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Alexander A. Reinert

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ARTICLE

DOES QUALIFIED IMMUNITY MATTER?

ALEXANDER A. REINERT[1]

ABSTRACT

In litigation brought pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), most commentators agree that qualified immunity plays a substantial role in limiting plaintiffs' ability to recover compensation. Many find this tradeoff acceptable, in part because of concerns of fairness to government official defendants and in part because courts may still play a central role in announcing the law without worrying over the retroactive effect their decision will have on the personal funds of the defendant official.

This paper considers the different role that qualified immunity may play in *Bivens* and other civil rights litigation. Empirical support for the proposition that qualified immunity plays a significant role in filed cases is limited and more recent data call it into question. Working from the assumption that qualified immunity plays less of a role in filed cases than has been assumed, this paper considers other ways in which the defense of qualified immunity may affect the course of constitutional litigation. In particular, this paper focuses on the role that qualified immunity may play in case screening and reports on the results of a qualitative survey of civil rights practitioners.

The results suggest that lawyers often take qualified immunity into account at the case-screening stage and indeed may in some cases avoid litigation in which qualified immunity is even a potential issue. This observation has ramifications for the theory that qualified immunity enhances the law-announcing function of federal courts.

INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[2] the Supreme Court held for the first time that federal employees may

1. Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. E-mail: areinert@yu.edu.

2. 403 U.S. 388 (1971).

be sued for damages in their personal capacity[3] for violations of the Constitution.[4] Despite the potentially broad nature of the remedy at its inception, plaintiffs seeking to use *Bivens* to establish individual liability of governmental officials for constitutional wrongdoing face numerous obstacles. They often proceed without representation, whereas governmental officials are represented either by experienced government lawyers or private counsel.[5] Relatedly, the resource inequality between individual plaintiffs and governmental-official defendants is stark.[6] Establishing that the Constitution has been violated can itself be a difficult task, with substantive legal principles tilting the balance in favor of governmental officials.[7] Some have argued that this is even more difficult when the defendant is a federal official because of judicial biases in favor of federal decision makers.[8] Finally,

3. Personal capacity claims are brought against government officials individually, almost always for damages. In theory, defendants who are found liable in their personal capacity are responsible for paying damages out of their own pockets, although the federal government usually indemnifies employees for the damages awarded in constitutional tort actions. *See, e.g.*, Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 76–78 (1999) (identifying methods individuals use to cover costs and justifications for employer shouldering the cost). Official capacity claims, by contrast, are brought nominally against government officials, but typically seek injunctive relief against a government entity that would otherwise be immune from suit in federal court. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100–01 (1984) (summarizing Eleventh Amendment principle that unconsenting states and their agencies may not be sued in federal court, regardless of the relief sought). For a detailed discussion of the practical distinction between personal and official capacity claims, see Hafer v. Melo, 502 U.S. 21 (1991).

4. 403 U.S. at 395–97.

5. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837–39 (2010) (reporting that of 241 *Bivens* cases filed over three years in five district courts, 190 were pro se); David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313 (2009) (reporting that of 188 *Bivens* appeals decided over the course of two years, 101 of the plaintiffs were pro se). *Bivens* defendants, by contrast, are entitled to representation by attorneys from the Department of Justice or, where appropriate, private counsel. *See, e.g.*, 28 C.F.R. § 50.15(a), (b)(2) (2011) (providing right to representation for federal employees and officials sued for actions within the scope of employment when representation is in the interest of the United States); 28 C.F.R. § 50.16 (2011) (detailing circumstances in which employee has right to representation by private counsel).

6. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 101–02 (2008) ("The government possesses numerous qualities that enable it to fare considerably better than any other party to litigation: it has vast resources and ample experience, and it is also the entity that sets the basic rules of the game.").

7. Prisoners, for instance, must show that officials acted with deliberate indifference in some instances, *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976), or that they behaved "maliciously and sadistically" in others, *see* Hudson v. McMillian, 503 U.S. 1, 9 (1992). Plaintiffs must show that defendants behaved unreasonably to establish a violation of the Fourth Amendment, but law enforcement officials are shown a high degree of deference in such cases. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution."), *abrogated on other grounds by* Pearson v. Callahan, 555 U.S. 223 (2009).

8. *See generally* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004) (arguing that federal courts did not find federal race discrimination unconstitutional as a result of shared views about what race discrimination was unlawful).

numerous principles have been adopted that limit the scope of *Bivens* liability, with the Supreme Court often expressing hostility to the remedy itself.[9]

Most academics and jurists agree, however, that the qualified immunity defense is one of the most substantial barriers to the success of lawsuits seeking damages against federal officials for constitutional violations (a.k.a. *Bivens* litigation).[10] Put simply, qualified immunity permits officials who have violated the law to escape liability when they have behaved reasonably. Official misconduct can be reasonable for one of two reasons: (1) because the law governing the official's conduct was not "clearly established;" or (2) because the official behaved in an objectively reasonable manner in light of clearly established law.[11] If an official can establish either of these elements,[12] then she is immune from damages liability.

Despite the widespread assumption that qualified immunity plays a large role in the inability of many *Bivens* plaintiffs to prevail against federal officials, there is little empirical support for the proposition. Some authors have relied on data from reported decisions,[13] but data from a wider range of cases have not suggested that qualified immunity plays a substantial role in the resolution of *Bivens* claims.[14] Assuming for the moment that qualified immunity does not play a significant role in the outcomes of most filed cases, this paper attempts to explore ways in which qualified immunity may still matter, particularly at the stage whereby putative plaintiffs convert their grievances into formal legal requests for relief.

