they have given to state and local government officials to make indemnification decisions in individual cases. *See id.* at 268–82. Among their insights is that fewer than half of the states mandate some form of indemnification for both state and local officials; the others prohibit indemnification by state or local governments, or give state or local officials the discretion to indemnify their officers. *Id.* Presumably, Nielson and Walker's reliance argument primarily concerns those state statutes that mandate some form of indemnification—it is more difficult to imagine how a state's prohibition on indemnification or grant of discretion to local governments to craft indemnification policies could be the product of state legislators' reliance on the protections of qualified immunity.

83. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

84. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 291.

85. *Id.* at 293.

86. *Id.* at 281; *see id.* at 288–90.

87. Nielson and Walker appear to have some ambivalence about the strength of the connection between qualified immunity and states' indemnification statutes, as well as about the degree of connection necessary to support their reliance argument. At times they describe states' reliance in vigorous terms: they assert that states' indemnification policies are “premised on the existence of federal qualified immunity,” *id.* at 263; that “there are significant reliance interests associated with retaining

and 1980s.⁸⁸ But what evidence we do have suggests that it was a desire to protect government officials from the threat of civil liability—not the perceived shield of qualified immunity—that spurred legislators to pass indemnification statutes.

Concerns about increased government liability were in the air during the 1970s and 1980s. During that period, the “dominant articulated perception of constitutional tort litigation” was that § 1983 “cases flood the federal courts.”⁸⁹ The Supreme Court first recognized a cause of action against state and local government officials under § 1983 in 1961,⁹⁰ and the number of civil rights filings increased from several hundred to tens of thousands in the years between 1961 and 1979.⁹¹ This expansion in federal civil rights filings and liability corresponded with a collapse of the insurance market for municipal liability coverage. As John Rappaport has described, municipal liability insurance was widely available from the 1960s to the mid-1970s.⁹² Then the market contracted, with

qualified immunity,” *id.* at 285; that the “state and local reliance on the existence of qualified immunity is significant—indeed, overwhelming,” *id.* at 235; and that eliminating qualified immunity would cause state and local governments to “experience real upheaval,” *id.* at 285. At other times, Nielson and Walker downplay states’ reliance, writing that states have “fashioned indemnification laws . . . against a backdrop of Supreme Court precedent, including precedent concerning qualified immunity,” *id.* at 234; that they “do not argue that the content of state and local indemnification law should be attributed solely or even primarily to qualified immunity,” *id.* at 288; and that “it is enough that *one* of those factors [that go into an indemnification provision or contract] is the diminished risk of liability that qualified immunity creates,” *id.*

88. For some evidence of legislators’ concerns, see *infra* notes 97–100 and accompanying text.

89. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 645 (1987); see also *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting) (“There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where ‘civil rights’ of any kind are at best an afterthought.”); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 98th Cong. 5–13 (1984) (statement of John D. Ashcroft, Att’y Gen. of Missouri) (explaining that § 1983 filings against police officers “skyrocket[ed]” from the mid-1960s to the mid-1970s, growing “in the thousands of percentage increase[s]”); Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 563, 567 (arguing that the “deluge” of § 1983 cases from 1960 to 1971 and the Court’s decisions that “substantially expand[ed] section 1983’s subject matter jurisdiction” have “placed additional burdens on federal courts”). Note, however, that Eisenberg and Schwab, after examining the evidence, concluded that “[n]ational filing data refute the myth of a recent civil rights litigation explosion.” Eisenberg & Schwab, *supra*, at 695.

90. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

91. See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 523 (1982) (“Between 1961 and 1979, nonprisoner civil rights cases filed in federal district courts increased from 296 to 13,168; state prisoner filings in federal courts showed a similar jump, increasing from 218 in 1966 to 11,195 in 1979.” (citation omitted)). The dramatic increase in cases has been attributed to Congress’s authorization of attorneys’ fees for prevailing plaintiffs; Supreme Court decisions that expanded the scope of constitutional rights and plaintiffs’ ability to sue state and local government officers; and Congress’s abolition, in 1980, of the \$10,000 jurisdictional amount for federal question cases (including civil rights cases). See Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 763–66, 780 (1988) (describing these developments, but finding that “attorney fees statutes may have less of an effect on filing rates than is commonly believed”).

92. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1555–56 (2017).

premiums doubling between 1974 and 1976, and many jurisdictions were left uninsured by 1977.⁹³ After a few years of improvement, there was another decline in the early 1980s.⁹⁴

One can imagine that the rising number of civil rights claims—accompanied by the collapse of the municipal liability insurance market—led police unions and other advocates to push for indemnification statutes to ensure that individual officers would not be financially responsible for payouts.⁹⁵ Indeed, as John Rappaport has observed, it was only with the rising insurance rates and uncertainty of insurance coverage in the 1970s that “the law enforcement community beg[an] to express ‘dismay about legal liability.’”⁹⁶

State legislators appeared to be motivated by these same types of concerns about officers’ personal liability. Available evidence suggests that legislators passed indemnification statutes because they feared that state and local governments would not be able to hire and retain officers—or officers would not vigorously perform their duties while on the job—if those officers were not promised indemnification. For example, the Kentucky Supreme Court described its indemnification statute as

enacted in part to shield public employees from the personal expense incurred in the defense of tort claims The protections afforded by [state law] allow public employees to diligently and faithfully serve the Commonwealth without worrying about the financial burdens and other adverse consequences of civil litigation, which may stem from their civil service.⁹⁷

Descriptions of the legislative intent motivating other states’ indemnification statutes tell a similar story: indemnification statutes were passed to “assure ‘the zealous execution of official duties by public employees,’”⁹⁸ “avoid placing a burden upon state employment,”⁹⁹ and “create a secure working environment wherein employees do not feel paralyzed in the performance of their duties for fear of being sued.”¹⁰⁰

93. *Id.*

94. *Id.*

95. Thanks to John Rappaport for this possible interpretation.

96. Rappaport, *supra* note 92, at 1556.

97. *Richardson v. Louisville/Jefferson Cty. Metro Gov’t*, 260 S.W.3d 777, 781 (Ky. 2008) (citations omitted).

98. *Chang v. County of Los Angeles*, 204 Cal. Rptr. 3d 293, 298 (Ct. App. 2016) (quoting *Farmers Ins. Grp. v. County of Santa Clara*, 906 P.2d 440, 446 (Cal. 1995)).

99. *Miller v. Egan*, 828 A.2d 549, 561 (Conn. 2003).

100. *Strength v. Ala. Dep’t of Fin.*, 622 So. 2d 1283, 1288 (Ala. 1993); *see also State v. Heisey*, 271 P.3d 1082, 1086 (Alaska 2012) (explaining that Alaska’s indemnification statute—which allows the state to be substituted for a government employee in a state law claim—was intended to “minimize the disruption to [government employees’] lives that would result from being part of protracted litigation, and protect their reputations by precluding the need to disclose their involvement in a lawsuit [and] [i]n addition, because employees would no longer be involved in and distracted by the lawsuit, they would serve the public more effectively than they would without a substitution”). Local governments also shared these concerns. For example, legislators’ memorandum in support of Nassau County’s

B. THE PARALLEL PURPOSES OF INDEMNIFICATION AND QUALIFIED IMMUNITY

Statements by legislators suggest that state indemnification statutes were passed to advance the same interests that motivated the Court to create qualified immunity—interests, as the Supreme Court put it, in protecting against “the diversion of official energy from pressing public issues,” “the deterrence of able citizens from acceptance of public office,” and “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”¹⁰¹

The parallel efforts of indemnification and qualified immunity can even be seen in the structure of states’ indemnification statutes. Supreme Court qualified immunity doctrine is designed not to protect “the plainly incompetent or those who knowingly violate the law.”¹⁰² Similarly, more than two-thirds of states’ indemnification statutes carve out exceptions for intentional, reckless, grossly negligent, willful, malicious, criminal, fraudulent, or wanton conduct, as well as conduct outside the scope of the officer’s employment.¹⁰³ Almost twenty percent of states’ statutes prohibit indemnification of punitive damages.¹⁰⁴

Available legislative history suggests that these statutory indemnification limits—like the limits on qualified immunity’s protections—were intended to expose officers to personal financial liability for egregious behavior. For example, Nassau County’s statute provides indemnification for damages awards only for conduct “arising out of a negligent act or other tort of such police officer committed while in the proper discharge of his duties and within the scope of his employment.”¹⁰⁵ The indemnification limits were a key part of the statute’s design. As the sponsors of the bill explained:

[T]he “bill does not provide blanket immunity,” but was meant only to “alleviate [officers’] concern that their actions, although proper, may subject them to personal liability.” In other words, lawmakers intended to condition indemnification on the propriety of police conduct—their aim was not to immunize all conduct.¹⁰⁶

Just as qualified immunity was described by the Supreme Court in 1982 as protecting officers from liability unless they violated “clearly established

indemnification statute, passed in 1983, explained that indemnification protections were necessary because of “an ‘increasing proliferation of lawsuits seeking personal damages from police officers,’ and the fear that such an increase would have a ‘chilling effect’ on police ‘properly discharging their duties.’” *Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 105 N.E.3d 1250, 1254–55 (N.Y. 2018) (quoting Sponsors’ Mem in Support, Bill Jacket, L 1983, ch 872 at 8).

101. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

102. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

103. *Nielson & Walker, Qualified Immunity and Federalism*, *supra* note 4, at 272–78, 273 & n.246.

104. *See id.* at 274.

105. N.Y. GEN. MUN. LAW § 50-I (Consol., LEXIS through 2020 released Chs. 1–55, 59–65, 67–69, 71–73, 77–80, 82–84, 86–88).

106. *Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 105 N.E.3d 1250, 1255 (N.Y. 2018) (alteration in original) (quoting Sponsors’ Mem in Support, Bill Jacket, L 1983, ch 872 at 8).

law,”¹⁰⁷ Nassau County’s indemnification statute, enacted one year later, aimed to protect officers from personal financial liability unless they acted improperly or outside the scope of their employment. Although the Court’s subsequent interpretations of “clearly established law” do not map precisely onto the exceptions in Nassau’s indemnification statute, both aim conceptually to do the same thing—to shield officers from personal financial liability unless their conduct goes far beyond the bounds of propriety.

C. STATES’ APPARENT INATTENTION TO QUALIFIED IMMUNITY

Nielson and Walker might agree that states’ indemnification statutes were intended to perform the same function as qualified immunity doctrine but still contend that qualified immunity played some role in the statutes’ enactments. They could argue, for example, that the availability of qualified immunity doctrine as a defense to § 1983 claims comforted legislators concerned about the extent of the financial risk local governments were assuming by agreeing to indemnify state and local officials. But nothing in available legislative history suggests that this is the case. And other aspects of indemnification statutes’ structure and the legal backdrop in which they were enacted suggest that qualified immunity did not play a significant role in state legislators’ calculations.

