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Qualified Immunity After *Ziglar v. Abbasi*: The Case for a Categorical Approach

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Qualified Immunity After *Ziglar v. Abbasi*: The Case for a Categorical Approach

LEAD ARTICLE

QUALIFIED IMMUNITY AFTER ZIGLAR V. ABBASI: THE CASE FOR A CATEGORICAL APPROACH

MICHAEL L. WELLS*

Qualified immunity protects officers from liability for damages unless they have violated clearly established rights, on the ground that it would be unfair and counterproductive to impose liability without notice of wrongdoing. In recent years, however, the Supreme Court has increasingly applied the doctrine to cases in which it serves little or no legitimate purpose. In Ziglar v. Abbasi, the rights were clearly established but the Court held that the officers were immune due to lack of clarity on other issues in the case. Because cases like Ziglar undermine the vindication of constitutional rights and the deterrence of violations, critics of immunity have called for its abolition. This Article rejects both of these approaches. This Article's thesis is that the availability of qualified immunity should depend on an assessment of costs and benefits, which vary depending on context. A better approach is to retain the basic doctrine but to identify categories of cases in which immunity should be denied, and others in which it should be strengthened.

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INTRODUCTION

After the September 11, 2001 attacks, federal officials arrested and detained over seven hundred undocumented aliens.¹ Many detainees were held for several months before being cleared of involvement in the attacks.² They sued the Attorney General and other federal

1. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1852–53 (2017).

2. *Id.* at 1853 (“Conditions in the Unit were harsh. Pursuant to official Bureau of Prisons policy, detainees were held in tiny cells for over 23 hours a day Lights in

officials over their treatment in detention. These complaints asserted violations of Fourth Amendment unreasonable seizure rights and Fifth Amendment substantive due process and equal protection claims. Because no federal statute authorizes lawsuits of this sort, the plaintiffs sought damages under the implied cause of action theory recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*³ for certain constitutional violations.⁴ In *Ziglar v. Abbasi*,⁵ a 4-to-2 majority declined to apply the *Bivens* doctrine to most of the plaintiffs' claims.⁶ *Ziglar* may become a landmark ruling based on its highly restrictive approach to judge-made damages remedies for constitutional wrongs. Although the majority consisted of only four Justices,⁷ the opinion seems designed to bury the "implied cause of action" doctrine. Nor did the outcome in *Ziglar* come as a surprise. Indeed, the Court's ruling was the ninth case in a row that narrowed the scope of permissible *Bivens* actions.⁸ One commentator has suggested that, "for the sake of judicial candor and litigative efficiency[,] [the Court] should hold that the *Bivens* cause of action is limited to the facts of *Bivens*" and of two other early post-*Bivens* cases.⁹

This Article focuses on a separate aspect of *Ziglar*: over the longer term, this case may attract as much interest for its holding on a separate issue—namely, the qualified immunity of executive officials. This defense blocks the recovery of damages even when the plaintiff can get past the "cause of action" hurdle by establishing an actionable violation

the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells.”).

3. 403 U.S. 388 (1971).

4. *See id.* at 392 (acknowledging that persons may bring certain constitutional claims and seek necessary relief even though remedies are not explicitly prescribed within the Bill of Rights, nor authorized by any statute).

5. 137 S. Ct. 1843 (2017).

6. *See id.* at 1854–65 (denying the plaintiffs' *Bivens* claims but remanding for reconsideration of the plaintiffs' claim that the warden of the detention facility had violated the Fifth Amendment by allowing prison guards to abuse them).

7. Justice Gorsuch had not yet been confirmed when the case was argued, and Justices Kagan and Sotomayor recused themselves. Justice Kennedy wrote the opinion for the Court. Justices Breyer and Ginsburg dissented.

8. *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 223, 313 (2017).

9. *Id.*

of constitutional rights.¹⁰ Qualified immunity shields an official engaged in executive or administrative functions from having to pay damages for constitutional wrongdoing unless the plaintiff can show that the official has violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹ The Court has left no doubt that qualified immunity is a powerful defense, which “protects ‘all but the plainly incompetent or those who knowingly violate the law.’”¹² It not only knocks out many *Bivens* claims, but, also, as a practical matter, its greatest impact is in the much larger number of suits, brought under 42 U.S.C. § 1983,¹³ against state and local officials.¹⁴

The qualified immunity issue arose in *Ziglar* because the detainees did not rely solely on *Bivens*. They also sued under 42 U.S.C. § 1985(3),¹⁵ which imposes statutory liability when two or more persons “conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws.”¹⁶ The Civil Rights Act of 1871 included § 1985(3), which is similar to the better known and far more widely used § 1983.¹⁷ Unlike § 1983, this statute does not operate only when the defendant has acted “under color of state law”; it can be used to sue both federal officials and private actors.¹⁸ The § 1985(3) count of the plaintiffs’ complaint asserted that federal

10. The “cause of action hurdle” refers to whether a particular plaintiff is an appropriate member of a class of litigants who may invoke the power of the court to seek a remedy.

11. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Officers engaged in legislative, judicial, or prosecutorial functions are absolutely immune from paying damages, no matter how flagrant the violation. *See infra* note 25.

12. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

13. 42 U.S.C. § 1983 (2012) (authorizing the possibility of civil actions for any person who is deprived of their constitutional rights).

14. *See Harlow*, 457 U.S. at 818 n.30 (indicating that the qualified immunity rule applies to § 1983 litigation).

15. 42 U.S.C. § 1985(3) (allowing any person deprived of their constitutional rights and privileges by two or more people to bring an action to recover damages).