This article proceeds in the following manner. Part I introduces the doctrine of qualified immunity as it relates to *Bivens* litigation. Part II summarizes the consensus view that qualified immunity is a substantial barrier to success in *Bivens* claims and offers some reason to question this view. Part III considers other possible explanations for why qualified immunity may matter in *Bivens* litigation, particularly at the pre-filing, informal screening stage. It reports on a qualitative survey of experienced *Bivens* attorneys that suggests qualified immunity has a significant impact on case selection. These data suggest that the fear of facing a qualified immunity

9. *See generally* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, CATO SUP. CT. REV., 2006-2007, at 23 (arguing that *Bivens* remedy has been gradually undermined, and is endangered by the Court's analysis in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007)); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009) (criticizing the Supreme Court's *Bivens* jurisprudence and suggesting alternative analysis).

10. *See* Reinert, *supra* note 5, at 812 (summarizing literature analyzing *Bivens* actions).

11. Malley v. Briggs, 475 U.S. 335, 341–42 (1986).

12. Although qualified immunity is an affirmative defense, *see* Gomez v. Toledo, 446 U.S. 635, 640 (1980), not every circuit consistently allocates to the defendant the burdens of establishing the defense. *See* discussion *infra* Part I.E.

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

14. *See* Reinert, *supra* note 5, at 843–44.

defense may have more of an impact on the law than previously assumed. Part IV offers a tentative conclusion and suggestions for further research.

I. Qualified Immunity Summary

There are three basic sources of liability under federal law for government officials or entities alleged to have violated substantive legal principles: 42 U.S.C. § 1983, which provides a cause of action against state actors for violations of the Constitution; liability pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[15] which implies a cause of action for damages against federal officials for certain violations of the Constitution;[16] and statutory causes of action, which specifically provide causes of action against government officials or their entities, such as the Americans with Disabilities Act. Whatever the source of liability, however, government officials and entities have three primary immunity defenses available to them: qualified immunity, sovereign immunity, and absolute immunity.[17] Of these three, qualified immunity arises most frequently for individual officials and will be the focus of this article.

A. *Qualified Immunity Summary*

Qualified immunity is a common-law concept, initially applied in the *Bivens* context, that offers protection from personal liability to government defendants who have not had "fair warning" that their conduct violated the law.[18] This formulation is a product of the tension between ensuring that citizens have a means to remedy constitutional violations and the Supreme Court's judgment that "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."[19]

The Court in *Harlow* created the doctrine based on its acceptance of the contention that "with increasing frequency . . . plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts," which resist dismissal at summary judgment because of the abilities of "ingenious plaintiff's coun-

15. 403 U.S. 388 (1971).

16. Although the Supreme Court has limited the reach of *Bivens* liability in many cases, it has squarely held that prisoners may bring claims against federal officials for violations of the Eighth Amendment. Carlson v. Green, 446 U.S. 14, 24–25 (1980).

17. Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights from Appeals Under the Federal Arbitration Act*, 44 Akron L. Rev. 375, 376 (2011).

18. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Hope v. Pelzer, 536 U.S. 730, 739–40 (2002) ("The defendant [is] entitled to 'fair warning' that his conduct deprived his victim of a constitutional right."); Saucier v. Katz, 533 U.S. 194, 202 (2001) ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); Wilson v. Layne, 526 U.S. 603, 621 (1999) (discussing a state judge who had fair warning when eliciting sexual favors from a potential litigant).

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

sel" to create material issues of fact based on little evidence.[20] Thus, moving to an "objective reasonableness" standard (from the prior good-faith standard) was viewed as necessary to "permit the resolution of many insubstantial claims on summary judgment."[21]

Qualified immunity is very frequently asserted as a defense to personal capacity claims for damages, whether those claims are based in constitutional or statutory protections.[22] Under *Harlow* and its progeny, defendants can establish the affirmative defense of qualified immunity through one of two routes: (1) by showing that the defendant's conduct did not violate law that was clearly established at the time he or she acted; or (2) by showing that they reasonably believed that their conduct did not violate clearly established law.[23] If a defendant can prevail on either prong, then she is entitled to qualified immunity.[24]

In *Saucier v. Katz*, the Court adopted a mandatory two-step sequential analysis to determine whether qualified immunity shields an official from liability.[25] First, defendants were required to show that, after drawing all factual inferences in plaintiffs' favor, plaintiffs have not alleged facts that "show that the officer's conduct violated a constitutional right."[26] If defendants could not meet this burden, then they were required to show that they nonetheless were entitled to qualified immunity either because the defendant did not violate clearly established law or because the defendant reasonably believed that her conduct did not violate clearly established law.[27] The mandatory nature of this sequential analysis was undermined in *Pearson v. Callahan*,[28] in which the Court held that while courts may analyze qualified immunity by engaging in the *Saucier* "two-step" analysis described above, they are not required to do so. They may skip the first question entirely and instead begin by determining whether the defendant's conduct violated

20. *Id.* at 817 n.29 (internal quotation marks omitted).

21. *Id.* at 818.

22. Most of the case law surrounding qualified immunity addresses the defense in the context of constitutional claims, not statutory claims, but the logic of the qualified immunity defense—the need to protect government officials from burdensome discovery and also encourage them to make decisions without worrying overly about the prospect of being held personally liable in a subsequent lawsuit—applies to any claim, whether based in the Constitution or statute.

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

24. At least superficially, qualified immunity is an affirmative defense. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635, 640 (1980). The defendant always has some minimal burden to establish an entitlement to the defense, but some circuits, as discussed in greater detail below, have adopted variations of a burden-shifting scheme that places much of the burden of rebutting the defense on the plaintiff.

25. Saucier v. Katz, 533 U.S. 194, 201 (2001).

26. *Id*. This is essentially the same inquiry that is required by any Fed. R. Civ. P. 12(b)(6) motion.

27. *Saucier*, 533 U.S. at 201 (2001).