As a preliminary matter, the structure and content of states’ indemnification statutes offer no reason to believe that states were motivated primarily by liability in § 1983 cases, where qualified immunity can be raised. Instead, most states’ indemnification statutes concern liability for both § 1983 claims and state tort claims—including assault, battery, negligence, and the like—where qualified immunity cannot shield government officials from liability.¹⁰⁸ If states enacted their indemnification statutes in reliance on qualified immunity doctrine, they presumably would have focused indemnification on § 1983 claims, where qualified immunity could provide the protection that Nielson and Walker describe.¹⁰⁹

Even if one assumes that liability in § 1983 cases was a primary motivation for states’ indemnification statutes and adopts the reliance narrative that Nielson and Walker advance—that states passed indemnification statutes because limitations

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

108. Although—as Nielson and Walker observe—some of these statutes expressly mention § 1983, states’ indemnification protections appear to apply both to state and federal claims. *See Nielson & Walker, Qualified Immunity and Federalism*, *supra* note 4, at 279–82; *see also, e.g.*, IND. CODE ANN. § 34-13-3-5(e) (West, Westlaw through 2020 2d Reg. Sess. of the 121st General Assemb.) (providing that “[t]he governmental entity shall provide counsel for and pay all costs and fees incurred by or on behalf of an employee in defense of a claim or suit for a loss occurring because of acts or omissions within the scope of the employee’s employment, regardless of whether the employee can or cannot be held personally liable for the loss”); N.H. REV. STAT. ANN. § 29-A:2 (Westlaw through Chapter 39 of the 2020 Reg. Sess.) (providing that, if “any civil action is commenced against any present or former officer” for conduct “while acting within the scope of official duty for the county and that said acts were not wanton or reckless,” the county will “protect, indemnify, and hold harmless such person from any costs, damages, awards, judgments, or settlements arising from said claim or suit”).

109. *See Schwartz, supra* note 20, at 10 (explaining that the qualified immunity defense cannot be raised in state law claims).

on § 1983 liability gave states confidence that they could shoulder the costs of settlements and judgments—legislators would have viewed qualified immunity as just one of several aspects of federal law intended to limit relief for civil rights plaintiffs during the 1970s and 1980s. In addition to qualified immunity, the Supreme Court during this period more narrowly interpreted the scope of various constitutional rights,¹¹⁰ limited the availability of attorneys’ fees,¹¹¹ and reformulated summary judgment law in ways that created higher hurdles for all plaintiffs (including civil rights plaintiffs).¹¹² Congress also took steps to limit civil rights liability during this period.¹¹³ So, even if legislators relied to some degree on limits to § 1983 liability when crafting their indemnification statutes, qualified immunity was just one of several doctrines and rules intended to serve this role.

D. CHANGES TO STATES’ FINANCIAL OBLIGATIONS OVER TIME

Nielson and Walker claim not only that indemnification statutes were originally passed in reliance on qualified immunity but also that they “exist[] in their current form[s] because of qualified immunity.”¹¹⁴ Nielson and Walker do not suggest that indemnification protections have shifted in response to changes to qualified immunity doctrine. Instead, they argue that qualified immunity doctrine has not changed.¹¹⁵ The supposed consistency of Supreme Court doctrine strengthens Nielson and Walker’s reliance argument. As they write:

It is one thing for the Supreme Court to interpret federal statutory law in a way that increases costs for the states. It is something else for the Court to reject such an interpretation for decades and then reverse course only after the states have organized their own laws and personnel contracts around the Court’s string of decisions.¹¹⁶

But the Supreme Court’s qualified immunity decisions have not been consistent. And available evidence suggests that these changes have at times expanded and contracted the financial obligations of state and local governments under the

110. See Eisenberg & Schwab, *supra* note 89, at 646–47 (describing restrictive Court decisions that reference concern about an explosion of civil rights litigation); Schwab & Eisenberg, *supra* note 91, at 764 (describing Burger Court decisions that limit the scope of constitutional rights).

111. *Evans v. Jeff D.*, 475 U.S. 717, 737–38 (1986) (holding that civil rights settlements may include waivers of fees and costs).

112. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986).

113. See Eisenberg & Schwab, *supra* note 89 (describing the Civil Rights of Institutionalized Persons Act, passed in 1980 “largely because [Congress] believed that prisoner civil rights filings burdened the federal courts”).

114. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 289.

115. See *id.* at 293 (explaining that state and local indemnification protections have been created “against a backdrop of decades of consistent cases from the Supreme Court”).

116. *Id.* at 293–94.

terms of their indemnification agreements.¹¹⁷

Over the past several decades, the Supreme Court has adjusted qualified immunity doctrine in many ways. The Court originally described qualified immunity as grounded in the Court's understanding of common law protections for officers acting in good faith and with probable cause.¹¹⁸ Then in *Harlow v. Fitzgerald*,¹¹⁹ the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action."¹²⁰ In 2001, in *Saucier v. Katz*, the Supreme Court held that lower courts ruling on qualified immunity motions must first decide whether plaintiffs' constitutional rights have been violated.¹²¹ Eight years later, the Court reversed *Saucier* in *Pearson v. Callahan*, holding that lower courts could grant qualified immunity without ruling on the merits of the constitutional claim.¹²²

Over the past decade, the Court has repeatedly tinkered with the doctrine in ways that appear to limit which courts can clearly establish the law and to heighten how factually similar a prior decision must be to clearly establish the law. For example, in *Wilson v. Layne*, the Court explained that a plaintiff could point to controlling authority in their circuit or to a consensus of cases in other circuits to clearly establish the law,¹²³ but the Court backed away from that standard in *Reichle v. Howards*, when it only "[a]ssum[ed] *arguendo*, that controlling Court of Appeals' authority could be a dispositive source of clearly established law,"¹²⁴ and in *Taylor v. Barkes*, when it only "[a]ssum[ed] for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals."¹²⁵ As another example, in *Anderson v. Creighton*, the Court described the relevant standard as whether the law is "sufficiently clear that a reasonable official would understand that what he is doing violates that right,"¹²⁶ but in *Ashcroft v. al-Kidd*, the Court substituted *every* for *a*, turning the standard into whether the law is "'sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that

117. Other aspects of the civil rights ecosystem have also caused civil rights case filings, dispositions, trial rates, and awards to shift over time. See generally Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4 (2015) (studying patterns in civil rights litigation from 1979 through 2013). For these reasons as well, states' indemnification statutes have not created consistent financial obligations over time.

118. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

119. 457 U.S. 800, 815–20 (1982).

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

121. 533 U.S. 194, 201 (2001).

122. 555 U.S. 223, 236 (2009).

123. 526 U.S. 603, 617 (1999).

124. 566 U.S. 658, 665 (2012).

125. 135 S. Ct. 2042, 2045 (2015) (per curiam).

126. 483 U.S. 635, 640 (1987).

right.”¹²⁷ Commentators share the view that these shifts are subtle but significant.¹²⁸

The Court has also dedicated an outsized portion of its docket in recent years to qualified immunity cases and virtually always reversed lower courts by granting qualified immunity in these cases.¹²⁹ In its recent decisions, the Court has repeatedly chastised lower courts for defining clearly established law at too high a level of generality and suggested that prior decisions can clearly establish the law only if they have virtually identical facts.¹³⁰ According to Will Baude, these decisions send the signal that lower courts should “think twice before allowing a government official to be sued for unconstitutional conduct.”¹³¹

As Baude has argued, the Court “openly tinker[ing]” with qualified immunity doctrine suggests that the Court “takes more ownership of [qualified immunity] than more orthodox statutory doctrines” and, thus, that stare decisis principles may apply with less force.¹³² The Court’s repeated tinkering with qualified immunity also weakens Nielson and Walker’s reliance claims. Nielson and Walker suggest that the Court’s consistent qualified immunity decisions have created consistent financial obligations for governments under the terms of states’ indemnification statutes; for this reason, adjusting qualified immunity doctrine after “decades of consistent cases” would require “massive changes” in state law.¹³³ But available evidence suggests that the Supreme Court’s qualified immunity decisions have contracted and then expanded the frequency with which qualified immunity motions are successful—which has, presumably, expanded and then

127. 563 U.S. 731, 741 (2011) (alteration in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640).

128. See, e.g., Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 633 (2013) (describing these decisions as “making it more difficult for Section 1983 plaintiffs to establish that the federal law was clearly established”); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 *HARV. L. REV.* 1, 61–62 (2012) (“Since the 1980s, the Supreme Court has dramatically transformed the doctrine of qualified immunity from its initial function as an affirmative defense to § 1983 liability into a threshold protection of ‘all but the plainly incompetent or those who knowingly violate the law.’ In recent Terms, the Roberts Court has refined this rule to provide that qualified immunity attaches unless ‘existing precedent [has] placed the statutory or constitutional question beyond debate.’” (alteration in original) (citations omitted)); Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 *MINN. L. REV. HEADNOTES* 62, 64 (2016) (explaining that these decisions “have made a *sub silentio* assault on constitutional tort suits” by “covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own”); Reinhardt, *supra* note 20, at 1248 (describing “[t]he sweeping results of the doctrinal shifts in *al-Kidd*”).

129. See William Baude, *Is Qualified Immunity Unlawful?*, 106 *CALIF. L. REV.* 45, 84–85 (2018).

130. See, e.g., *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam) (“The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, [it] defined the clearly established right at a high level of generality by saying . . . that the ‘right to be free of excessive force’ was clearly established.”); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (“Today, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’” (quoting *al-Kidd*, 563 U.S. at 742)).

131. Baude, *supra* note 129, at 84.

132. *Id.* at 81.

133. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 293.

contracted the success of civil rights claims and the magnitude of governments' financial obligations arising from their indemnification agreements.

Studies show that courts more frequently denied qualified immunity motions in the period between 2001 and 2009, when *Saucier* was the law, than during the pre-*Saucier* period, before 2001.¹³⁴ Then, the Court's 2009 decision in *Pearson*—as well as the Court's other qualified immunity decisions in recent years—appear to have caused lower courts to grant qualified immunity motions more often. Reuters studied circuit court rulings on qualified immunity in excessive force cases and found that forty-four percent of the decisions favored police officer–defendants in the years between 2005 and 2007, and fifty-seven percent of the decisions favored officers in the years between 2017 and 2019—a thirty percent increase in grants.¹³⁵ Anecdotal evidence also suggests the lower courts are taking to heart the Roberts Court's recent spate of reversals of qualified immunity denials. For example, in a 2017 opinion, the Ninth Circuit “acknowledge[d] the Supreme Court's recent frustration with [lower courts'] failures to heed [the Court's qualified immunity] holdings,” cited two of the Court's reversals of qualified immunity, made clear that it “hear[d] the Supreme Court loud and clear,” and granted qualified immunity.¹³⁶

Nielson and Walker argue that the *Saucier* and *Pearson* decisions do not undermine their claims of doctrinal consistency because the decisions “involved the Court's *supervisory* power and [were] not tied to § 1983's substantive scope.”¹³⁷ And they argue that the Court's qualified immunity decisions in recent years should be understood as shifts of tone rather than substance.¹³⁸ Regardless of whether one agrees with these characterizations, these decisions appear to have impacted the success rates of qualified immunity motions and so,

134. Nielson & Walker, *The New Qualified Immunity*, *supra* note 4, at 37 tbl.1 (reporting the results of three studies: in one, courts found no qualified immunity in 20.1% of pre-*Saucier* cases and 26.5% of *Saucier* cases; in a second, courts found no qualified immunity in 28.6% of pre-*Saucier* cases and 36.5% of *Saucier* cases; and, in a third, courts found no qualified immunity in 25.8% of pre-*Saucier* cases and 46.4% of *Saucier* cases).