16. *Id.*; *Ziglar*, 137 S. Ct. at 1865–66.

17. Civil Rights Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (1871). Thus, section 1 of the 1871 statute is currently codified as 42 U.S.C. § 1983, and section 2 is currently codified as 42 U.S.C. § 1985(3).

18. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971) (holding that defendants do not have to just act under color of state law, as conspiracy claims may be brought under § 1983 against state and federal officials). For examples of § 1983 cases, see *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017); and *White v. McKinley*, 519 F.3d 806, 816 (8th Cir. 2008).

officers “detained them in harsh conditions because of their actual or apparent race, religion, or national origin, in violation of the equal protection component of the Fifth Amendment.”¹⁹ Absent a compelling state interest, it is clear that the government may not discriminate on these grounds.²⁰ Thus, the complaint alleged violations of clearly established law. Even so, the Court held that the officials were protected by qualified immunity, reasoning that the § 1985(3) doctrine was unclear as to whether an actionable conspiracy can exist among officials of the same department of government and that the case involved high level executive decision making about national security.

Ziglar is an especially officer-protective qualified immunity decision because it seems to treat qualified immunity as a general no-liability rule *whenever* the law bearing on liability is unsettled and no matter *why* liability is uncertain. The holding thus implicitly rejects an alternative view, under which the official avoids liability only when the disputed element of the plaintiffs’ claims involves the *defensibility of the official’s conduct*. In other words, the Court in *Ziglar* treats qualified immunity as a general rule of “no liability when any element is uncertain,” even when the policies that gave rise to the immunity defense do not apply in the case at hand. The Court’s approach rests on a preference for laying down bright-line rules, as opposed to formulating a more refined doctrine rooted in the reasons that underlie the qualified immunity defense. This preference for rules is not inherently objectionable, because rules can serve worthy goals independent of the substantive interests they are designed to further. These goals include promoting stability in the law, predictability of outcomes, control of lower level decision makers, and efficiency in resolving disputes.²¹ The Court’s predilection for bright-line rules over substance-driven rules, so vividly illustrated by *Ziglar*, permeates the Court’s qualified immunity doctrine.²² This Article focuses on the institutional interests served by

19. *Ziglar*, 137 S. Ct. at 1853.

20. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 678, 681–82, 1564–65 (19th ed. 2016) (summarizing the Court’s jurisprudence and application of classifications that meet strict scrutiny).

21. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 539–44 (1988) (discussing the values served by rule-based decision making and concluding that “[f]ormalism . . . achieves its value when it is thought desirable to narrow the decisional opportunities and the decisional range of a certain class of decisionmakers”).

22. See, e.g., John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 258 (2013) [hereinafter Jeffries, *Liability Rule*] (“Qualified immunity should be narrowed to adhere more closely to the rationales for limiting liability in the first place.”).

framing qualified immunity doctrine in the form of rules. It argues that “ruleness” values deserve to play a role in the qualified immunity context, but not nearly as much of a role as the Court now accords them. The universe of constitutional tort cases is not monolithic. One can make categorical distinctions between substantive contexts in which the policies favoring immunity are comparatively strong or weak.

This Article’s argument rests on three key points: First, recognizing the existence of *any* immunity defense is arguable. Second, there are nonetheless defensible, *substantive* justifications for retaining some form of immunity defense. Third, the best accommodation of the competing considerations involves marking off manageable categories of cases in which these substantive grounds for applying the immunity doctrine are especially weak or strong. As Richard Fallon has explained, “official immunity doctrines perform an equilibrating function by diminishing the social costs that constitutional rights would have if officers who violated them were always strictly liable in suits for damages.”²³ Thus, the case against the Court’s broad rule is not strong enough to warrant wholesale abandonment of the defense, despite the empirical arguments marshalled by the Court’s anti-immunity critics. The Court, in addressing the arguments of anti-immunity critics, should embrace a readily available and modest alternative to the current law that falls short of wholesale abandonment of the immunity doctrine.

The analysis in this Article honors the Court’s overarching framework for resolving immunity issues. That framework treats § 1983 and § 1985(3) as “common law statutes,” which authorize the Court to act freely in the manner of a common law court in shaping of official immunity doctrine.²⁴ The Court “seeks a proper balance between two competing interests.”²⁵ One set of interests involves

23. Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 485 (2011).

24. See Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, *CAL. L. REV. ONLINE* 1, 2 (forthcoming 2018). But see William Baude, *Is Qualified Immunity Unlawful?*, 106 *CAL. L. REV.* 45, 50–51 (2018) (arguing that § 1983 is better understood as a “common law statute”); see also *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment) (endorsing Baude’s view).

25. *Ziglar*, 137 S. Ct. at 1866; see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests”); *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (“Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government’s ability to perform its traditional functions.”); *Davis v. Scherer*, 468 U.S. 183, 195 (1984)

vindicating constitutional rights and deterring constitutional violations. On the other side of the ledger lies an interest in ensuring fairness to government officials²⁶ and in lowering the “social costs” that constitutional tort litigation can generate.²⁷ The Court’s cost-benefit model rejects *both* the notion that a remedy should be available for every violation of a constitutional right,²⁸ *and* the proposition that executive officers should always enjoy immunity from suits for damages.²⁹

A key feature of the doctrine is that the Court refuses to balance interests on a case-by-case basis—for example, by evaluating in each case the precise degree of official wrongfulness, the nature and importance of the constitutional rights at stake, and other considerations presented by that particular case. Instead, the Court aims for “the best attainable accommodation of competing values,”³⁰ by applying the “clearly established law” rule to all qualified immunity cases.³¹ That rule thus “reflects a balance that has been struck across the board.”³²

This Article does not take issue with the Court’s rejection of case-by-case balancing in the qualified immunity context, particularly because

(discussing the Court’s effort to strike a “balance . . . between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties”); *Harlow v. Fitzgerald*, 457 U.S. 800, 813–14 (1982) (“The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”).