28. 555 U.S. 223 (2009).

clearly established law or the defendant reasonably believed she did not violate clearly established law.[29]

The Court's concern in *Pearson* was that the *Saucier* two-step analysis posed the risk that courts would issue advisory opinions by unnecessarily deciding whether the plaintiff's allegations established a violation of the law. On the other hand, skipping *Saucier*'s first step raises the concern that constitutional law will become static because courts will focus on whether particular rights were clearly established at the time of alleged violations, rather than whether the rights exist at all. It remains to be seen how often lower courts will accept the Court's invitation to disregard the *Saucier* two-step analysis—because the first step in *Saucier* is essentially identical to deciding whether a plaintiff has stated a claim for relief, some courts may continue to decide that question first before turning to the affirmative defense of qualified immunity.[30] Whether courts accept *Pearson*'s invitation to answer the "clearly established law" question first, however, qualified immunity will remain one of the principal defenses asserted by government officials being sued for damages under *Bivens*.

B. Defendants Entitled to Assert Qualified Immunity

Qualified immunity is available only in individual-capacity cases and not in official-capacity cases.[31] In other words, it is only available as a defense to claims seeking damages, not to claims seeking injunctive relief. Moreover, it is only available to individuals, whether sued as direct participants in a constitutional violation or on the basis of supervisory liability,[32] but not to municipalities.[33] Despite the fact that municipalities are not entitled to the defense, some circuits, including the Second, hold that a right must be clearly established before a municipality can be held liable for failure to train with respect to it.[34]

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29. *Id.* at 236.

30. Indeed, the Supreme Court did just that in a recent Fourth Amendment case, deciding first that school officials violated the Fourth Amendment, but also that the right was not clearly established. Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2645 (2009).

31. P.C. v. McLaughlin, 913 F.2d 1033, 1039 (2d Cir. 1990); *see also* Starkey *ex rel.* A.B. v. Boulder Cnty. Soc. Services, 569 F.3d 1244, 1250 (10th Cir. 2009); Goodman v. Harris Cnty., 571 F.3d 388, 396 (5th Cir. 2009); Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 24 (1st Cir. 2007); Alexander v. City of Milwaukee, 474 F.3d 437, 443 (7th Cir. 2007); Alkire v. Irving, 330 F.3d 802, 810–11 (6th Cir. 2003); Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995); Melo v. Hafer, 912 F.2d 628, 635 (3d Cir. 1990).

32. *See* Poe v. Leonard, 282 F.3d 123, 146–47 (2d Cir. 2002); *see also* Lowery v. Cnty. of Riley, 522 F.3d 1086, 1092 (10th Cir. 2008); Valdes v. Crosby, 450 F.3d 1231, 1236 (11th Cir. 2006); Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004); Comstock v. McCrary, 273 F.3d 693, 712–13 (6th Cir. 2001).

33. Owen v. City of Independence, 445 U.S. 622, 635–58 (1980).

34. *See* Young v. Cnty. of Fulton, 160 F.3d 899, 902–03 (2d Cir. 1998); Szabla v. City of Brooklyn Park, 486 F.3d 385, 394 (8th Cir. 2007); Revis v. Meldrum, 489 F.3d 273, 288 (6th Cir. 2007); Kitzman-Kelley *ex rel.* Kitzman-Kelley v. Warner, 203 F.3d 454, 456–57 (7th Cir. 2000);

The status of *Bivens* actions against private individuals is quite tenuous, but in the § 1983 context, qualified immunity is not always available to private individuals who are sued under § 1983.[35] For instance, the Supreme Court has explicitly held that privately employed prison guards are not entitled to qualified immunity, at least in § 1983 litigation.[36] Whether a private individual is entitled to invoke the qualified immunity defense is determined on a case-by-case basis, after an analysis of history (whether private individuals had a good faith defense at common law) and the purposes that underlie governmental immunity—primarily, ensuring that individuals are not deterred from serving the government.[37]

C. The Meaning of "Clearly Established" Law

As described above, a government official sued in his or her individual capacity is entitled to qualified immunity: (1) if the defendant behaved reasonably in light of clearly established law;[38] or (2) if that conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[39]

The most important, and often determinative, question in the qualified immunity inquiry is what law is "clearly established." On one hand, it is generally true that a Constitutional amendment cannot constitute "clearly established" law without some judicial interpretation.[40] Therefore, the "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."[41] At the same time,

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Joyce v. Town of Tewksbury, 112 F.3d 19, 23 (1st Cir. 1997). *But see* Gray v. City of Detroit, 399 F.3d 612, 616–17 (6th Cir. 2005) ("When an officer violates a plaintiff's rights that are not 'clearly established,' but a city's policy was the 'moving force' behind the constitutional violation, the municipality may be liable even though the individual officer is immune."). The rationale for requiring that a right be clearly established in municipal failure-to-train cases is based on the fact that the standard for municipal liability in such cases is "deliberate indifference." *Joyce*, 112 F.3d at 23 ("[O]ur rationale here for granting qualified immunity to the officers-that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional-also precludes municipal liability. *Tewksbury* could not have been "deliberately indifferent" to citizens' rights in failing to teach the officers that their conduct was unconstitutional.") (citations omitted); Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1264–65 (E.D. Va. 1992) ("[Even if] the constitutional rights alleged by plaintiff did exist, the conclusion that they were not clearly established negates the proposition that the city acted with deliberate indifference."), *aff'd*, 991 F.2d 793 (4th Cir. 1993).

35. *See* Wyatt v. Cole, 504 U.S. 158, 159 (1992) (holding § 1983 private defendants sued for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are not entitled to qualified immunity).

36. Richardson v. McKnight, 521 U.S. 399, 401 (1997).

37. *See id.* at 403–04.

38. *See* Scott v. Harris, 550 U.S. 372 (2007); Saucier v. Katz, 533 U.S. 194, 201 (2001).

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

40. *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987). *But see* Groh v. Ramirez, 540 U.S. 551, 563–64 (2004) (finding that "particularity requirement" in Warrant Clause of Fourth Amendment constituted clearly established law).