135. See Chung et al., *supra* note 22.

136. *S.B. v. County of San Diego*, 864 F.3d 1010, 1015, 1017 (9th Cir. 2017) (citing *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015)); see also *McCoy v. Alamu*, 950 F.3d 226, 233 n.8 (5th Cir. 2020) (finding a constitutional violation but granting qualified immunity, noting that “[s]ome might find this a puzzling result,” but explaining that “[t]he Supreme Court has repeatedly reversed courts of appeals for failing to define established law narrowly, and we must follow that binding precedent”); *Francis v. Fiocco*, 942 F.3d 126, 145–46 (2d Cir. 2019) (finding a constitutional violation, but granting qualified immunity, and observing that “the Supreme Court has ‘repeatedly told courts . . . not to define clearly established law at a high level of generality,’ instead emphasizing that ‘clearly established law must be ‘particularized’ to the facts of the case’” (alteration in original) (first quoting *Sheehan*, 135 S. Ct. at 1775–76; then quoting *White*, 137 S. Ct. at 552)); *Garcia v. Escalante*, 678 F. App'x 649, 654–55 (10th Cir. 2017) (noting the Supreme Court's repeated admonitions to lower courts that they define clearly established law narrowly, observing that the Tenth Circuit was “recently faulted” by the Court for “fail[ing] to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment,” and granting qualified immunity (alterations in original) (citing *White*, 137 S. Ct. at 552)).

137. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 293 n.367.

138. *Id.*

presumably, the scope of local governments' obligations under their indemnification agreements. This evidence therefore undercuts Nielson and Walker's claim that "state governments have created their own schemes for compensating officers" against "a backdrop of . . . consistent cases from the Supreme Court."¹³⁹

* * *

This discussion likely does not fully capture the reasons that states' indemnification statutes were passed in the 1970s and 1980s or the impact of qualified immunity on local governments' financial obligations under these statutes today. More could be done to understand the motivations underlying some states' decisions to prohibit indemnification, leave indemnification decisions up to state or local officials, and impose caps on indemnification.¹⁴⁰ More could also be done to understand the extent to which states view their indemnification statutes as advancing—or frustrating—the deterrence and compensation goals of § 1983.¹⁴¹ But even this modest additional detail about the civil rights ecosystems that served as a backdrop for the enactment of states' indemnification statutes in the 1970s and 1980s calls into question Nielson and Walker's claim that states' indemnification statutes were passed in reliance on qualified immunity. And evidence of the Court's repeated tinkering with qualified immunity—and the apparent effects of those adjustments on local governments' financial obligations—show that states have not maintained their indemnification arrangements in reliance on decades of consistent qualified immunity protections.

III. INDEMNIFICATION STATUTES' PROTECTIONS

Based primarily on my prior research that police officers virtually never contribute to settlements and judgments entered against them,¹⁴² Nielson and Walker assert that "there often is little difference functionally between suits against officers in their individual capacities and suits against those same officers in their official capacities . . . because the government almost always indemnifies the officers."¹⁴³ The certainty of government indemnification matters to their argument because it establishes that if the Supreme Court eliminated qualified immunity—and liability dramatically increased—financial responsibility would fall on the shoulders of state and local governments. But, as I show in this Part, indemnification statutes do not make suits against individual officers the functional equivalent of lawsuits against the government. And, if qualified immunity were eliminated, local governments would not be left holding the bag.

139. *Id.* at 293.

140. *See id.* at 268–82; *see also infra* Part III.

141. *See infra* notes 226–30 and accompanying text (describing the relationship between state and local indemnification rules and the federal interests motivating § 1983).

142. *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

143. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 264.

A. THE CONTINGENCIES OF INDEMNIFICATION

Although I once shared Nielson and Walker's view that suits against individual officers are functionally identical to suits against municipalities,¹⁴⁴ further consideration of the statutes that Nielson and Walker have unearthed, and the civil rights ecosystems in which those statutes are applied, has led me to revise that view in an important way. I continue to believe that when plaintiffs recover money through settlements or judgments, that money is virtually always paid by the municipality.¹⁴⁵ I continue to believe that officers are almost always indemnified.¹⁴⁶ But indemnification coverage—like qualified immunity—is the product of interactions between multiple state, local, and nongovernmental people, rules, and practices. Examining the interactions of these elements of civil rights ecosystems reveals why cases against individual officers are not functionally equivalent to cases against municipalities and why indemnification is less set in stone than Nielson and Walker believe.¹⁴⁷

As Nielson and Walker document, states' indemnification statutes contain a wide range of provisions.¹⁴⁸ Some states' statutes mandate indemnification for state employees, others mandate indemnification for local employees, and some give discretion to state and local governments to determine whether and to what extent they should indemnify their employees.¹⁴⁹ Even when state statutes require indemnification, the statutes may grant discretion to—or require—governments not to indemnify officers if the officers' conduct is intentional, willful, or wanton; if officers engaged in criminal conduct; or if punitive damages are awarded.¹⁵⁰ States' statutes may also limit indemnification: Nielson and Walker found sixteen states that cap indemnity, ranging from a high of \$5,000,000 to a low of \$25,000.¹⁵¹

In addition to the state statutes that Nielson and Walker researched, each city, county, township, and village also has its own indemnification policy. When there is a state statute, local policies must be consistent with that statute but also can set out important details, including who will make the indemnification decision, at what point during the litigation process that decision will be made, and whether there are indemnification caps.¹⁵² When there is no governing statute, local

144. Schwartz, *supra* note 142, at 890.

145. *See id.*

146. *See id.*

147. *See* Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 263–64.

148. *Id.* at 268–82.

149. *Id.* at 269–72.

150. *Id.* at 272–78; *see, e.g.*, Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 844–45 (2017) (describing the significant discretion that Pennsylvania's indemnification statute gives to local governments to craft their own indemnification policies).

151. *See* Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 278–79, 278 n.282, 279 n.284.

152. *See, e.g.*, *City of Minneapolis v. Lehner*, No. A16–0608, 2017 WL 24682, at *1–2 (Minn. Ct. App. Jan. 3, 2017) (describing the indemnification decisionmaking process in Minneapolis, which involves a preliminary decision by the city attorney, a hearing (upon the officer's request) before an

governments can craft their policies without limitation. A variety of different local and nongovernmental actors may influence the crafting of these local indemnification policies: policies may be the product of contract negotiations with police union representatives, may be codified by city councils, or may be unwritten practices followed by the local government attorney.¹⁵³

Then, when a case is filed, someone in local government must determine whether to indemnify the officer under the applicable state statute, local rules, or practices. For example, when a policy excludes indemnification of conduct that is intentional, willful, or reckless, or outside the scope of the officer's employment, a local official must determine whether the officer's conduct falls within at least one of those exceptions.¹⁵⁴ Nongovernmental actors may also influence these decisions. For example, in jurisdictions where indemnification of punitive damages is discretionary or prohibited,¹⁵⁵ plaintiffs' counsel determines whether to seek punitive damages, and juries decide whether to award punitive damages.¹⁵⁶ And, when local officials retain discretion to decide whether to indemnify, police unions—notorious for “aggressively protect[ing] the rights of members accused

administrative law judge, and a final decision by the city council that is subject to judicial review); *Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 105 N.E.3d 1250, 1253 (N.Y. 2018) (describing the indemnification decisionmaking process in Nassau County, which involves an initial decision by the Nassau County Police Indemnification Board that (1) can be revoked based on information disclosed during litigation and (2) is subject to judicial review); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 *FORDHAM URB. L.J.* 587, 592–96 (2000) (describing the indemnification decisionmaking process in New York City, which involves an initial determination by the “Corporation Counsel of the City of New York” that is subject to judicial review); *see also* Lisa D. Hawke, *Municipal Liability and Respondeat Superior: An Empirical Study and Analysis*, 38 *SUFFOLK U. L. REV.* 831, 847–50 (2005) (describing local indemnification policies and limits across the country).

153. For discussions of indemnification provisions in police union contracts, *see* Ravenell & Brigandi, *supra* note 150, at 866 and Stephen Rushin, *Police Union Contracts*, 66 *DUKE L.J.* 1191, 1221 (2017). For a discussion of a statutory provision governing indemnification of officers, *see* Emery & Maazel, *supra* note 152, at 590–92 (describing New York's state statute). For a discussion of jurisdictions with no written indemnification policies, *see* Schwartz, *supra* note 142, at 906 n.96 (describing indemnification practices in Atlanta, El Paso, and Prince George's County).

154. *See, e.g.*, *Banks v. Yokemick*, 214 F. Supp. 2d 401, 402 (S.D.N.Y. 2002) (affirming New York City's denial of indemnification on the grounds that the officer acted intentionally or recklessly); *Riehle v. County of Cattaraugus*, 794 N.Y.S.2d 186, 187 (App. Div. 2005) (affirming the county's decision to deny indemnification to sheriff's deputy on the ground that his conduct was beyond the scope of his employment). For a description of courts' assessments about whether officers were acting within the scope of their employment for indemnification purposes, *see* Ravenell & Brigandi, *supra* note 150, at 846–52.

155. *See, e.g.*, Schwartz, *supra* note 142, at 920–21 (describing policies in Las Vegas, New York City, Oklahoma City, and Prince George's County that prohibit indemnification of punitive damages awards and for wanton, malicious, intentional, or reckless conduct).

156. *See, e.g.*, Ravenell & Brigandi, *supra* note 150, at 866–67 (“In Newark, New Jersey, for instance, if there is a claim for punitive damages, the city will defend and defray the officer's costs only if it is determined that the officer was not acting recklessly or without the scope of employment. If the officer is found to have been reckless or wanton, he or she is advised to retain separate counsel for the punitive damages claim.” (citation omitted)); *see also* *Keenan v. City of Philadelphia*, 936 A.2d 566, 569–70 (Pa. Commw. Ct. 2007) (denying an officer's demand for indemnification after a jury found that the officer was liable for assault and battery, which amounts to willful misconduct—for which indemnification is prohibited under Pennsylvania law).

of misconduct”¹⁵⁷—may pressure city officials to assume the liabilities of their officers.¹⁵⁸

For all of these reasons, civil rights suits against individual officers are not the functional equivalent of suits against the municipality. Instead, a number of different people, rules, and practices interact to determine whether an officer will be indemnified in any given case. My research shows that these various factors almost always cause officers to be indemnified. As I show in the next Section, these same factors usually combine to shield officers from personal financial liability even in the rare event that they are denied indemnification.

B. FORCES SHIELDING UNINDEMNIFIED OFFICERS FROM PERSONAL LIABILITY

Sometimes, local government officials exercise their discretion to deny indemnification to officers.¹⁵⁹ I have described several examples of indemnification denials in prior work and periodically learn of others.¹⁶⁰ Plaintiffs sometimes

157. Noam Scheiber, Farah Stockman & J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html>. For other research examining the ways in which police unions undermine accountability, see, for example, Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 571 (2019) (finding that union contracts in the median police department in the study “offer[] police officers up to four layers of appellate review in disciplinary cases”); Rushin, *supra* note 153, at 1198–99 (describing the role that collective bargaining agreements play in shaping police disciplinary procedures); and Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, J.L. ECON. & ORG. (forthcoming) (manuscript at 30) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095217 [<https://perma.cc/3A89-JGBA>]) (finding that “collective bargaining rights led to about a 40% increase in violent incidents of misconduct among sheriffs’ offices”).