26. See, e.g., *Butz v. Economou*, 438 U.S. 478, 506 (1978) (“[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law.”); *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (“Liability for damages for every action which is found subsequently to have been violative of a student’s constitutional rights . . . would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion . . .”); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (holding that one rationale for official immunity is “the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion”); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”).

27. *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

28. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–86 (1991) (arguing American legal tradition demonstrates that there are constitutional rights without individually effective remedies).

29. For a defense of absolute immunity for executive officers in the common law context, see *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

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

31. See *supra* note 11.

32. *Anderson*, 483 U.S. at 642 (citation and internal quotation marks omitted).

a repudiation of case-by-case balancing marks much of our constitutional law. In the First Amendment context, for example, the Court has generally rejected such balancing, because it would “lead to unpredictable results and uncertain expectations.”³³ To say that the Court has wisely embraced a non-case-by-case balancing approach in qualified immunity cases is not to say, however, that the particular approach it has embraced makes good sense. Close examination suggests that the Court’s current approach gives too much weight to the pro-immunity side of the balancing ledger. Cost-benefit balancing is best employed, as it is in First Amendment doctrine, as a means for making rough, but useful, comparisons among categories of fact patterns.³⁴ A category-by-category approach would accommodate the competing policies at work in qualified immunity cases more fully than the Court’s current across-the-board rule. And it would do so without giving up the benefits of rule-based doctrine.

Part I of this Article focuses on *Ziglar* and makes two points, one in Section I.A and the other in Section I.B. Section I.A shows that the application of qualified immunity in *Ziglar* does not square with the aims of the doctrine, but only with the values served by bright-line rules. The Court’s premise, albeit unarticulated and unexamined, is that qualified immunity must operate as a sweeping rule that is equally applicable in each and every case. Section I.B argues that the case for a rule of this kind is unpersuasive, because its costs outweigh its benefits. Part II addresses critics of qualified immunity who favor its abolition by one means or another, in favor of a general rule of liability for constitutional torts.³⁵ Section II.A defends qualified immunity against objections that it rests on faulty empirical premises and Section II.B rejects an alternative approach that would greatly expand recoveries by shifting liability to local governments. This Article’s defense of qualified immunity, however, is not a defense of the current

33. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974) (rejecting case-by-case balancing in setting free speech constraints on liability for defamation).

34. *Cf.* SULLIVAN & FELDMAN, *supra* note 20, at 944–46.

35. *See, e.g.*, Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1, 7 (2018); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811–13 (1994) (focusing on Fourth Amendment remedies); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015); Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1510–11 (1999); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1800 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*].

regime. Building on this idea, Part III proposes a new approach that gives significant—but not always controlling—weight to the values of rule-based doctrine. The alternative this Article calls for is judicial recognition of a limited number of categories in which the defense is unavailable because the benefits of immunity are significantly outweighed by its costs. Section III.A identifies six such categories. Section III.B then identifies two categories of cases in which the benefits of immunity are especially high in comparison to its costs. In these two sets of cases, according to the analysis offered here, a thoughtful build-out of categorical balancing rules might well support the displacement of the Court’s existing clear-error approach with a truly bright-line rule of absolute immunity.

I. QUALIFIED IMMUNITY IN *ZIGLAR*

Official immunity protects all officials engaged in “discretionary” functions from liability for damages, at least to some extent. Judges,³⁶ legislators,³⁷ and prosecutors³⁸—or, more precisely, persons engaged in judicial, legislative, and prosecutorial functions³⁹—are absolutely immune from liability for damages, no matter how egregious their conduct is. Executive and administrative acts are covered by qualified immunity. Under *Harlow v. Fitzgerald*,⁴⁰ officers who engage in these acts are “are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴¹ Thus, plaintiffs may lose even when they can prove a violation of constitutional rights and damages resulting from the violation.

A. *Ziglar and the Policies Underlying Qualified Immunity*

In *Ziglar*, Justice Kennedy’s majority opinion ordered dismissal of the § 1985(3) claim on the ground that all of the officer-defendants were shielded from liability under the qualified immunity doctrine. According to the opinion, the application of § 1985(3) to these allegations failed the “clearly established law” test, because “the

36. *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978).

37. *Bogan v. Scott-Harris*, 523 U.S. 44, 52–54 (1998).

38. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

39. *See, e.g., Burns v. Reed*, 500 U.S. 478 (1991) (distinguishing between the advocative and investigative conduct of prosecutors); *Forrester v. White*, 484 U.S. 219 (1988) (distinguishing judicial from administrative functions).

40. 457 U.S. 800 (1982).