41. *Saucier*, 533 U.S. at 201.

an earlier case may clearly establish a right, even when its facts are not "materially similar" to the case in dispute.[42] A court need only be convinced that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional.[43] In *Hope v. Pelzer*, a § 1983 case involving prison conditions, the Court found that prison guards' use of a "hitching post" as discipline violated clearly established law despite the fact that there was sparse precedent—and on some accounts no precedent—specifically striking down such punishment.[44] In other words, certain conduct will be so extreme that one would not expect a prior decision on the issue: In some cases this absence of precedent may even evince the impropriety of the practice.[45]

Absent extreme examples like the hitching post in *Hope*, however, a recurring problem arises in defining the content of "clearly established law" and how specific it must be to provide the "fair warning" qualified immunity requires. Some courts have held that a right is clearly established if (1) the law is defined with reasonable clarity; (2) the Supreme Court or the controlling circuit court has recognized the right; and (3) a reasonable defendant would have understood that his conduct was unlawful.[46] Appellate cases deciding whether a law was clearly established in specific factual contexts are far too numerous for this review. Some examples, however, offer further guidance on how to analyze this question.

In one Second Circuit case, *Back v. Hastings on Hudson Union Free School District*, a plaintiff alleged that she was the victim of stereotyping by other women about the qualities of motherhood.[47] The Second Circuit held that certain defendants were not entitled to immunity because it was "eminently clear by 2001, when the alleged discrimination took place, both that individuals have a constitutional right to be free from sex discrimination, and that adverse actions taken on the basis of gender stereotypes can constitute sex discrimination."[48] Even though "there may not have been any precedents with precisely analogous facts prior to the instant case," given the "well known underlying general legal principle," defendants were not

42. *E.g.*, Hope v. Pelzer, 536 U.S. 730, 740–41 (2002); *Anderson*, 483 U.S. at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.").

43. *Hope*, 536 U.S. at 741.

44. *Id.* ("Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution.").

45. *E.g.*, Borello v. Allison, 446 F.3d 742, 750 (7th Cir. 2006) ("A plaintiff is required to show that a violation of that right has been found in factually similar cases, or that the violation was so clear that an official would realize he or she was violating an inmate's constitutional rights even in the absence of an on-point case.").

46. *See* Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003); Young v. Cnty. of Fulton, 160 F.3d 899, 903 (2d Cir. 1998); Luna v. Pico, 356 F.3d 481, 490 (2d Cir. 2004).

47. 365 F.3d 107, 113 (2d Cir. 2004).

48. *Id.* at 130.

entitled to qualified immunity.[49] Similarly, in *Andrews v. City of Philadelphia*, the Third Circuit denied qualified immunity in a sexual harassment case even though no Third Circuit precedent had held that the Equal Protection Clause specifically prohibited sexual harassment.[50]

Often the question of what law is "clearly established" is determined by deciding the scope of the right the plaintiff asserts. A Second Circuit prison case, *LaBounty v. Coughlin*,[51] exemplifies this interrelationship. In *LaBounty*, the plaintiff complained of chemical contamination in the prison's drinking water and exposure to friable asbestos in the air.[52] In holding that defendants were not entitled to qualified immunity, the court stressed the importance of not defining the right at issue too narrowly (or too broadly).[53] The court found it too narrow to describe the right as "the right to be free from crumbling asbestos."[54] Instead, the challenged conduct was encompassed by "the right to be free from deliberate indifference to serious medical needs," a well-established Eighth Amendment right.[55] Similarly, in *Ford v. McGinnis*, the court denied qualified immunity to defendants in a case involving a Muslim plaintiff's right to participate in the festival marking the end of Ramadan, absent specific precedent on the issue.[56] The court held that it was enough that the law was clearly established as to a prisoner's rights to a diet consistent with his religious beliefs and to participate in religious services, even if confined in special housing.[57]

One issue in deciding whether law is clearly established is the extent to which law can be considered clearly established when authority splits exist within or without a particular circuit court of appeals. The circuits are divided on this issue,[58] as well as on whether district court decisions alone

49. *Id.* (internal quotation marks omitted).

50. *See* 895 F.2d 1469, 1479–80 (3d Cir. 1990).

51. 137 F.3d 68 (2d Cir. 1998).

52. *Id.* at 73.

53. *Id.* at 73–74.

54. *Id.*

55. *Id.* at 74.

56. 352 F.3d 582, 584, 597 (2d Cir. 2003).

57. *Id.* at 597. Outside of the prison context, the Second Circuit has confirmed that officials can have fair warning of the illegality of their conduct in "'novel factual circumstances.'" Pena v. DePrisco, 432 F.3d 98, 114–15 (2d Cir. 2005) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002); *see also* Greenwood v. N.Y. Office of Mental Health, 163 F.3d 119, 123 (2d Cir. 1998) (reversing district court's decision on summary judgment which "relied heavily on the lack of any explicit holding in our circuit" that clinical privileges at a hospital were a property interest).

58. The Third and Ninth Circuits take the position that a right can be clearly established despite a split in authority among the circuits. *See, e.g.*, Morgan v. Morgensen, 465 F.3d 1041, 1046 (9th Cir. 2006); Bieregu v. Reno, 59 F.3d 1445, 1458–59 (3d Cir. 1995) (finding a right to be clearly established despite a circuit split, as long as "no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule" to the contrary), *abrogated on other grounds by* Lewis v. Casey, 518 U.S. 343 (1996). The Fourth, Sixth, Seventh, and Eighth Circuits take the position that disagreements between the circuits can render the law unclear. *See, e.g.*, Baranski v. Fifteen Unknown Agents, 452 F.3d 433, 449 (6th Cir. 2006) (en banc); Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health, 447 F.3d 1021, 1025–26 (8th

create clearly established rights.[59]

D. Objective Reasonableness Standard

Even where law prohibiting certain conduct is clearly established, qualified immunity protects officials who "act in ways they reasonably believe to be lawful."[60] Hence, a defendant is not liable if he did not violate clearly established law or if it was objectively reasonable for him to believe that he was not violating clearly established law.[61] The question becomes "what a reasonable person in the defendant's position should know about the constitutionality of the conduct," taking into account the facts known to the defendant at the time of the conduct.[62]