158. See, e.g., Parker Gavigan, *NBC 10 I-Team: Lawsuit Against RI State Trooper Alleges ‘Turf War,’* NBC 10 NEWS (Feb. 15, 2017), <https://turnto10.com/i-team/nbc-10-i-team-lawsuit-against-ri-state-trooper-alleges-turf-war> [<https://perma.cc/BDQ3-MSBM>] (describing the Rhode Island attorney general’s decision not to indemnify two state troopers sued for excessive force and the grievance filed by the officers’ union against the state for failing to honor an indemnification provision in the collective bargaining agreement).

159. See, e.g., *City of Minneapolis v. Lehner*, No. A16–0608, 2017 WL 24682, at *5–6 (Minn. Ct. App. Jan. 3, 2017) (describing Minneapolis’s decision to deny indemnification to an officer in an excessive force case); *Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 105 N.E.3d 1250, 1256–57 (N.Y. 2018) (describing Nassau County’s decision not to indemnify an officer when it was revealed during his deposition that the officer had known and failed to disclose that the plaintiff was in jail on the date of a crime for which he was arrested); Phil Fairbanks, *A Buffalo Cop Was Acquitted of Excessive Force Charges. But He’s Still Suspended*, BUFFALO NEWS (Aug. 3, 2020), https://buffalonews.com/news/local/crime-and-courts/a-buffalo-cop-was-acquitted-of-excessive-force-charges-but-hes-still-suspended/article_284d6217-9baf-583a-b069-83d53a39c18c.html (describing the City of Buffalo’s refusal to indemnify an officer in an excessive force case); Justin Fenton, *Baltimore’s City Solicitor Presses Case to Get Taxpayers Off Hook for Gun Trace Task Force Misconduct Claims*, BALT. SUN (Apr. 1, 2019, 12:40 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-gttf-davis-indemnification-20190401-story.html> (describing Baltimore’s decision not to indemnify officers sued for widespread corruption in Baltimore’s Gun Trace Task Force). See also *supra* note 154 for examples of indemnification denials upheld by reviewing courts.

160. See Schwartz, *supra* note 142, at 924–30 (describing thirty-seven cases—out of more than 9,200 cases studied—in which officers personally contributed to settlements and judgments, including five cases in which officers were off duty; seven cases alleging officers engaged in sexual misconduct; four cases alleging abuse of process; and twenty-three cases alleging false arrests, unreasonable searches, and excessive force); *id.* at 978–81 (describing the allegations in these thirty-seven cases); see

pursue damages awards directly against officers denied indemnification.¹⁶¹ But far more often, I hear stories of local government officials, plaintiffs' attorneys, and defense counsel acting in ways that insulate officers denied indemnification from personal liability.¹⁶² If a plaintiff's attorney learns before or during litigation that an officer will not be indemnified, the attorney may abandon the claims against the officer.¹⁶³ The attorney may then decide to pursue claims against other officers who will be indemnified or may sue the municipality.¹⁶⁴ If a jurisdiction determines that it will not indemnify an officer during litigation, it may nevertheless agree to pay a global settlement that resolves claims against both the city and the officer.¹⁶⁵ If a jurisdiction declines to indemnify an officer after trial, the plaintiff's attorney may be able to negotiate a posttrial settlement with the municipality,¹⁶⁶ or the plaintiff or officer may challenge the jurisdiction's decision not to indemnify.¹⁶⁷ Defendants have even assigned their rights to challenge indemnification denials to plaintiffs' counsel.¹⁶⁸

also supra notes 155–59 and accompanying text (describing several indemnification denials); *infra* notes 164–67 and accompanying text (same).

161. See Schwartz, *supra* note 142, at 925–30 (describing cases where plaintiffs secured money from defendant-officers).

162. Future study should attempt to determine how frequently plaintiffs pursue awards against officers who are declined indemnification and what factors play a role in determining whether plaintiffs do so. For an examination of this dynamic in personal injury cases, see generally Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

163. See Schwartz, *supra* note 6, at 1564–65 (describing the unwillingness of plaintiffs' attorneys to accept cases against officers employed by the East Cleveland Police Department because the city is close to bankruptcy and will not indemnify its officers).

164. See Schwartz, *supra* note 14, at 1806 n.63 (describing a police shooting case in which the City of Philadelphia declined to indemnify the officer and the plaintiff's attorney decided to pursue a case against the municipality).

165. See Schwartz, *supra* note 142, at 919 (describing El Paso's policy of not indemnifying officers for judgments entered against them but the city's willingness to enter into pretrial settlements on behalf of officers to resolve cases).

166. See, e.g., *id.* at 921–22 (describing several cases in which punitive damages were awarded against officers and municipalities could not or did not want to indemnify for the punitive damages awards, so plaintiffs and the municipalities settled the cases posttrial and plaintiffs dismissed the punitive damages awards as a condition of settlement); Schwartz, *supra* note 14, at 1807 & n.65 (describing a case in which the jury awarded compensatory and punitive damages, the city refused to indemnify the punitive damages award, the plaintiff appealed, and the plaintiff and city settled while the appeal was pending).

167. See Schwartz, *supra* note 14, at 1807 n.66 (describing a case in which the plaintiff won a verdict against a police officer, the city refused to indemnify the officer, and the plaintiff's attorney represented the officer in a suit challenging the denial of indemnification); see also *Lampkin v. Little*, 286 F.3d 1206, 1210 (10th Cir. 2002) (describing a joint appeal, by the plaintiff and the defendant-officer, of the county's decision to deny indemnification following a jury verdict against the officer).

168. See *Louisville/Jefferson Cty. Metro Gov't v. Braden*, 519 S.W.3d 386, 391 (Ky. Ct. App. 2017) (describing an officer who settled with the estate of the victim and assigned to the estate his "rights and claims to full indemnification by and from Louisville Metro"); Schwartz, *supra* note 142, at 929 (describing a case in which the Massachusetts State Police declined to indemnify an officer, the plaintiff was awarded more than \$400,000 against the officer in binding arbitration, the officer assigned to the plaintiff his right to seek indemnification from the Massachusetts State Police in exchange for release from the arbitration award, the plaintiff sued the Commonwealth of Massachusetts, and Massachusetts and the plaintiff ultimately settled for \$580,000).

This coordination between plaintiffs' counsel and officer-defendants may be unexpected. But ultimately, plaintiffs' attorneys and officer-defendants often want the same thing—for the government to pay. Officer-defendants' preference for this result should come as no surprise. Plaintiffs and their attorneys may also prefer this result because government entities have deeper pockets than do the officers that they employ.¹⁶⁹ Attorneys with whom I have spoken report that they are disinclined to bring or pursue police misconduct cases when there are inadequate resources to make the plaintiff whole.¹⁷⁰ As a result, when officers are denied indemnification, plaintiffs and their attorneys may be less interested in pursuing claims against officers who have limited resources or are judgment-proof than they are in trying to find another way of recovering against the municipality or state.

* * *

This Part has made two observations that complicate Nielson and Walker's argument. First, suits against individual officers are not functionally equivalent to suits against the municipality or state. Although officers are almost always indemnified, that indemnification is the product of a web of state, local, and non-governmental rules, practices, and exercises of discretion. Second, limiting or eliminating indemnification will not necessarily increase officer liability. Even when officers are denied indemnification, the preferences and decisions of local government officials, plaintiffs' attorneys, and defense counsel often insulate officers from personal liability. As I show in Part IV, both of these observations undercut Nielson and Walker's dire predictions about the impact of eliminating qualified immunity. Briefly put, local governments' hands would not be tied if qualified immunity were eliminated because they would have the discretion to deny or limit indemnification more regularly. And, if they exercised these

169. See, e.g., Emery & Maazel, *supra* note 152, at 596–97 (“[W]ithout the prospect of compensation, few victims of unconstitutional conduct would sue in the first instance.”); Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 261 (2016) (“When you select defendants, make sure you are suing defendants that are either insured or have resources to pay a judgment. . . . Obtaining a judgment against a defendant who cannot pay will not solve the client’s goal of receiving fair compensation.”); Ravenell & Brigandi, *supra* note 150, at 863 (“[M]ost savvy plaintiff’s attorneys will not enter into a settlement with a defendant without some guarantee that the defendant will be able to pay the agreed upon amount, either through his employer or insurer.”).

170. See Schwartz, *supra* note 6, at 1565 (describing attorneys who are unwilling to bring cases against the East Cleveland Police Department because the city is on the verge of bankruptcy and will not indemnify their officers); Schwartz, *supra* note 142, at 932 (describing a conversation with the city attorney of El Paso, who reports that no officer has contributed to a settlement or judgment even though the city has a policy of never indemnifying officers, and explaining that “plaintiffs’ attorneys are less likely to pursue cases against individual officers, knowing that they are judgment proof”); Schwartz, *supra* note 14, at 1806 n.63 (describing a case in which plaintiff’s attorney decided not to pursue a case against an officer who was denied indemnification, explaining that “[The officer is] completely judgment proof. . . . I didn’t want to take a verdict against him. I didn’t want to take any damages against him”). For a discussion of the reluctance to pursue against defendants awards that are above insurance limits in personal injury cases, see Baker, *supra* note 162, at 277.

dramatic options, plaintiffs would be as likely as—if not more likely than—defendant—officers to suffer the consequences.

IV. CIVIL RIGHTS LITIGATION WITHOUT QUALIFIED IMMUNITY

Nielson and Walker assert that “state and local governments should be expected to experience real upheaval” if the Supreme Court does away with or significantly limits qualified immunity.¹⁷¹ Without qualified immunity, Nielson and Walker imagine, local governments will be “force[d] . . . to bear the full costs of the mistakes made by their officers, even if the officers made reasonable mistakes or at least acted in a way that was not clearly lawful.”¹⁷² As a result, the costs of civil rights litigation would increase to such an extent that they would throw local governments into financial turmoil, make it more difficult to hire talented officers, and chill officers’ behavior on the street.¹⁷³ Nielson and Walker provide no empirical support—beyond the Supreme Court’s qualified immunity decisions—for these dire predictions.¹⁷⁴ But just because the Supreme Court has predicted something does not mean that it will come to pass. In prior work, I have predicted a different future without qualified immunity founded on my research about the role that qualified immunity currently plays in civil rights ecosystems around the country.¹⁷⁵ Viewing indemnification and qualified immunity from this broader perspective makes clear that Nielson and Walker’s concerns are overstated. This broader perspective also reveals the ways in which state and local governments already adjust the strength and scope of officer liability, and could continue to do so if qualified immunity were eliminated.

A. THE SCOPE OF GOVERNMENT LIABILITY

First, ending or limiting qualified immunity would not force local governments “to bear the full costs of the mistakes made by their officers,” as Nielson and Walker assert.¹⁷⁶ Many different aspects of civil rights ecosystems—including the challenges of finding an attorney, juries’ hostility to civil rights claims, and various procedural rules aimed at shielding government officials from insubstantial suits—will continue to mean that some constitutional violations go without remedy.¹⁷⁷ And these same challenges will continue to inform plaintiffs’

171. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 285.