41. *Id.* at 818.

conspiracy recited in the complaint was alleged to have been between or among officers in the same branch of the government (the Executive Branch) and in the same department (the Department of Justice).⁴² Without addressing whether such “intra-branch” behavior can give rise to a conspiracy for purposes of § 1985(3), the Court held that the law on the question lacked sufficient clarity.⁴³ In order to show why, Justice Kennedy drew an analogy to the antitrust context.⁴⁴ In antitrust, the Court rejected the existence of “intracorporate conspiracies” to restrain trade because the officers of a corporation all act for the same corporate entity.⁴⁵ As such, “agents of the same legal entity are not distinct enough to conspire with one another.”⁴⁶ As for § 1985(3), the Court had never ruled one way or the other on the “intracorporate conspiracy doctrine.” Turning to lower court decisions, Justice Kennedy found a division of authority over the viability of the intracorporate conspiracy doctrine, in cases that involved suits against private businesses and officers sued for violations under § 1985(3).⁴⁷ This division of lower court authority was apparently decisive: “When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability.”⁴⁸ Thus, the officials avoided liability because “[u]nder these principles, . . . reasonable officials in petitioners’ positions would not have known, and could not have predicted, that § 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged.”⁴⁹

Ziglar is an ambitious qualified immunity case in part because the Court ruled on a motion to dismiss the complaint, and thus

42. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

43. *See id.* (holding that here reasonable officers could not have known the law applied to their behavior).

44. *Id.* (comparing officers of a corporate entity jointly adopting a policy with federal agents of the same department making a similar joint agreement).

45. *Id.*

46. *Id.* at 1868.

47. *See id.* (finding that since § 1985(3) does not contain an “under color of” state law requirement, it can be used against private actors for violations of civil rights and against officials acting under color of federal law).

48. *Id.*

49. *Id.* at 1867. The Court also said that immunity was justified because “open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue.” *Id.* at 1868. For a discussion of this aspect of the opinion, see *infra* Section III.B.

“accept[ed] as true the facts alleged in the complaint,”⁵⁰ including the allegation that the officers unjustifiably discriminated against the plaintiffs on the basis of race, religion, and national origin. The impermissibility of such discrimination has been settled for decades, and the Court in *Ziglar* does not suggest otherwise. The only lack of clarity in the case involved the intrabranched conspiracy issue. The question thus arises whether *this type* of lack of clarity should matter.

1. *Fairness to defendants*

An important objection to the Court’s reliance on “uncertainty as to intracorporate conspiracies” is that the uncertainty on that point has nothing to do with either of the two rationales for qualified immunity. First, official immunity is recognized as a matter of fairness when an officer reasonably believes he is acting within the constitutional rules.⁵¹ For example, in *Pierson v. Ray*,⁵² the first modern case in the development of qualified immunity for constitutional torts, the Court awarded qualified immunity to police officers to avoid the unfairness of imposing liability without fault.⁵³ Writing for the Court, Chief Justice Warren emphasized the unfairness of a strict liability rule when he wrote: “A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”⁵⁴ Thus, the Court recognized a defense of “good faith and probable cause,” which meant that the officer would have a defense if he reasonably believed the arrest was proper, even if the arrest in fact violated the Fourth Amendment. In *Scheuer v. Rhodes*,⁵⁵ the Court added that recognizing qualified immunity avoids “the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion.”⁵⁶ More recently, in *Hope v. Pelzer*,⁵⁷ the Court said

50. *Id.* at 1852.

51. *See id.* at 1867 (discussing the inherent tension between private citizens’ constitutional rights and police officers’ ability to perform their duties effectively).

52. 386 U.S. 547 (1967).

53. *Id.* at 557.

54. *Id.* at 555.

55. 416 U.S. 232 (1974).

56. *Id.* at 240.

57. 536 U.S. 730 (2002).

that the point of qualified immunity is that officials are entitled to “fair warning” that their act violates federal law.⁵⁸

This fairness rationale is analogous to the negligence rule in ordinary tort law. A central principle of negligence law is that it is unfair to impose liability on a private actor who cannot reasonably foresee that his act will injure someone.⁵⁹ It seems similarly unfair to impose liability on an officer who cannot reasonably foresee that his act will violate a plaintiff’s constitutional rights. There is a difference between private actors and state officials, in sense that officials typically do intend to touch, threaten, imprison, or otherwise invade the plaintiff’s person or property. But this difference is irrelevant to the “fair warning” issue. Fair warning relates to whether the officer made a choice to risk *unconstitutional* interference with the plaintiff.⁶⁰ Some intentional interferences are unconstitutional and others are not.⁶¹ Officers who reasonably but mistakenly believe they have sufficient grounds to make an arrest, fire an employee, or revoke a business license lack “fair warning” that they have crossed constitutional lines.⁶² This principle is reflected in the common law of intentional torts, which declines to impose liability on a person who shoots another, even a police officer, in the absence of fair warning that his target is

58. *Id.* at 739–40; *see also* Wood v. Strickland, 420 U.S. 308, 319 (1975) (finding liability for all constitutional violations, no matter how innocent, “would unfairly impose upon the school decision maker the burden of mistakes made in good faith in the course of . . . his official duties”).

59. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 77 (Mark DeWolfe Howe ed., 1963) (“The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.”). Holmes’ rationale remains “the most influential theoretical argument on behalf of a negligence rule tied to the principle of reasonable foresight.” RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 121 (11th ed. 2016). Modern tort theorists have elaborated on this central principle. *See, e.g.*, Stephen Perry, *Torts, Rights, and Risk*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 60, 60 (John Oberdiek ed., 2014) (“[T]he fundamental moral right underlying negligence law is, roughly, a right not to be caused reasonably foreseeable physical harm as a proximate result of another person’s engaging in unreasonably risky conduct towards one.”); ARTHUR RIPSTEIN, PRIVATE WRONGS 89–94 (2016) (discussing the role of foresight in negligence law).

60. *See, e.g.*, *Hope*, 536 U.S. at 739–41 (noting that officers are on notice that their conduct is unlawful only so far as their conduct violates “clearly established” law).