E. Pleading and Proving Qualified Immunity

Qualified immunity is considered an affirmative defense, which implies that the defendant bears the burden of pleading and proving it. However, several circuits have adopted a more nuanced approach. At one extreme are the Seventh and Tenth Circuits, which have stated that the plaintiff has the burden of proof in qualified immunity cases.[63] On the other end are the First, Second, Fourth, and Ninth Circuits, which place the burden of both pleading and proving an entitlement to qualified immunity on the defendant.[64]

Cir. 2006) (holding where "no Supreme Court, Missouri, or Eighth Circuit case had yet decided the issue," it was not unreasonable for official to follow the New Hampshire Supreme Court rather than the Third Circuit); Rogers v. Pendleton, 249 F.3d 279, 288 (4th Cir. 2001) ("[I]f there are no cases of controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes."); Donovan v. City of Milwaukee, 17 F.3d 944, 953 (7th Cir. 1994) ("Because only two circuits had considered cases on point, reaching opposite results, we conclude that 'the relevant case law was still developing [and] the key issue in this case had not been clearly settled.'") (citation omitted); *see also* Wilson v. Layne, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

59. *See* Doe v. Delie, 257 F.3d 309, 321 n.10 (3d Cir. 2001) (collecting cases from Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

60. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

61. Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003); Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001).

62. McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272, 278 (2d Cir. 1999).

63. *E.g.*, Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007) ("Although the privilege of qualified immunity is a defense, the plaintiff carries the burden of defeating it."); Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007) ("Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct."); *see also* Poolaw v. Marcantel, 565 F.3d 721, 728 (10th Cir. 2009).

64. *E.g.*, Blissett v. Coughlin, 66 F.3d 531, 539 (2d Cir. 1995); *see, e.g.*, Henry v. Purnell, 501 F.3d 374, 377–78 (4th Cir. 2007); Moreno v. Baca, 431 F.3d 633, 637 (9th Cir. 2005); DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 35 (1st Cir. 2001).

In between these extremes are the circuits that have adopted burden-shifting frameworks. In the Fifth, Sixth, and Eleventh Circuits, once the defendant shows he was acting within his discretionary authority at the time of the alleged unlawful conduct or that he acted in good faith, the burden of proof "shifts . . . to the plaintiff to show that the defendant is not entitled to qualified immunity."[65] In the Eighth Circuit, the defendant bears the burden of proof on all elements of the defense, except the plaintiff must show that the relevant law was clearly established.[66]

Qualified immunity can be raised at any time: at the motion to dismiss stage, after limited or full discovery through summary judgment, or at trial.[67] A defendant need not raise it at any particular time to preserve it for trial and may raise it as many times as she wishes.[68]

F. Appeal of Denial of Qualified Immunity

Defendants who seek dismissal on qualified immunity grounds are protected from discovery until the threshold legal question of qualified immunity is resolved.[69] Relatedly, defendants are entitled to take interlocutory appeals of otherwise unappealable denials of motions to dismiss or summary judgment.[70] This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly.[71]

Not every issue raised in the district court will be reviewable by an appellate court, however. In general, qualified immunity raises the "essentially legal question [of] whether the conduct of which the plaintiff complains violated clearly established law."[72] However, if a district court's order is based on the sufficiency of the evidence, the decision is not immediately appealable because that determination "is not truly 'separable' from the plaintiff's claim."[73] And when bringing a qualified immunity appeal,

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

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

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

68. This is the implication of *Behrens*, 516 U.S. 299, and *Mitchell*, 472 U.S. 511, which permit interlocutory appeal of denials of qualified immunity at the motion to dismiss and summary judgment stage without regard for how many times a defendant has raised the defense.

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

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

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

72. *Mitchell*, 472 U.S. at 526.

73. *Behrens*, 516 U.S. at 313. *Behrens* has been eroded slightly by the Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), in which the Court *sub silentio* exercised jurisdiction over a

the defendant must accept the plaintiff's version of the facts the district court adopted so that the appellate court can review its determination of the "purely legal issue [of] what law was 'clearly established.'"[74]

In the motion to dismiss context, however, the Supreme Court has indicated that it is appropriate for appellate courts to exercise appellate jurisdiction over the question of whether a complaint sufficiently alleges a constitutional cause of action, even though this issue is distinct from whether the law governing the claim was clearly established at the time of the defendant's conduct.[75] As the Court explained, both issues are decided on purely legal grounds that are well within an appellate court's expertise, unlike the sufficiency of the evidence determination made at the summary judgment stage.[76]

II. Role of Qualified Immunity in *Bivens* Cases

Almost from its inception, *Bivens* has occupied a tenuous position as a tool for vindicating civil rights. The Supreme Court initially indicated its intent to apply *Bivens* liability beyond the Fourth Amendment context in which it arose to other kinds of constitutional violations.[77] Thus, the Supreme Court put plaintiffs injured by federal officials' unconstitutional conduct in nearly the same shoes as victims of state and municipal unconstitutional conduct (who have a statutory right to seek damages and other remedies under 42 U.S.C. § 1983).[78] Precisely because *Bivens* was a matter of judicial implication, however, the Court retains and has exercised the power to limit the extent of any *Bivens* remedy, consistently restricting its reach from 1980 on.[79]

Thus, despite its broad potential, most commentators view *Bivens* liability as more powerful in theory than in practice. This is due partly to the Court's continued hostility to "extending" *Bivens* to new constitutional con-

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factual sufficiency determination because there was material in the record that "quite clearly contradict[ed]" the lower courts' interpretation of the factual material. *Id.* at 378.

74. Johnson v. Jones, 515 U.S. 304, 313 (1995).

75. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1946–47 (2009).