172. *Id.* at 259.

173. *See id.* at 255.

174. *See id.* at 6 (“Without qualified immunity, we should expect—based on the reasoning of the Supreme Court’s cases and some empirical research—that state and local governments operating in competitive employment markets would either pay officers more (to offset the increased risk of judgments) or require officers to do less (to eliminate the risk).” (citation omitted)); *id.* at 255 (“[Q]ualified immunity (1) helps states recruit, hire, and retain the best people; (2) allows officers to go to work rather than go through litigation; and (3) prevents chilling officers’ willingness to make tough decisions that faithfully execute the law.” (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982))).

175. *See generally* Schwartz, *supra* note 1.

176. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 259.

177. *See supra* Sections I.A–B.

attorneys' decisions about whether to accept civil rights cases.¹⁷⁸ Eliminating qualified immunity would change civil rights litigation in important ways—it would reduce the cost, complexity, and time necessary to litigate civil rights suits, and it would mean that cases alleging violations of plaintiffs' rights could not be dismissed simply because there was no prior court decision holding virtually identical facts to be unconstitutional—and, for these reasons, the total number of suits filed and damages paid would likely increase.¹⁷⁹ But the majority of cases dismissed today are dismissed for reasons other than qualified immunity, and those other barriers to relief would continue to exist in qualified immunity's absence and would continue to discourage plaintiffs' attorneys from accepting insubstantial civil rights cases.¹⁸⁰

B. THE FINANCIAL IMPACT OF SUITS

Second, Nielson and Walker overstate the financial turmoil that local governments would face if the Court eliminated qualified immunity. True, there have been instances of small jurisdictions disbanding their police forces following large payouts.¹⁸¹ But in these examples, the jurisdictions are often underfunded, then go without insurance, and then are sued again.¹⁸² Most jurisdictions' financial well-being is not threatened by lawsuits—civil rights or otherwise.¹⁸³

Local governments have been struggling financially, and those struggles have only been compounded by the devastating effects of the COVID-19 pandemic.¹⁸⁴ But the impact of ballooning police budgets on local governments' financial stability is a far more pressing concern than is the impact of payouts for police misconduct. In many cities—including Atlanta, Baltimore, Chicago, Detroit, Houston, and Los Angeles—annual police spending amounts to between

178. See *supra* Section I.C.

179. See Schwartz, *supra* note 1, at 344–51 (describing this prediction); see also *supra* Section I.D (same).

180. See Schwartz, *supra* note 1, at 344–51.

181. See, e.g., Rappaport, *supra* note 92, at 1588 & n.282 (describing municipalities that have closed their forces after losing liability insurance); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1190–91 (2016).

182. See, e.g., Andrew Cockburn, *Blood Money: Taxpayers Pick Up the Tab for Police Brutality*, HARPER'S MAG. (Nov. 2018), <https://harpers.org/archive/2018/11/blood-money-police-brutality-taxpayers/>. For further discussion of this dynamic, see Schwartz, *supra* note 1, at 354–55, 354 n.239.

183. See SYDNEY CRESSWELL & MICHAEL LANDON-MURRAY, UNIV. AT ALBANY, *TAKING MUNICIPALITIES TO COURT: AN EXAMINATION OF LIABILITY AND LAWSUITS IN NEW YORK STATE LOCAL GOVERNMENTS*, at vii (2013) (reporting that liability costs amount to approximately one percent of total expenditures for local governments of all sizes in New York State); Schwartz, *supra* note 181, at 1164–65, 1165 n.74 (reporting that the executive director of 200 risk pools that insure small municipalities estimates that “[c]ontributions to risk pools . . . are minimal in a local government's overall budget” amounting to, at most, “just a percent or two of a city's budget” (first alteration in original)); *id.* at 1224–34 (reporting that expenses related to police misconduct lawsuits are usually far less than one percent of general budgets in 100 jurisdictions across the country).

184. Anshu Siripurapu & Jonathan Masters, *How the Coronavirus Will Harm State and City Budgets*, COUNCIL FOREIGN REL. (May 15, 2020), <https://www.cfr.org/backgroundunder/how-coronavirus-will-harm-state-and-city-budgets> [<https://perma.cc/4ATY-LB55>].

one-quarter and one-third of general fund expenditures.¹⁸⁵ In these same cities, settlements and judgments in police misconduct suits are a relative drop in the bucket, amounting to between 0.06% and 0.64% of general expenditures.¹⁸⁶ Eliminating qualified immunity is unlikely to prompt a dramatic increase in payouts for reasons I have already explained¹⁸⁷—but any increase in payouts would still represent a modest portion of most jurisdictions' budgets.

We are in the midst of a national conversation about how much money and power local governments should allocate to the police,¹⁸⁸ and some local governments are taking steps to reduce police budgets—sometimes by several times more than they pay to settle police misconduct lawsuits.¹⁸⁹ Concerns about the implications of eliminating qualified immunity on lawsuit payouts are overblown, particularly when viewed in the context of these far more impactful fiscal debates.

C. OFFICER HIRING, RETENTION, AND DECISIONMAKING

Third, Nielson and Walker overstate the impact that eliminating qualified immunity would have on governments' ability to hire and retain officers, and on those officers' decisions on the street.

185. See Niall McCarthy, *How Much Do U.S. Cities Spend on Policing?*, STATISTA (June 12, 2020), <https://www.statista.com/chart/10593/how-much-do-us-cities-spend-on-policing/> [https://perma.cc/2RPY-934S] (reporting that, in 2020, police budgets represent 30.3% of Atlanta's general fund expenditures, 26.4% of Baltimore's general fund expenditures, 37% of Chicago's general fund expenditures, 29.9% of Detroit's general fund expenditures, 33.1% of Houston's general fund expenditures, and 25.5% of Los Angeles's general fund expenditures).

186. See Schwartz, *supra* note 181, at 1224–26 (reporting that average police misconduct payouts between 2012 and 2014 represented 0.10% of Atlanta's general fund expenditures, 0.07% of Baltimore's general fund expenditures, 0.64% of Chicago's general fund expenditures, 0.13% of Detroit's general fund expenditures, 0.06% of Houston's general fund expenditures, and 0.41% of Los Angeles's general fund expenditures).

187. See *supra* note 183 and accompanying text.

188. For recent commentary, see, for example, Amna A. Akbar, *How Defund and Disband Became the Demands*, NYR DAILY (June 15, 2020), <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/>; Brian Highsmith, *On Reimagining State and Local Budgets in an Abolitionist Moment*, LAW & POL. ECON. PROJECT (June 15, 2020), <https://lpeblog.org/2020/06/15/on-reimagining-state-and-local-budgets-in-an-abolitionist-moment/> [https://perma.cc/8KUW-YSJU]; Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>; and Jocelyn Simonson, *Power over Policing*, BOS. REV. (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [https://perma.cc/696M-VZWU].

189. Compare Kate Amara & Kai Reed, *City Council Approves More Than \$22M in Cuts to BPD amid Calls to Defund Police*, WBAL-TV 11 (June 16, 2020, 1:01 PM), <https://www.wbal.com/article/defund-police-baltimore-city/32868909#> [https://perma.cc/U7KP-9AND] (describing \$22 million in approved spending cuts to the Baltimore Police Department), and *LA City Council Moves Forward with LAPD Budget Cuts Proposed by Black Lives Matter Coalition*, CBS L.A. (June 15, 2020, 10:20 PM), <https://losangeles.cbslocal.com/2020/06/15/la-city-council-to-take-up-proposed-budget-cuts-to-lapd/> (describing \$150 million in budget cuts approved by a Los Angeles city council committee), with Schwartz, *supra* note 181, at 1224–25 (reporting that Baltimore paid an annual average of \$2.1 million in police misconduct lawsuits between 2012 and 2014 and that Los Angeles paid an annual average of \$29.8 million during that same period). Not all local governments are moving to reduce their police budgets, however. See, e.g., Jen Rice & Paul Debenedetto, *Houston Passes Budget That Increases Police Funding, amid Calls to 'Defund'*, HOUS. PUB. MEDIA (June 11, 2020, 11:44 AM), <https://www.houstonpublicmedia.org/articles/news/2020/06/10/375627/houston-passes-budget-that-increases-police-funding-amid-calls-to-defund/> [https://perma.cc/MU4T-Z75B].

Law enforcement officials have reported in recent years that hiring and retaining officers is difficult for reasons that have nothing to do with being sued—police departments report struggling to meet their hiring goals because of “tight budgets and strained relationships with communities of color,”¹⁹⁰ “all of the negative images of the police,”¹⁹¹ low salaries and low unemployment rates,¹⁹² and a reduction in retirement benefits.¹⁹³ Following nationwide protests against police brutality in the wake of George Floyd’s murder and highly publicized images of police using excessive force against protesters, the challenges of hiring and retaining qualified officers will likely become even more difficult.¹⁹⁴

Even though hiring and retaining officers is difficult for reasons other than the threat of legal liability, is it possible, as Nielson and Walker suggest, that things could “become worse” if qualified immunity were eliminated?¹⁹⁵ Perhaps—to the

190. Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015, 9:07 PM), <http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081>; accord Jeffrey Nowacki, Joseph A. Schafer & Julie Hibdon, *Workforce Diversity in Police Hiring: The Influence of Organizational Characteristics*, JUST. EVALUATION J., Apr. 2020, at 4 (“Achieving satisfactory racial and ethnic representation is partially predicated on the level of interest underrepresented group members have in law enforcement careers. Specifically, people of color may be reluctant to pursue opportunities in policing because of negative attitudes toward police held by potential applicants, as well as their peers and family members.”).

191. Daniel Denvir, *Who Wants to Be a Police Officer?*, BLOOMBERG CITYLAB (Apr. 21, 2015, 12:45 PM), <http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017> (quoting Police Executive Research Forum executive director Chuck Wexler); accord INT’L ASS’N OF CHIEFS OF POLICE, THE STATE OF RECRUITMENT: A CRISIS FOR LAW ENFORCEMENT 4 (2019), https://www.theiacp.org/sites/default/files/239416_IACP_RecruitmentBR_HR_0.pdf [<https://perma.cc/79WB-JGP8>] (“Agencies strongly believe that public perception of law enforcement limits interest in the profession and is a sizable barrier to effective recruitment. Scrutiny of the police, cellphone recordings of interactions between the police and public, media coverage, and popular entertainment portrayals of police have led many young people to view police differently than their parents may have.”).

192. See POLICE EXEC. RESEARCH FORUM, THE WORKFORCE CRISIS, AND WHAT POLICE AGENCIES ARE DOING ABOUT IT 7 (2019), <https://www.policeforum.org/assets/WorkforceCrisis.pdf> [<https://perma.cc/C8T5-JURU>] (“A robust economy and strong job growth are creating more options for people entering the labor market, so police agencies are facing more competition in hiring.”); Tim Peterson, *What Are the Struggles for Recruiting Police Officers in Wisconsin?*, WIS. PUB. RADIO (Feb. 28, 2020, 12:45 PM), <https://www.wpr.org/what-are-struggles-recruiting-police-officers-wisconsin> [<https://perma.cc/RVZ3-KPGG>] (reporting the Madison Police Department acting chief’s belief that there are “two primary factors behind the decline” in officer recruitment: “[A] strong economy, where people have a lot of other job opportunities” and “[h]eightedened scrutiny of police over the last several years”).