61. *Id.*

62. *Id.*

not an aggressor.⁶³ It is equally unfair to impose constitutional tort liability on an officer in a similar situation.

2. “*Social costs*”

Second, constitutional tort litigation generates “social costs [which] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”⁶⁴ All litigation produces similar costs, yet no immunity defense is generally available to private persons and entities. The difference between private and public actors is that public actors face a different incentive structure. The core of the “social costs” rationale for official immunity is that, at least in theory, private actors capture the benefits of their actions.⁶⁵ When those actions generate risks to others, private actors should take those costs into account.⁶⁶ The aim is to encourage them to (more or less accurately) weigh the real costs against the benefits. Public officers do not capture the benefits of their actions in the same way. Those benefits go to society at large, for example, in the form of effective policing, fire protection, safe products, clean air and water, good teaching, and generally efficient administration of government.⁶⁷

Allowing for official immunity maximizes social utility and, by extension, social welfare by enabling officials to act without limitation toward the public good.⁶⁸ If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability. A police officer may decline to make an arrest that arguably violates the Fourth Amendment, or the supervisor of a government agency may decline to fire an incompetent employee whose job is arguably protected under the due process clause. From the “social costs”

63. See *Courvoisier v. Raymond*, 47 P. 284, 286–87 (Colo. 1896) (finding that if the defendant’s fears were reasonable under the circumstances then liability would not be extended).

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

65. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (discussing the incentive structures that private firms face and how it affects behavior).

66. Reasoning along similar lines, the Court rejected qualified immunity for privately employed prison guards in *Richardson*. *Id.* at 409.

67. For a systematic exposition of this point, see Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1135–40 (1981).

68. See *Forrester v. White*, 484 U.S. 219, 223 (1988) (explaining that “the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties”).

perspective, the rationale for the defense is that official immunity will correct the asymmetrical incentives officials otherwise face.⁶⁹ The availability of a defense protects officers who act in the public interest. Thus, the defense encourages the police officer to make the arrest and the supervisor to fire the employee despite the uncertain constitutional issue that would otherwise counsel caution.

3. *Fairness, utility, and the conspiracy issue*

In *Ziglar*, neither fairness nor utility were threatened by the imposition of liability. According to the complaint, the officials deliberately discriminated on the basis of race, religion, and national origin in their abusive treatment of the detainees.⁷⁰ There is no lack of clarity in the constitutional doctrine that forbids these types of discrimination, no lack of fair warning that the acts are forbidden, and no danger that officials will be overly cautious in an area in which the constitutional line is uncertain. The application of § 1985(3) conspiracy doctrine is a collateral matter. Lack of clarity on that issue is as irrelevant as lack of clarity on the statute of limitations, or issue preclusion. It is as though the Court, instead of permitting an action for a clear constitutional violation in *Bivens* itself, should have held that the officials were immune because of lack of clarity as to the previous available *Bivens* actions. Many questions may determine outcomes, but not all of them have to do with the state of the law as to whether the conduct at issue violated the plaintiff's constitutional rights. If the officers knew they could be sued under § 1985(3) pursuant to an "intra-branch conspiracy" theory, they understood (according to the complaint) that they were violating constitutional rights.⁷¹

In this respect, the *Ziglar* Court seems to enlarge the scope of qualified immunity beyond the *Harlow* doctrine.⁷² *Harlow* held that executive officials are immune from damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷³ The plaintiffs in *Ziglar* claimed violations of their rights to equal protection and religious liberty. These rights were "clearly established," no matter how

69. See Cass, *supra* note 67, at 1152 (describing the pressures public officials face and the social benefits of damage liability).

70. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1853 (2017).

71. *Id.* at 1853–54.

72. *Id.* at 1872 (acknowledging the Court's precedent and the gradual expansion of qualified immunity).

73. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

unclear the doctrine may have been on whether intragovernmental conspiracy can trigger § 1985(3) liability.⁷⁴ Under *Ziglar*, it appears that the defendant may win without showing lack of clarity as to the right violated, so long as he can show that the law is uncertain as to *other* aspects of the plaintiff's case.

B. *Benefits and Costs of the Ziglar Rule*

In *Ziglar*, the Court treats “lack of clearly established law” as a broad rule, which hinges on lack of clarity across-the-board, not only as to the core legal obligation owed by the defendant, but also as to whether § 1985(3) reaches collaboration among members of the same Executive Department.⁷⁵ The rule controls the outcome even though there is no link between the rationales for the rule and its application to the plaintiff's substantive claims. *Ziglar* presents a typical example of the Supreme Court's increasing focus on developing sharp edge rules in its qualified immunity cases. The early cases on qualified immunity considered several factors in their application of the defense, including the nature of the defendant's duties and his state of mind.⁷⁶

Beginning with *Harlow*, the Court moved to a more rule-oriented approach, by taking two steps.⁷⁷ First, it abandoned the old distinctions among government jobs in favor of a general norm for all qualified

74. *Ziglar*, 137 S. Ct. at 1869.

75. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 23 (1991) (explaining that “generalization, with its necessary selection and suppression, is . . . central to prescribing by rule”).

76. *Pierson v. Ray* focused on the special problems confronted by police officers. 386 U.S. 547 (1967). In *Scheuer v. Rhodes*, the defendant was the governor of Ohio, and the Court framed the issue with that office in mind. 416 U.S. 232, 247 (1974) (explaining that because “the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility,” the governor was entitled to a “comparably broad” “range of discretion”). *Wood v. Strickland*, 420 U.S. 308 (1975), took the same approach with school administrators. In *Pierson*, *Scheuer*, and *Wood*, the Court developed a two-prong test. In the school administrator context, for example:

The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

Wood, 420 U.S. at 321.