76. *Id.* at 1947.

77. *See* Reinert, *supra* note 5, at 822.

78. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006). Although § 1983 plaintiffs can recover costs and attorneys' fees if they are successful, 42 U.S.C. § 1988, no similar provision is applicable to *Bivens* plaintiffs. *See, e.g.*, Kreines v. United States, 33 F.3d 1105 (9th Cir. 1994) (rejecting claim for attorneys' fees in *Bivens* action and collecting cases coming to similar conclusion).

79. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 562 (2007); United States v. Stanley, 483 U.S. 669, 684 (1987); *see also* Tribe, *supra* note 9, at 64–67.

texts and partly to the barriers to success built into recognized *Bivens* causes of action. Thus, both academics and judges assume that *Bivens* litigation is generally unsuccessful as a practical matter.[80] Commentators offer many explanations for this relative lack of success, but most agree that *Bivens* plaintiffs are disadvantaged because the personal defense of qualified immunity is an imposing barrier to recovery from federal officers.[81]

Supporting this general view that qualified immunity plays a significant role in the resolution of *Bivens* actions are empirical studies that have suggested that, when introduced as a defense, it is highly successful.[82] These studies, however, were based entirely on reported decisions, which at the district court level may exclude over 95% of judicial decision-making.[83] A study that I conducted of all district court decisions and dockets over a three-year period within five varied judicial districts revealed that only 2% of *Bivens* cases were resolved via qualified immunity defenses.[84] While

80. Reinert, *supra* note 5, at 812.

81. *See*, *e.g.*, PETER H. SCHUCK, SUING GOVERNMENT 100–02 (1983) (arguing for expanded governmental liability in lieu of individual liability, because immunity doctrine is unpredictable, does not deter, and often leaves victims without compensation); George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 218–20 (2011) (describing role of immunity in national security cases); Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 297 (1980) (citing Department of Justice figures that only seven of "several thousand" *Bivens* suits have resulted in judgments against federal defendants, with the likely culprit being the availability of qualified immunity); Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1111 (2010) (focusing on Supreme Court's finding of qualified immunity in most *Bivens* cases); Morgan Leigh Manning, *Less than Picture Perfect: The Legal Relationship Between Photographers' Rights and Law Enforcement*, 78 TENN. L. REV. 105, 145 (2010) (stating that qualified immunity is "fatal" in most *Bivens* cases); Peter Margulies, *Judging Myopia in Hindsight:* Bivens *Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 218–19 (2010) (noting that qualified immunity seeks to protect officials from "hindsight bias, which transforms mistakes into products of 'dishonest or vindictive motives'"); Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 356 (1989) (describing qualified immunity as "most substantial obstacle to recovery by a constitutional tort plaintiff"); H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 774–75 (1991) (arguing that, because of conceptual and practical difficulties with qualified immunity doctrine, *Bivens* actions should be encompassed within FTCA claims).

82. *See* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 525, 545 (2010) (reporting that qualified immunity was denied in about one-third of a random sample of over nine hundred published § 1983 decisions issued by the federal appellate courts between 1976 and 2008); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 692 (2009) (finding, in random sample of published qualified immunity opinions decided by federal courts between 1988 and 2006, that immunity was denied in only about 20% to 30% of the cases); Hassel, *supra* note 13, at 136 n.65, 145 n.106 (finding that qualified immunity defenses were denied in only 20% of federal cases over a two-year period, but citing only reported cases). These studies did not compare the rate at which qualified immunity served as a ground for dismissal with the rate at which other bases for dismissal were relied upon.

83. Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 976 (2008).

84. *See* Reinert, *supra* note 5, at 832, 843–44.

these data themselves are limited, they at least suggest the possibilty that it is misleading to look only to published cases to determine the role that qualified immunity plays in *Bivens* litigation.

So, let us assume that qualified immunity plays a much less significant role in the outcomes of run-of-the-mill cases than has previously been assumed. Nonetheless, the defense still could have a significant impact on *Bivens* litigation for many reasons. First, because qualified immunity focuses on those cases in which the law is hazy, the defense is most logically going to do its most significant work when a claim for relief is novel or unanticipated by prior precedent. These cases may be a small subset of the overall universe of *Bivens* claims, but they may also be more significant to the public and the legal community precisely because of their precedential and political significance. Indeed, this may explain the difference between the reported role of qualified immunity in published and appellate decisions and its reported role in a broader range of decisions.

Second, qualified immunity may be important as a release valve because it may provide courts with an opportunity to affirm that a particular plaintiff was wronged, even if it is unfair to hold an individual defendant personally liable for that wrong. John Jeffries has made arguments along this line, essentially maintaining that the rights-remedy gap qualified immunity creates is a net positive because it frees courts to announce new rights going forward without imposing retroactive liability on government officials.[85]

It is worth noting that for qualified immunity to play a role in either of these scenarios, cases in which a qualified immunity defense may be raised must be filed with the courts. Courts cannot take advantage of qualified immunity as a pressure valve if every filed case involves legal principles so commonly accepted that there is never a need or opportunity to announce new legal principles. In this sense, at least where the law is unclear, there likely is an optimal amount of cases involving novel legal principles in which qualified immunity may be an appropriate defense. If very few or no cases are filed in which qualified immunity may play a dispositive role, that may limit the power of federal courts to announce prospective rules moving forward, even if underlying constitutional violations have transpired.

This brings me to the question I seek to begin to answer here: namely, whether qualified immunity is affecting case-screening decisions for those attorneys who have some experience litigating *Bivens* actions. To assess this possibility, I report on the results of a series of conversations with attorneys with experience litigating *Bivens* and other civil rights claims. These results, while limited in some respects, reflect a hesitance of many attorneys

85. *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 287 (2000); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

to litigate cases that could even come close to implicating the qualified immunity defense.