193. William J. Woska, *Police Officer Recruitment—A Decade Later*, POLICE CHIEF MAG., <http://www.policechiefmagazine.org/police-officer-recruitment/> (last visited Oct. 24, 2020).

194. See, e.g., Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across US*, GUARDIAN (June 6, 2020, 4:00 AM), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> (describing the “[u]se of teargas, batons, pepper spray, fists, feet and vehicles against protesters”); see also Mitchell Willets, *Police Already Struggle to Find Recruits. Public Scrutiny Makes It Harder, Poll Shows*, MIAMI HERALD (June 16, 2020, 5:18 PM), <https://www.miamiherald.com/news/nation-world/national/article243580022.html> (“Police departments have been struggling with recruiting and retaining officers for years, but with public scrutiny toward cops seemingly at an all-time high, very few are interested in earning a badge—and among those who have, there’s temptation to turn it in.”).

195. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 283 n.310.

extent that officers and recruits are told that eliminating qualified immunity will expose them to personal liability when they make good faith mistakes.¹⁹⁶ But this message, which has been circulated by defenders of qualified immunity doctrine, is inaccurate. The Supreme Court's Fourth Amendment doctrine already protects officers from liability when they make good faith mistakes.¹⁹⁷ And even when officers are found liable, they are almost never held personally responsible for the settlements and judgments against them.¹⁹⁸ Given constitutional protections for good faith errors, the likelihood that most officers will continue to be indemnified, and the many other reasons that police departments already struggle to hire and retain officers, it is hard to imagine that eliminating qualified immunity will meaningfully "deter[] [more] able citizens from acceptance of public office"¹⁹⁹ than are already deterred from entering this line of work. And, frankly, to the extent that officers and potential recruits are discouraged from serving without the protections of qualified immunity—which shields officers from liability for unconstitutional conduct simply because a prior case has not held sufficiently similar conduct to be unconstitutional—we may be better off without them on the force.

Eliminating qualified immunity might even improve governments' ability to hire and retain officers. As explained by a coalition of cross-ideological groups

196. See, e.g., Karen Kasler, *Ohio FOP Ok with Some Reforms, But Says One Idea Is a "Non-Starter,"* WKSU (June 18, 2020, 11:24 PM), <https://www.wksu.org/post/ohio-fop-ok-some-reforms-says-one-idea-non-starter#stream/0> [<https://perma.cc/7K8W-26NU>] (reporting the Ohio Fraternal Order of Police vice president as saying: "Qualified immunity's a very important tool for law enforcement, and if you remove those safeguards, it could have a major negative impact not just on today's law enforcement, but the recruiting and retention of qualified people across this country"); Casey McCarthy & Emry Dinman, *Moses Lake Police Chief Discusses Proposed Police Reform Legislation*, COLUM. BASIN HERALD (June 21, 2020, 11:24 PM), <https://www.columbiabasinherald.com/news/2020/jun/21/moses-lake-police-chief-discusses-proposed-2/> (reporting the police chief as saying: "Who in their right mind would serve in this job, with all that comes with law enforcement, and be able to take the risk that, if you make a mistake, you could lose your house, your job, your retirement? . . . Who's gonna do that? And that's the issue. We're given that qualified immunity because we're asked to make split (second) decisions that other professions aren't asked to make"); see also *Exclusive: Maria Bartiromo Interviews AG Barr on Police Reform, Big Tech Censorship, Durham Investigation*, FOX BUS. (June 21, 2020), <https://www.foxnews.com/transcript/exclusive-maria-bartiromo-interviews-ag-barr-on-police-reform-big-tech-censorship-durham-investigation> [<https://perma.cc/W3R7-3Vfy>] (quoting Attorney General William Barr as stating that "without qualified immunity, I think most people would not take the job as a police officer. So, we would essentially be doing away from [sic] our police departments"); *IACP Statement on Qualified Immunity*, INT'L ASS'N CHIEFS POLICE, <https://www.theiacp.org/sites/default/files/IACP%20Statement%20on%20Qualified%20Immunity.pdf> [<https://perma.cc/6KHB-6PAV>] (last visited Oct. 24, 2020) ("[Qualified immunity] allows police officers to respond to incidents without pause, make split-second decisions, and rely on the current state of the law in making those decisions. . . . The loss of this protection would have a profoundly chilling effect on police officers and limit their ability and willingness to respond to critical incidents without hesitation.").

197. See, e.g., Joanna C. Schwartz & Seth Stoughton, *The Unnecessary Protection of Qualified Immunity*, JUSTIA: VERDICT (June 26, 2020), <https://verdict.justia.com/2020/06/26/the-unnecessary-protection-of-qualified-immunity> [<https://perma.cc/23SU-H8P9>]; Jay Schweikert, *Rebutting the IACP's Spurious Defense of Qualified Immunity*, CATO INST.: CATO AT LIBERTY (June 11, 2020, 4:20 PM), <https://www.cato.org/blog/rebutting-iacps-spurious-defense-qualified-immunity> [<https://perma.cc/B7P9-6WYV>].

198. See Schwartz, *supra* note 142, at 890.

199. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

that has submitted multiple amicus briefs to the Supreme Court, qualified immunity “prevents law-enforcement officers from overcoming . . . negative perceptions about policing” and “instead protects the minority of police who routinely break the law and thereby erodes relationships between communities and law enforcement.”²⁰⁰ To the extent that eliminating qualified immunity might strengthen public trust in law enforcement, doing so may reduce one barrier to hiring and retaining qualified officers.

For similar reasons, Nielson and Walker overstate the danger that eliminating qualified immunity will unduly chill officers’ behavior. Several studies have found that most officers do not think about the possibility of being sued while they are on patrol.²⁰¹ One criminology scholar, reviewing these and other studies, concluded that “the prospect of civil liability has a deterrent effect in the abstract survey environment but . . . does not have a major impact on field practices.”²⁰² These studies suggest that lawsuits are not currently playing *enough* of a role in officers’ decisionmaking. After all, government officers and officials are not supposed to be shielded from *any* possibility of liability—qualified immunity is, by definition, supposed to be qualified. Some degree of deterrence is necessary to advance the goals of § 1983. And the view is now widely held, across political lines, that police need to be *more* constrained, not *less*—particularly in their interactions with Black people.²⁰³

Eliminating qualified immunity could mean that civil rights suits play a greater role in officers’ decisionmaking in at least a few different ways. Courts would

200. Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public’s Trust in Law Enforcement, & Promoting the Rule of Law as Amici Curiae in Support of Petitioner at 16–17, *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693 (U.S. Nov. 2, 2020) (per curiam); accord Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2356 (2018) (“[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.”). For the negative messages sent by grants of qualified immunity, see *supra* notes 74–75 and accompanying text.

201. As Nielson and Walker note—and as I have described in more detail elsewhere—there is some variation in the studies’ findings. See Schwartz, *supra* note 14, at 1811–12, 1812 n.98. But between 46% and 100% of officers surveyed, depending on the study, reported that the threat of being sued is not among officers’ top ten considerations when stopping vehicles, engaging in personal interactions, or performing emergency duties. See *id.* at 1812 n.98.

202. VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 7 (4th ed. 2006).

203. See, e.g., Jacqueline Alemany & Brent D. Griffiths, *Power Up: There’s Been a Dramatic Shift in Public Opinion About Police Treatment of Black Americans*, WASH. POST: POWERPOST (June 9, 2020, 7:12 AM), <https://www.washingtonpost.com/news/powerpost/paloma/powerup/2020/06/09/powerup-there-s-been-a-dramatic-shift-in-public-opinion-over-police-treatment-of-black-americans/5edef042602ff12947e87b23/> (reporting that “[m]ore than 2 in 3 Americans—a whopping 69 percent—said that [George] Floyd’s killing represents a broader problem in law enforcement”); Chris Kahn, *Exclusive: Most Americans, Including Republicans, Support Sweeping Democratic Police Reform Proposals—Reuters/Ipsos Poll*, REUTERS (June 11, 2020, 4:43 PM), <https://www.reuters.com/article/us-minneapolis-police-poll-exclusive/exclusive-most-americans-including-republicans-support-sweeping-democratic-police-reform-proposals-reuters-ipsos-poll-idUSKBN23I380> [<https://perma.cc/JVB8-KCLT>] (reporting poll findings that the public supports police reforms and that seventy-five percent of those polled and sixty percent of Republicans support “allowing victims of police misconduct to sue police departments for damages”).

stop issuing opinions that send the message to officers that they will be shielded from liability, even if they have violated the law, so long as there is no prior case holding sufficiently similar facts to be unconstitutional.²⁰⁴ In addition, courts would no longer be able to grant qualified immunity motions without ruling on the constitutionality of officers' behavior, which would lead to opinions that offer more guidance about the scope of officers' constitutional authority and can be used to inform police department policies and trainings.²⁰⁵ But, taking account of other aspects of civil rights ecosystems—including constitutional protections for good faith errors, the many other barriers to relief in civil rights cases, the ubiquity of indemnification, and the many other things on officers' minds when doing their jobs—there is little danger that eliminating qualified immunity would result in *overdeterrence*.

D. STATE AND LOCAL GOVERNMENTS' POWER TO CALIBRATE LAWSUITS' EFFECTS

I have made each of the observations and predictions in this Part before.²⁰⁶ It may be that Nielson and Walker simply do not find them convincing. Part of our disagreement appears to be about how airtight the evidence of qualified immunity's policy failures—or predictions about a future without qualified immunity—need be.²⁰⁷ Nielson and Walker may also disagree with me about what type and magnitude of effect qualified immunity need have on government officials and entities to justify the doctrine's continued existence in its current form.²⁰⁸ We

204. See, e.g., *McCoy v. Alamu*, 950 F.3d 226, 233 n.8 (5th Cir. 2020); *Francis v. Fiacco*, 942 F.3d 126, 145–46 (2d Cir. 2019).

205. See Schwartz, *supra* note 1, at 319.

206. See generally Schwartz, *supra* note 1.

207. Nielson and Walker have suggested that the methodological limitations of my studies make it impossible to foreclose the possibility of counterfactual results. For example, when I reported that few of the almost 1,200 civil rights cases that I studied were dismissed on qualified immunity grounds, Nielson and Walker noted that qualified immunity may be having a greater effect on attorneys' pre-filing decisions to accept cases. See Nielson & Walker, *supra* note 23, at 1881. Then, when I studied qualified immunity's effects on attorneys' case-filing decisions and concluded that the doctrine did not do a good job of screening out insubstantial cases, Nielson and Walker noted that attorneys may not be accurately describing their case-selection process. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 287.