77. 457 U.S. 800, 816–18 (1982).

immunity cases.⁷⁸ Second, it eliminated the subjective “malice” or “good faith” prong in favor of what it characterized as an “objective” test.⁷⁹ Some of the reasoning of *Harlow* seemed, at least to Justice Brennan, to permit recovery when the official “*actually knows* that he was violating the law . . . even if he could not ‘reasonably have been expected’ to know what he actually did know.”⁸⁰ The Court blocked even that avenue a few years later in *Anderson v. Creighton*,⁸¹ holding in the context of a Fourth Amendment challenge to a search that the test is strictly objective.⁸² The officer’s “subjective beliefs about the search are irrelevant.”⁸³ The Court further extended the rule in *Ashcroft v. Al-Kidd*,⁸⁴ at least in its rhetoric, by stating that it would apply unless “every” officer would have been on notice that his action was unconstitutional, and by adding that the constitutional validity of the officer’s action must have been “beyond debate” at that time.⁸⁵ But *Ziglar* goes further than any of these cases. The innovation in *Ziglar* is to apply qualified immunity to lack of clarity not only on the content of “constitutional rights,” on which *Harlow* had focused, but on a collateral matter as to the applicability of a particular statute.

1. Form and substance in qualified immunity doctrine

It is easy to criticize practically any rule, because there is always a gap between the fact patterns to which the rule applies and the policies on which the rule is based. As a result, the rule is overinclusive, underinclusive, or both.⁸⁶ For example, because the Court’s rule for qualified immunity in *Ziglar* is triggered by “lack of clarity” in judicial

78. *Id.* at 817–18 (indicating that the reformulated rule would apply to government officials in general); *see also* *Anderson v. Creighton*, 483 U.S. 635, 642 n.4, 642–43 (1987).

79. 457 U.S. at 816–18.

80. *Id.* at 821 (Brennan, J., concurring) (quoting *Procunier v. Navarette*, 434 U.S. 555, 565 (1978)).

81. 483 U.S. 635 (1987).

82. *Id.* at 641.

83. *Id.*

84. 563 U.S. 731 (2011).

85. *Id.* at 741. The phrase “beyond debate” seems to have become part of the standard recitation of the doctrine on qualified immunity. *See* *Kisela v. Hughes*, No. 17-467, slip op. at 4 (U.S. Apr. 2, 2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

86. *See* Schauer, *supra* note 21, at 539 (“Once we understand that rules get in the way, that they gain their ruleness by cutting off access to factors that might lead to the best resolution in a particular case, we see that rules function as impediments to optimally sensitive decision making.”).

interpretation of the conspiracy statute, and not based on fairness and utility rationales, *Ziglar* sacrifices the plaintiff's constitutional tort interest in recovery for a violation of settled constitutional rights. The ill-fit of the grounds for a rule and the operation of the rule is a defining feature of rules.⁸⁷ Otherwise, the "rule" would be superfluous. A decision maker would reach the same result by applying the policies underlying the rule. Yet rules are often justified, despite their clumsiness and seeming arbitrariness, because they serve critical values of the legal system. Across many areas of law rules contribute to the resolution of disputes by saving time and effort in decision making,⁸⁸ generating and maintaining stability in the law,⁸⁹ enabling us to predict of outcomes of disputes that may arise,⁹⁰ and controlling the discretion of officers who apply the law to particular cases.⁹¹

Thus, to evaluate the *Ziglar* rule fairly, the question of its merit should be framed differently, as a balance between costs and benefits. While the rule may be arbitrary, it has many benefits such as predictability, stability, assuring fairness to officials, and easing concerns about overdeterrence of effective government operations. Given the benefits of rules, what substantive interests on the plaintiff's side of the case are sacrificed under the *Ziglar* rule? That is, what are its costs? Notably in *Harlow* and many other cases, the Court identifies the plaintiff's interest as "vindication" of rights and "deterrence" of constitutional violations.⁹² Can those costs be diminished by an approach that is less sweeping than that of *Ziglar*, without unduly sacrificing the fairness and social utility benefits that ruling provides? The resolution of this question necessarily depends on value choices. Neither the rigorous champion of remedying constitutional violations nor the hardcore advocate of effective government will have difficulty answering them, though in opposite directions. Many judges, however, will find that their initial value judgments fall somewhere between the two extremes. On the premise that there is value on both

87. See SCHAUER, *supra* note 75, at 224–28.

88. See *id.* at 145–49.

89. See *Rowland v. Christian*, 443 P.2d 561, 569 (Cal. 1968) (Burke, J., dissenting).

90. See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 60–62 (1961) (discussing the value or predictability in connection with reliance on precedent).

91. See SCHAUER, *supra* note 75, at 158–62.

92. 457 U.S. 800, 814 (1982); see also *Town of Newton v. Rumery*, 480 U.S. 386, 395–96 (1987); *Robertson v. Wegmann*, 436 U.S. 584, 599–600 (1978); *Carey v. Piphus*, 435 U.S. 247, 255–56 (1978).

sides, the task is to draw distinctions between contexts in which the case for immunity is stronger or weaker.