III. Qualified Immunity as a Pre-Litigation Filter

Evaluating the role that qualified immunity may play at the pre-litigation stage of a case is not subject to easy quantification. It is perhaps impossible to know how many *Bivens* cases have never been filed because of the threat of a qualified immunity defense. But it is likely that attorneys who have experience with *Bivens* and other civil rights litigation will have a valuable, if anecdotal, perspective to offer on the role, if any, that qualified immunity plays in case screening. This part of the paper describes my attempt to capture that perspective, and provides some initial, necessarily tenuous, impressions.

I summarize the results below, but I must emphasize that it is far too soon to draw any conclusions from them. First, at this point it is impossible to know if the respondents are representative of *Bivens* litigators (to the extent there is such an identifiable group) or civil rights litigators more generally. Second, the collection of data was not systematic; I did not use a directed interview approach and generally was content to let the respondents dictate the course of the conversation. I also do not have training that might be appropriate for conducting uniform qualitative research of this kind. Thus, for each conversation, I surely asked the same questions in different ways depending on the course of the discussion. Third, the "data," even had they been collected by someone with greater experience and training, are soft by nature. I have questioned reliance on anecdotal reports about the state of *Bivens* litigation in the past,[86] and I am loath to place undue weight on it in this context.

Nonetheless, the data at least point in useful directions for further research and, although soft, may be the only way of unearthing the effect of qualified immunity at the case-screening stage. Unlike measuring "success" of litigation, which at least can be defined one way or another and then evaluated, considerations of case screening are very difficult to measure quantitatively. For example, the cases rejected by attorneys may ultimately be filed pro se, but discovering this fact may be impossible given attorney-client confidentiality.[87] Finally, however reliable the data may be for drawing broad conclusions, they are fundamentally interesting and reinforce some of the observations about *Bivens* litigation that other commentators and I have made in the past.

86. Reinert, *supra* note 5, at 827–31.

87. Consultations for the purpose of case evaluation are considered confidential. Therefore, even if attorneys could remember or provide records for each of the cases that they rejected because of qualified immunity or other concerns, they could not disclose that information to allow for follow-up to determine whether rejected cases ultimately found a home with another attorney or were filed pro se.

The first task was to identify attorneys who have had some experience litigating *Bivens* claims. This was accomplished by first searching for all reported decisions after January 1, 2006, in which the plaintiff was represented by counsel and the *Bivens* decision was cited.[88] This search produced 299 decisions, but not all were *Bivens* cases. Therefore, I reviewed each decision and identified 133 cases in which one or more attorneys had brought a *Bivens* or related cause of action.[89] To focus on the attorneys most likely to have experience with multiple *Bivens* actions, I then conducted a secondary search for each attorney in each of the 133 cases to determine which of them had been involved in multiple reported decisions in which *Bivens* or a related cause of action was implicated, identifying more than forty attorneys or law firms.[90] After identifying these attorneys, I sought to contact each by telephone (or, alternatively, by email) to discuss the potential role that qualified immunity concerns played in their decisions to accept *Bivens* cases for representation. Telephone conversations with these attorneys were generally unstructured, but I sought to focus respondents on the following issues: (1) screening factors in general, including firm resources, client considerations, and substantive law; (2) the extent to which evaluations of qualified immunity as a substantive barrier to relief were considered at the case-screening stage; (3) the extent to which the procedural dimensions of qualified immunity (e.g., the availability of interlocutory appeal or the likelihood of stays of discovery during resolution of the qualified immunity defense) affected screening decisions; and (4) any observations the respondents could make about the distinction between *Bivens* cases and § 1983 cases that mattered for screening. Respondents were informed that I was working on a paper regarding *Bivens* litigation and the role of qualified immunity and that their responses to my questions would be incorporated into the paper.

Nearly every respondent, regardless of the breadth of her experience, confirmed that concerns about the qualified immunity defense play a substantial role at the screening stage.[91] For some, qualified immunity was the primary factor when evaluating a case for representation. Most of these respondents focused on the hostility to *Bivens* and other civil rights actions within their own circuits when explaining why qualified immunity was so significant a case-evaluation tool. For instance, one advocate operating in

88. I used the following search in the "CTA" Westlaw database: BIVENS & da(aft 1/1/2006) % ("PRO SE").

89. For instance, some cases involved Federal Tort Claims Act claims. I reasoned that attorneys who initiated FTCA actions were likely to have been involved with *Bivens* actions on other occasions.

90. This was accomplished using the following search in the "ALLFEDS" Westlaw database: "Bivens & at (**)" where "**" was the name of each attorney.

91. Telephone and email interviews with Respondent No. 1 (Mar. 10, 2011); No. 4 (Mar. 9, 2011); No. 8 (Mar. 8, 2011); No. 13 (Mar. 9, 2011); No. 14 (Mar. 8, 2011); No. 18 (Mar. 8, 2011); No. 19 (Mar. 10, 2011); No. 26 (Mar. 9, 2011); No. 29 (Mar. 9, 2011) (notes on file with author).

the Fourth Circuit explained that that court's approach forced him to take qualified immunity concerns into account at the outset of client screening.[92] Similarly, a lawyer working in Illinois stated that because of the Seventh Circuit's case law, he will not take a case if there is even the "slightest chance" that dismissal will be based on qualified immunity.[93]

For those respondents who felt that qualified immunity was less significant, the explanation often addressed other case-selection criteria. For instance, multiple respondents indicated that they only accepted the most egregious cases for representation, which made it unlikely that qualified immunity would play a role.[94] While acceptance of egregious cases was not designed to avoid qualified immunity concerns, it had this incidental effect because it is unlikely that a defendant who committed an egregious violation would also be protected by qualified immunity. For a few other respondents, qualified immunity did not play a role either because of self-professed hubris[95] or a unique mission. Respondents who worked at non-profit organizations or who had other law reform goals, for instance, expressed concern about qualified immunity but stated that it was not dispositive because of their organization's mission.[96]