208. Nielson and Walker appear to believe that eliminating qualified immunity could cause civil rights suits to have too much influence on officers' behavior. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 282 (suggesting that the Court should not eliminate qualified immunity because, if it does, "there is at least a reasonable chance that fear of liability—which will be paid for out of the public fisc—may . . . cause governments to adopt policies that favor less aggressive action for fear of crossing constitutional lines that cannot be identified *ex ante*—even where aggressiveness may be valuable," particularly in situations where third parties may be at risk); *id.* at 283 n.310 (suggesting that, if "risk of liability would play an even more significant role without qualified immunity," then that would be reason for the Court not to adjust qualified immunity); *id.* (explaining that hiring and retention challenges might "become worse" without qualified immunity); *id.* (citing with approval the Supreme Court's concern that eliminating qualified immunity would have a chilling effect on officers, noting that officers may worry about the threat of liability in "emergency situations," and pointing to one study that found that the threat of civil liability was among the top ten thoughts for forty-six percent of officers when performing emergency duties (emphasis omitted)). In contrast, and as I have made clear, I believe that lawsuits currently do not have sufficient impact on government behavior, and that eliminating qualified immunity would not cause suits to have too much power.

also disagree about the relationship between qualified immunity and public safety. Nielson and Walker believe that eliminating qualified immunity would have a chilling effect on officers and thereby increase the risk of harm to those whom officers are sworn to protect.²⁰⁹ I believe that, given the prevalence of indemnification and the Fourth Amendment's protection of reasonable mistakes, eliminating qualified immunity would not chill officers or put the public in harm's way.²¹⁰ But, even if Nielson and Walker remain unconvinced—in fact, even if they are right, and eliminating qualified immunity would cause civil rights liability to increase markedly and would chill policymakers and officers—other aspects of the civil rights ecosystem could adjust.²¹¹ Viewing lawsuits as the product of the civil rights ecosystems in which the claims arise shows that state, local, and nongovernmental actors have multiple means of calibrating the relationship between right and remedy.

As Nielson and Walker's study illustrates, indemnification rules and decisions make up part of state and local officials' toolkits. The flexibility built into state and local indemnification provisions means that local officials will often have the option of adjusting the frequency with which they indemnify by exercising their discretion in individual cases, renegotiating union agreements, or changing local policies.²¹² Local governments could also continue to indemnify their officers but impose the types of indemnification caps that have been created in some states and localities.²¹³ Some changes—to state indemnification statutes or union agreements—might take time to effectuate. But other changes—to informal indemnification practices or decisions in individual cases about whether an officer's conduct falls within the terms of the indemnification policy—could be made tomorrow.

If local governments take these steps, officers' personal liability would not increase as dramatically as Nielson and Walker assume. Some plaintiffs may pursue awards against individual officers. But plaintiffs' counsel will have strong incentives to find alternative means of recovering against municipalities when they can. Or, they may forego their claims as they currently do in East Cleveland—where officers are not indemnified—and Houston—where there is a cap on indemnification.²¹⁴

209. See *id.* at 284 (“Qualified immunity is a difficult issue with imperfect solutions precisely because there is not just one interest; chilling officers reduces the risk that they will violate someone else’s rights but increases the risk that other individuals may go unprotected.”).

210. See *supra* Part III (describing the frequency of indemnification); see also Schwartz & Stoughton, *supra* note 197 (describing Fourth Amendment doctrine’s protections for officers).

211. It is possible—as Richard Fallon, John Jeffries, and Daryl Levinson have each observed—that eliminating qualified immunity might cause federal courts to shift their interpretations of other justiciability, substantive, and remedial doctrines to restore what they consider to be equilibrium. See Schwartz, *supra* note 1, at 323–24 (describing these predictions). In my view, courts’ decisions would not dramatically shift the scope of rights, although there may be regional variation. See *id.* Regardless, my point here is that maintaining equilibrium is not a job for federal judges alone.

212. See *supra* Part II.

213. See *supra* note 151 and accompanying text.

214. See Schwartz, *supra* note 6, at 1565 (describing the reluctance of plaintiffs’ attorneys to take cases against East Cleveland officers because of the city’s financial instability); *id.* at 1576–77 (describing the reluctance of plaintiffs’ attorneys to take cases against Houston officers because of indemnification caps).

I do not endorse indemnification limitations and caps because they prevent plaintiffs whose rights have been violated from being fully compensated for their injuries.²¹⁵ And nongovernmental officials—including police union representatives and the plaintiffs’ bar—will likely push back against efforts to restrict indemnification. Local governments may find it challenging to balance the interests of their officers, officers’ union representatives, plaintiffs’ attorneys, police accountability advocates, and comptrollers in making these decisions. But it is important to recognize that these are options on the table.

Moreover, as I argue in Part V, this type of case- and jurisdiction-specific calibration would be better suited to balance plaintiffs’ and governments’ interests than the Supreme Court’s qualified immunity doctrine. Key to Nielson and Walker’s argument in favor of maintaining qualified immunity is the concern that governments could not effectively respond to the elimination of qualified immunity.²¹⁶ I maintain that eliminating qualified immunity would not cause the sea change that they fear. But, if it did, the discretion and subjective judgment built into state and local indemnification provisions and practices make them far more flexible than Nielson and Walker suggest.

V. THE INSTITUTIONS BEST SUITED TO CALIBRATE OFFICER, LOCAL GOVERNMENT, AND ACCOUNTABILITY INTERESTS

In its qualified immunity decisions, the Supreme Court has repeatedly asserted that the doctrine is intended to “strike[] a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”²¹⁷ Courts, scholars, and advocates across the political, methodological, and ideological spectrums agree that qualified immunity doctrine is not achieving that balance. The question is: what institutions are best situated to do so?

In Nielson and Walker’s ideal world, Congress could adjust qualified immunity doctrine if it chose,²¹⁸ but otherwise qualified immunity’s gloss on § 1983 would serve as a constitutional floor that states could go above and beyond with their own causes of action.²¹⁹ I believe, instead, that Congress or the Court should eliminate qualified immunity, and then states can calibrate officer, government,

215. For further discussions of these concerns, see Joanna Schwartz, *Who Should Pay for Police Misconduct?*, LAW & POL. ECON. PROJECT (June 11, 2020), <https://lpeblog.org/2020/06/11/who-should-pay-for-police-misconduct/> [https://perma.cc/9ZUN-8HSM].

216. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 268–69, 288–89, 289 n.348.

217. *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

218. For the likelihood and sensibility of Congress doing so, see *infra* note 232.

219. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 237–38. Nielson and Walker favor a legislative response, *id.*, but state and local legislatures seem better suited than Congress to address their concerns. Nielson and Walker’s reasons for preferring legislation to judicial action—state sovereignty interests motivating qualified immunity doctrine, states’ indemnification statutes having been passed against the backdrop of qualified immunity and other Supreme Court doctrine, and states’ widely varying approaches in structuring civil liability in various ways in light of that doctrine—all focus on states’ interests and variation in states’ responses to § 1983 liability. See *id.* at 234–38.

and public interests. In this Part, I explain why federal qualified immunity should not serve as the floor for states to go above, and why it makes the most sense for the Court or Congress to eliminate or greatly restrict qualified immunity and allow states to work from a clean slate.

A. QUALIFIED IMMUNITY SHOULD NOT BE THE CONSTITUTIONAL FLOOR

Nielson and Walker argue that, unless Congress takes action to adjust qualified immunity doctrine, qualified immunity's gloss on § 1983 should serve as a constitutional floor that states could go above and beyond with their own causes of action.²²⁰ Nielson and Walker point to several examples of states' causes of action that are not subject to a qualified immunity defense,²²¹ applaud these examples of state experimentation, and conclude that they "further counsel in favor of leaving qualified immunity up to legislatures."²²²

I agree with Nielson and Walker that state and local governments' laws and other decisions have significant influence over civil rights ecosystems, the power of qualified immunity over civil rights claims, and the availability of remedies for plaintiffs who have been wronged.²²³ And I agree that state laws in California, Colorado, Iowa, and elsewhere—that provide causes of action against government officials without adopting the qualified immunity defense crafted by the Supreme Court—amount to valuable experimentation.²²⁴ But Nielson and Walker offer an overly narrow view of the impact that state and local government rules can have on civil rights ecosystems. Regardless of whether qualified immunity exists, state and local governments can create rules that go above the constitutional floor. But state and local rules can also weaken the constitutional floor and even cause that floor to collapse.

As Heather Gerken has observed, states and localities can express their preferences not only through policies made "in accord with their own preferences, separate and apart from the center"—like state law causes of action—but also through the manner in which they "administer national policy."²²⁵ This Article has illustrated multiple ways in which state laws administer the national policies associated with § 1983. After all, the ability of § 1983 to achieve its compensation and deterrence goals depends on state and local indemnification obligations, indemnification caps, and litigation and indemnification decisions in individual cases. States, such as California, that have passed statutes mandating indemnification of

220. *Id.* at 295–96.

221. *See id.* at 296–99.

222. *Id.* at 301.

223. For example, qualified immunity matters far less to plaintiffs in California than it does to plaintiffs in Texas in part because California plaintiffs can sue under California law (where there is no qualified immunity defense), but Texas plaintiffs can sue only under federal law. *See* Schwartz, *supra* note 6, at 1569–72 (describing the lack of Texas state law causes of action); *id.* at 1585–87 (describing the interaction of California state law causes of action and qualified immunity).

224. *See* Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 237–38, 296–99 (describing these laws).

225. Gerken, *supra* note 9, at 7.

officers acting within the course and scope of their employment, could be understood to be engaging in a form of cooperative federalism—enacting state laws that advance the goals of federal law.²²⁶ Other states, such as South Dakota—which does not require municipalities to indemnify their officers and caps indemnification at \$25,000—could be understood to be engaging in a form of uncooperative federalism, resisting the intent of federal law.²²⁷

This broader view of the ways in which state laws and practices interact with federal law demonstrates that states have the power not only to expand rights above the constitutional floor but also to weaken that floor or cause it to collapse. For example, in states and localities that cap indemnification or regularly threaten or refuse to indemnify, the constitutional floor is unsupported. In Houston, for example, city attorneys regularly threaten not to indemnify officers, and the city caps indemnification at \$100,000 per officer and \$300,000 per event.²²⁸ Other aspects of Houston’s civil rights ecosystem are hostile to plaintiffs as well—there are no available state tort causes of action, federal judges are notoriously unsympathetic to plaintiffs’ civil rights claims, juries render defense verdicts even in the face of egregious misconduct, and few plaintiffs’ attorneys are willing to accept even strong cases.²²⁹ As a result, in Houston—a city with more than 2.2 million residents and 5,200 sworn officers—a total of twenty-five lawsuits were filed against the city and its officers over my two-year study period; all but one plaintiff who received money was a victim of deadly force, and no plaintiffs who alleged that they were wrongfully arrested or searched received any compensation.²³⁰

Regardless of whether qualified immunity exists, states and localities can craft laws and practices that go above the constitutional floor, or can craft laws and practices that weaken the constitutional floor or cause it to collapse. The question is, then: should states and localities create their rules and practices against the backdrop of the Constitution or qualified immunity? In the next Section, I explain why I prefer the former approach.

B. THE BENEFITS OF LETTING STATES WORK FROM A CLEAN SLATE

Nielson and Walker believe that states should craft causes of action against the backdrop of qualified immunity. They believe this approach “allows for closer tailoring of policy to local conditions and greater experimentation,” and gives the discretion to legislatures which are better suited than courts “to balance competing interests and assess real-world evidence.”²³¹

226. For discussions of cooperative federalism, see generally Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001); and Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15 (2001).