There is no room for argument that a broad immunity rule like that of *Ziglar* will entirely block vindication of constitutional rights and deterrence of violations in some contexts. When the constitutional violation is in the past, damages constitute the only viable remedy. Courts will deny a request for an injunction or declaratory judgment unless a plaintiff can show a likelihood of recurrence,⁹³ *City of Los Angeles v. Lyons*⁹⁴ illustrates this theme. In *Lyons*, the police put the plaintiff in a chokehold.⁹⁵ He sued for both damages and an injunction, on the theory that the officer used excessive force.⁹⁶ The Court held that the suit for an injunction could not go forward, because Lyons could not show that he was likely to be choked again.⁹⁷ Yet there was no assurance that the police would not continue to use chokeholds.⁹⁸ A combination of a broad immunity-from-damages doctrine and this unavailability of prospective relief could eliminate any action that seeks to vindicate constitutional rights and deter constitutional violations.

The problem exists across a range of constitutional tort issues, so long as a plaintiff's disagreeable encounter with the government is unlikely to be repeated. Many constitutional tort suits involve random encounters with the police,⁹⁹ or complaints by inmates of their treatment by guards on a specific occasion,¹⁰⁰ or one-time decisions by high-level officers to fire or otherwise disadvantage government employees under their supervision.¹⁰¹ Typically, the *Lyons* requirement

93. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasizing that unless a plaintiff is "realistically threatened by a repetition of his experience," he cannot seek injunctive relief in federal court).

94. *Id.* at 107 n.7, 107-09; see, e.g., *Updike v. Multnomah Cty.*, 870 F.3d 939, 947 (9th Cir. 2017).

95. *Lyons*, 461 U.S. at 97-98.

96. *Id.*

97. *Id.* at 105-06; *id.* at 111 ("Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.").

98. *Id.* at 106 (finding that so long as the city did not condone the behavior, Lyons could not seek injunctive relief at the prospect that a rogue officer could use chokeholds in defiance of "city policy").

99. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 227-28 (2009); *Anderson v. Creighton*, 483 U.S. 635, 641-42 (1987).

100. See, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1853 (2017); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 125 (3d Cir. 2001).

101. See, e.g., *Sheppard v. Beerman*, 94 F.3d 823, 825-26 (2d Cir. 1996).

of likelihood of recurrence is not present, and for these plaintiffs, “it is damages or nothing.”¹⁰² For this basic reason, alternatives to the *Ziglar* rule deserve careful attention.

One simple way to give more weight to vindication and deterrence, at little cost to the fairness and social utility goals served by official immunity, would be for the Court to repudiate *Ziglar*’s focus on unclear “law” and return to the *Harlow* formulation, under which immunity is available only for lack of clarity as to the “rights” the defendants have violated. The *Ziglar* opinion gives no indication that the Court focused on this possibility or even noticed that it was expanding immunity far beyond *Harlow*.¹⁰³ Nor is the Court’s subtle expansion of immunity addressed by Justice Breyer’s dissent.¹⁰⁴ At the very least, the Court should have to explicitly address the issue of whether immunity extends to cases like *Ziglar*, in which the lack of clarity has nothing to do with the plaintiff’s substantive rights.

Another step would be to eliminate small but tactically important glosses on the *Harlow* formulation. For example, the Court has said that immunity would be available unless clearly established law places the “statutory or constitutional question beyond debate,”¹⁰⁵ and that immunity is available unless “every” reasonable officer would understand that the act was unconstitutional.¹⁰⁶ This sort of rhetoric seems to disappear when courts move to deny immunity.¹⁰⁷

2. “Featureless generality” as an alternative to *Ziglar*

The overinclusiveness objection to the qualified immunity rule is not limited to the *Ziglar* version of the defense. John Jeffries argues that the misalignment between the qualified immunity policies and the *Harlow* “clearly established law” rule should be remedied by reformulating the rule, so that it will “adhere more closely to the

102. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

103. 137 S. Ct. at 1851–69 (declining to acknowledge the possibility that defeating qualified immunity requires even more than for government officials to have violated rights a reasonable person would have been aware of).

104. *Id.* at 1872–85 (Breyer, J., dissenting) (failing to address the expansion of qualified immunity in the majority opinion).

105. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011).

106. *Reichle v. Howards*, 566 U.S. 658, 664 (2012). See Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TUORO L. REV.* 633, 654–55 (2013) (discussing the impact of this language on the adjudication of qualified immunity issues).

107. See, e.g., *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017).

rationales for limiting liability in the first place.”¹⁰⁸ To this end, he rejects the Court’s “hyper-technical” rule, in favor of “a broader concept of notice derived from existing law.”¹⁰⁹ He would “shift the doctrinal focus from whether the defendant violated a ‘clearly established’ right to whether the defendant’s actions were ‘clearly unconstitutional.’”¹¹⁰ What he means by this distinction is that the Court should take a holistic approach to the situation presented rather than a technical, precedent-oriented, one. If the police tie a man to a pole in the middle of the night and leave him there, their conduct is unconstitutional even if the case law does not clearly say so.¹¹¹ Professor Jeffries seems to me to be on the right track, but I am skeptical of this solution. The problem with it is that, without a change in the structure of the doctrine, it seems unlikely a shift in emphasis will necessarily have much impact. As Professor Jeffries admits, “no mere turn of phrase can avoid hard cases or ensure good decisions.”¹¹²

Professor Jeffries’ proposal accepts the Court’s current immunity framework, in which the doctrine consists of a rule that cuts across all categories of cases.¹¹³ That feature of the doctrine makes it “a relatively crude tool” for mediating between rights and remedies.¹¹⁴ A more radical solution to the overinclusiveness costs of *Harlow* is to abandon the rule-oriented approach in favor of borrowing from the common law tort of negligence. Instead of a lack-of-clarity rule, the parties would be asked to present an array of evidence for a jury to consider. The judge would instruct the jury to decide whether, in light of all of the evidence it has heard, the officer violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹⁵ By this means, the plaintiff would have an opportunity to make the case for vindication and deterrence in a wide range of

108. Jeffries, *Liability Rule*, *supra* note 22, at 258.

109. *Id.* at 262.