Only one respondent, with a small amount of experience litigating *Bivens* actions, minimized the role of qualified immunity.[97] Instead, this respondent's concerns about *Bivens* litigation had more to do with the "special factors" analysis than qualified immunity. Thus, my study suggests nearly overwhelming support for the proposition that qualified immunity considerations matter at the screening stage, and some attorneys consider them dispositive. On the substantive side, some respondents accounted for qualified immunity by not taking cases in which it could be raised, taking only the most egregious cases, or attempting to limit the impact of circuit precedent by litigating cases in state court (something that is a non-starter for *Bivens* claims).[98]

Qualified immunity also mattered to these attorneys on the procedural side. That is, the aspect of qualified immunity that permits interlocutory appeal at every stage of the proceeding, with stays of discovery routinely granted pending the resolution of a qualified immunity defense, also operates as a substantial factor in case screening. Two respondents indepen-

92. Interview with Respondent No. 8.

93. Interview with Respondent No. 18.

94. Interviews with Respondents Nos. 1, 3, 7, 17.

95. One respondent stated that qualified immunity did not matter to him because "I like challenges." Interview with Respondent No. 10.

96. Interviews with Respondents Nos. 19, 31.

97. Interview with Respondent No. 44.

98. Although state courts of general jurisdiction could presumably exercise subject matter jurisdiction over *Bivens* claims, defendants could also exercise the right to remove to federal court. Every respondent who addressed the question took the view that federal civil defendants would always prefer to be in federal court.

dently referred to the interlocutory appeal issue as a "killer," because it slows down the litigation.[99] While an appeal is being resolved, evidence may become stale, witnesses may disappear, and a client may lose hope.[100] For defendants in a case with political implications, the delays occasioned by the procedural aspect of qualified immunity may stretch litigation on so that it becomes the problem of a new administration.[101]

Finally, the attorneys offered some explanations regarding the relative scarcity of *Bivens* litigation and its perceived lack of success. Some respondents noted that one explanation for the difficulty bringing *Bivens* suits relates to the tendency of federal judges to defer to federal agents, particularly law enforcement agents.[102] Others pointed to the related observation that federal agents are, as a matter of both perception and reality, more sophisticated, professional, and well-trained than their state counterparts.[103] Finally, some respondents indicated that the inability to obtain attorneys' fees for *Bivens* actions, as well as the formal position that the federal government takes regarding indemnification of individual employees, deters lawyers from bringing such claims.[104]

IV. Reflections on the Data

The data are limited and anecdotal in nature, but assuming these results are representative of the available pool of lawyers who represent potential *Bivens* plaintiffs, they suggest a number of conclusions. First, qualified immunity plays a large role in case selection. Most attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation. If the given wisdom that plaintiffs' lawyers are risk averse is true,[105] the limited universe of attorneys who litigate *Bivens*-type claims may choose cases in which qualified immunity plays a limited role in case resolution. The result may be that the vast majority of *Bivens* cases never test the limits of existing law, because the attorneys who file them select cases that are within the "clearly established" zone that will defeat a qualified immunity defense.

Second, qualified immunity may have this impact not simply because of its substantive content, but also due to the procedural obstacles that ac-

99. Interviews with Respondents Nos. 7, 29.
100. Interviews with Respondents Nos. 7, 26, 29.
101. Interview with Respondent No. 13.
102. Interviews with Respondents Nos. 10, 19.
103. Interviews with Respondents Nos. 7, 8.
104. Interviews with Respondents Nos. 7, 13.
105. *See, e.g.*, Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 Ala. L. Rev. 447, 453 (2010); Patrick A. Luff, Bad Bargains: *The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. Mem. L. Rev. 65, 80 n.59 (2010); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 230–32 (1983).

company invocation of the qualified immunity defense. Dealing with client expectations while a case is on interlocutory appeal and not progressing through discovery may be a deterrent to bringing particular lawsuits—even when the plaintiff's attorney thinks that the qualified immunity defense will ultimately be rejected.

The effect of qualified immunity, therefore, may not be to reduce the success of civil rights claims but to limit the extent to which civil rights litigation tests the boundaries of the law. If the result is a suboptimal level of constitutional *Bivens* litigation, then it might be worth considering some modifications short of the governmental liability model that many critics of qualified immunity have suggested.[106] For instance, if attorneys' fees were available for plaintiffs who showed that their rights were violated, even though the rights were not clearly established, it might incentivize attorneys to represent litigants in the "gray" area of constitutional litigation. This model is not foreign to civil rights litigation—in mixed-motive employment discrimination cases, plaintiffs are not entitled to compensatory damages but may be awarded other relief, including attorneys' fees.[107] Similarly, circuit courts of appeals could create fast-track appeals for cases involving appeals from the denial of qualified immunity at the motion to dismiss stage, so as to minimize the delay for discovery. The United States Court of Appeals for the Second Circuit recently created a fast track for appeals of a large category of motions to dismiss.[108] Notably, however, appeals from denials of motions to dismiss on qualified immunity grounds are not included in the new procedure.

I recognize that we may worry less about suboptimal levels of civil rights litigation for damages if we think that there are not that many violations of the law in the gray area that qualified immunity protects. As to the former possibility, it is not clear that there are other effective ways of enforcing most constitutional rights outside of damages litigation. Injunctive relief is not a viable option for many reasons, particularly in the area of the Fourth Amendment, and criminal cases rarely result in written opinions resolving disputed constitutional issues. When they do, they often revolve around fact-intensive applications of established constitutional law. With regard to the possibility that there simply are not that many violations of the law in the gray area implicated by qualified immunity, it is difficult if not impossible to evaluate this contention.

106. *See* Reinert, *supra* note 5, at 814 n.18 (summarizing literature).

107. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

108. *See* 2D CIR. R. 31.2(b) (effective Dec. 15, 2010) (creating fast track for appeals from dismissals based on Rules 12(b)(1), (6) and 28 U.S.C. § 1915(e)(2)).