227. For discussions of uncooperative federalism, see generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

228. Schwartz, *supra* note 6, at 1572.

229. *Id.* at 1563–84.

230. *Id.* at 1597.

231. Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 237.

I agree with Nielson and Walker that states are better suited than courts to balance competing interests related to officer liability—local and nongovernmental actors are better than courts at balancing these interests as well. But these observations lead me to a different conclusion. Instead of keeping qualified immunity and allowing states to work around the doctrine when they choose, the Supreme Court or Congress should do away with qualified immunity.²³² States and localities can then use the many tools at their disposal to calibrate officer incentives in qualified immunity’s absence. I prefer that Congress or the Court eliminate qualified immunity for three reasons.

First, states and localities are better situated to balance plaintiffs’ and governments’ interests than is qualified immunity doctrine. State and local litigation, settlement, and indemnification policies and practices can be responsive to the particular interests and priorities of the jurisdiction, can be tailored to the circumstances of individual cases, and can depend on the nature of the officer’s conduct. The Supreme Court’s qualified immunity doctrine has none of these qualities. Although the doctrine ostensibly balances officer, government, and accountability interests, it can do so only in the abstract—qualified immunity doctrine is not designed to reflect the priorities and preferences of specific jurisdictions, does not take into account the circumstances of particular cases, and considers irrelevant the wrongfulness or willfulness of the officer’s conduct. What would do a better job of determining whether an officer should bear the financial consequences of their actions: a policy providing for indemnification if an officer’s conduct was within the course and scope of employment, or a doctrine shielding officers from liability unless there has been a decision from the Supreme Court, the controlling circuit, or a consensus of cases around the country that holds factually similar conduct unconstitutional?

Second, doing away with the Supreme Court’s qualified immunity doctrine and allowing state and local governments to balance competing interests related to officer liability would align current practices with those of the early days of the republic. As James Pfander and Jonathan Hunt have shown, federal officers found liable for damages during the antebellum period could seek indemnification from Congress through private bills.²³³ In that regime, courts “did not take

232. Anyone can guess the likelihood that Congress will legislate with regards to qualified immunity. Congress took little action with regards to qualified immunity in the doctrine’s half-century of existence, deferring adjustments to the Court. See Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 999, 2001 (2018). Following the killing of George Floyd, several bills were introduced to end or limit qualified immunity. See Christopher J. Walker, *Legislating Away Qualified Immunity in Section 1983*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2020), <https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/> [https://perma.cc/2TAM-6F4C]. Given that Republican leadership has described qualified immunity abolition as a “poison pill” to proposed police reforms, congressional action on this front is uncertain. See Christal Hayes, *As Congress Debates Police Reform, Qualified Immunity Emerges as Key Dividing Issue*, USA TODAY (June 16, 2020, 9:07 AM), <https://www.usatoday.com/story/news/politics/2020/06/16/george-floyd-gop-prepping-bill-qualified-immunity-becomes-key-issue/3193368001/> (quoting Republican Senator Tim Scott).

233. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1918 (2010).

responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability.”²³⁴ Instead, courts adjudicated the legality of officers’ conduct—the task of calibrating officers’ incentives “were matters for Congress to adjust through indemnification and other modes of calibrating official zeal.”²³⁵ My point is not that federal officers should once again rely on petitions to Congress for indemnification. Other indemnification schemes currently in place for federal officials have absolved Congress of this responsibility,²³⁶ and state and local government officials already make indemnification determinations when their officers are sued.²³⁷ But eliminating qualified immunity would return courts to the more limited role that they played in the early republic—adjudicators of the legality of government officials’ conduct—and leave the allocation of liability costs to other bodies better situated to assess and adjust officer incentives and other interests.

Third, eliminating qualified immunity and allowing states and localities to calibrate officer incentives through existing tools would cohere with at least some Justices’ views of the Court’s proper role. The Supreme Court has observed “that it is not [its] role ‘to make a freewheeling policy choice [regarding the need for immunity],’ and that [it] do[es] not have a license to create immunities based solely on [its] view of sound policy.”²³⁸ For this reason, the Court has declined to extend qualified immunity to private defendants.²³⁹ When Justice Thomas recently urged the Court to reconsider qualified immunity, he chided the Court for going beyond its authority when crafting qualified immunity doctrine because it “is no longer grounded in the common-law [sic] backdrop against which Congress enacted the 1871 Act” but instead is based on “precisely the sort of ‘freewheeling policy choice[s]’ that we have previously disclaimed the power to make.”²⁴⁰ Eliminating qualified immunity would remove the Court from the business of imposing its “freewheeling policy choice[s]”²⁴¹ on state and local governments, and allow states and localities to make these policy choices for themselves.

234. *Id.* at 1924.

235. *Id.*

236. See generally James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020) (explaining the federal government’s formal indemnification scheme, as well as the ways in which most claims against federal officers are actually resolved—by reformulating the *Bivens* claims against individual officers as claims under the Federal Tort Claims Act against the United States, which are paid from the U.S. Treasury’s Judgment Fund).

237. See *supra* Part III.

238. *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

239. See *Richardson v. McKnight*, 521 U.S. 399, 401 (1997); *Wyatt v. Cole*, 504 U.S. 158, 159 (1992).

240. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *Rehberg*, 566 U.S. at 363).

241. *Id.* (alteration in original) (quoting *Rehberg*, 566 U.S. at 363).

The strongest argument in favor of retaining qualified immunity and making states work around the doctrine—which Nielson and Walker favor—is that states’ current systems are crafted in reliance on qualified immunity and eliminating qualified immunity would cause real upheaval.²⁴² But, as I have shown, neither assertion has empirical support. There is no basis to conclude that states relied on qualified immunity when crafting their state indemnification statutes,²⁴³ and there is no basis to conclude that eliminating qualified immunity will have the ruinous consequences that Nielson and Walker predict.²⁴⁴ Moreover, states and localities will retain a great deal of discretion to adjust civil rights ecosystems—including by limiting indemnification—if they conclude that that is the right course of action. After calming fears of state reliance and upheaval, we can think clearly about what institutional design choice makes the most sense. I believe—and Nielson and Walker and Supreme Court Justices appear to agree—that states and localities are better situated than courts to tailor policies to address local preferences, experiment, and balance competing interests.²⁴⁵

CONCLUSION

The Supreme Court has repeatedly expressed willingness to reconsider qualified immunity doctrine if it is not achieving its intended policy goals—balancing interests in vindicating plaintiffs’ rights with interests in shielding government officials from insubstantial suits. Over the past several decades, the Court has repeatedly adjusted qualified immunity doctrine—in ways large and small—with the aim of better achieving these goals.²⁴⁶

If the Court takes seriously available evidence of qualified immunity’s failures, it should adjust qualified immunity again. There are many paths the Court could take. The most dramatic courses of action include eliminating qualified immunity altogether and returning the doctrine to the common law good faith defenses described in *Pierson v. Ray*.²⁴⁷ To my mind, these most dramatic actions are the most sensible to take. The Court’s post-*Pierson* adjustments to qualified immunity have undermined government accountability and failed to achieve the Court’s intended goal of shielding government officials from the costs and burdens of insubstantial cases.²⁴⁸ And taking this dramatic action will not open the

242. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 285–90.

243. See *supra* Part II.

244. See *supra* Part IV.

245. See Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 4, at 237–38; see also *Bond v. United States*, 564 U.S. 211, 221 (2011) (explaining that “[t]he federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous [sic] society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry’” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

246. See *supra* notes 118–31 and accompanying text.

247. 386 U.S. 547, 557 (1967).

248. See Schwartz, *supra* note 14, at 1809, 1832.

floodgates to meritless civil rights lawsuits, as defenders of qualified immunity predict.²⁴⁹

But, to the extent that the Court has stare decisis concerns, there are also less dramatic steps it could take. Just as the Court reversed *Saucier v. Katz* upon learning that “a judge-made rule that was recently adopted to improve the operation of the courts” did not work as intended,²⁵⁰ the Court could reverse its decision in *Mitchell v. Forsyth*—which allows interlocutory appeals of qualified immunity denials²⁵¹—given evidence that such appeals increase the time, cost, and complexity of civil rights litigation without resulting in the dismissal of many cases.²⁵² The Court could also decide once again to allow consideration of officers’ subjective intent in the qualified immunity analysis, given evidence that its decision in *Harlow v. Fitzgerald* to eliminate consideration of officers’ subjective intent²⁵³ spares few officers from participating in discovery and trial.²⁵⁴ Because officers are not actually educated about the facts and holdings of cases that interpret the scope of constitutional protections, the Court could stop criticizing lower courts for viewing clearly established law at a high level of generality and stop requiring plaintiffs to produce cases with virtually identical facts to defeat qualified immunity motions.²⁵⁵

There are even steps that the Court could take in response to evidence of qualified immunity’s policy failures that would not require it to reverse any of its prior decisions. The Court has repeatedly stated that there need not be a case “directly on point” to clearly establish the law²⁵⁶ and held in *Hope v. Pelzer* that constitutional rights can be clearly established without pointing to a prior, factually analogous case.²⁵⁷ Although the Court largely ignored *Hope* for almost two decades, it reaffirmed that virtually identical facts are unnecessary to clearly establish the law in November 2020, just as this Article was going to print. Its decision in *Taylor v. Riojas* reversed the Fifth Circuit’s grant of qualified immunity to officers who kept a prisoner in a cell “teeming with human waste” for six days.²⁵⁸ The Court explained, citing *Hope*, that “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions

249. See Schwartz, *supra* note 1, at 317, 361.

250. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

251. 472 U.S. 511, 530 (1985).

252. See Schwartz, *supra* note 43, at 1120–21, 1162.

253. 457 U.S. 800, 818–19 (1982).

254. See Schwartz, *supra* note 20, at 71.

255. See generally Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. (forthcoming 2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540 [<https://perma.cc/7SGE-8VPH>]) (critiquing qualified immunity on this basis).

256. E.g., *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

257. 536 U.S. 730, 741 (2002).

258. *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *1–2 (U.S. Nov. 2, 2020) (per curiam).

for such an extended period of time.”²⁵⁹ The Court’s decision in *Taylor* sends the signal to lower courts that they can deny qualified immunity without a prior case on point—a very different message than the Court has sent in its recent qualified immunity decisions.²⁶⁰ Although it is far too early to tell, the Court, with *Taylor*, may have limited one of the most troublesome aspects of the Court’s qualified immunity jurisprudence without reversing itself. The Court could continue to issue decisions that describe qualified immunity in terms that diminish the doctrine’s power.

Reliance and stare decisis concerns should not take any of these options off the table. Moreover, viewing federalism all the way down, and recognizing the roles of qualified immunity and state indemnification statutes in the context of the broader civil rights ecosystems in which they operate, shows that modifying or eliminating qualified immunity would not have the ruinous consequences Nielson and Walker fear. In fact, Nielson and Walker’s illuminating study of indemnification statutes—and the interaction of those statutes with federal, state, local, and nongovernmental people, rules, and practices—show that states and localities can take on the responsibility of calibrating officer liability and can do so more effectively than the Court.

259. *Id.* at *1.

260. *See supra* Section II.D.