110. *Id.* at 263 (emphasis removed); *see also* John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 867–68 (2010) [hereinafter Jeffries, *What’s Wrong*] (arguing that a “clearly unconstitutional” rule is superior to the “clearly established” rule).

111. *See* Jeffries, *Liability Rule*, *supra* note 22, at 255 (discussing *Robles v. Prince George’s Cty.*, 302 F.3d 262 (4th Cir. 2002)).

112. *Id.* at 264.

113. *See* Fallon, *supra* note 23, at 480 (noting the “trans-substantive” nature of immunity doctrine).

114. *Id.*

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

cases,¹¹⁶ and the defendant would be obliged to persuade the jury that the fairness and avoidance of overdeterrence concerns should control in the circumstances of the particular case. In this “ordinary tort” approach, officers would be obliged to rely on reasons specific to the case at hand to support their immunity claims, including but not limited to the lack of clarity of the rights at stake, rather than obtaining dismissal based on judicial application of the “clearly established law” rule.

To see how this approach might work, consider the facts of *Brown v. Elliott*,¹¹⁷ a typical qualified immunity case. Elliott, a police officer, leaned into the open window of a car at a traffic stop.¹¹⁸ The driver started the car and when it began to move, Elliott fired a shot, killing a passenger.¹¹⁹ The victim’s estate sued for a Fourth Amendment violation, claiming excessive force¹²⁰ since the relevant precedents had ruled that an officer violates the Fourth Amendment when he shoots at a car that is speeding away from him.¹²¹ However, *Brown* held that those earlier cases did not clearly establish that an officer in Elliott’s position should not fire his weapon.¹²² According to the court, the difference was that in the earlier cases, “the threat to [the officers’] safety was eliminated and thus could not justify the subsequent shots.”¹²³ That reasoning may not hold when the officer “was leaning into the window of a moving truck, not standing off to the side as the truck passed him without veering in his direction.”¹²⁴ Qualified immunity applied even if Elliott used excessive force,¹²⁵ since the earlier cases did not clearly establish that proposition.

In the hypothesized “ordinary tort” alternative, the judge would initially resolve the constitutional issue. If that ruling favored the

116. Of course, one side or the other would sometimes win “as a matter of law,” because a jury could not reasonably find for the other. *See* Fed. R. Civ. P. 50.

117. 876 F.3d 637 (4th Cir. 2017).

118. *Id.* at 640.

119. *Id.*

120. *Id.* at 639.

121. *Id.* at 643–44.

122. *Id.* at 644.

123. *Id.* (citation and internal quotation marks omitted).

124. *Id.*; *see also* *Almighty Supreme Born Allah v. Milling*, 876 F.3d 48, 59–60 (2d Cir. 2017) (applying the qualified immunity doctrine even though a prisoner’s substantive due process rights were violated because prison officials followed established practices when they confined the prisoner after making an individualized finding that the prisoner posed a threat to security).

125. 876 F.3d at 644. The court chose not to address this substantive constitutional issue. *See* *Pearson v. Callahan*, 555 U.S. 223, 239–42 (2009) (giving lower courts the choice of whether to address the merits of the constitutional claim before the immunity issue).

plaintiff, the jury would then rule on qualified immunity. Jurors would consider all of the circumstances surrounding the shooting and the state of the law at the time to decide whether the officer acted reasonably in light of “clearly established law” at the time of the shooting.¹²⁶ In principle, this approach would solve the problem of overinclusiveness and underinclusiveness that is endemic to rule-based decision making, just because the trier of fact would have access to a much wider array of information and much more discretion to arrive at the optimum outcome.¹²⁷ But that solution would come at a heavy price. One objection to the case-by-case approach is that the judge-jury issue is one on which constitutional torts differ in a fundamental way from common law torts. The leading case on the role of the jury in adjudicating negligence is *Sioux City & Pacific Railroad Co. v. Stout*,¹²⁸ in which the Court said that “twelve men know more of the common affairs of life than does one man,” and “they can draw wiser and safer conclusions . . . than can a single judge.”¹²⁹ This rationale does not

126. A more radical move toward an “ordinary tort” approach would abandon the “clearly established law” norm in favor of an instruction to the jury on whether the officer acted “reasonably,” based on all of the circumstances of the incident. That alternative, unlike the approach this Article advances in Part II, would require a radical reconstruction of the doctrine.

127. For example, under this approach the officer may escape liability based on the practice of the agency for which he works. *Cf. Wilson v. Layne*, 526 U.S. 603, 607, 617 (1999) (finding that U.S. Marshals successfully asserted qualified immunity despite a Fourth Amendment violation for allowing journalists to accompany them in executing an arrest warrant). In *Wilson*, the Supreme Court cited, among other things, “reliance by the United States [M]arshals in this case on a Marshal’s Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes.” *Id.* Should it matter, under an approach that focuses on fault, that the law is clearly established at the time he acted, but the case that establishes it was decided so shortly before he acted that a reasonable official would not necessarily have learned of it? *Cf. Doby v. Hickerson*, 120 F.3d 111, 113–14 (8th Cir. 1997) (denying qualified immunity to a prison psychiatrist when the applicable Supreme Court decision was handed down twenty-two days before he administered anti-psychotic medications without the prisoner’s consent). Should a lawyer’s advice influence the qualified immunity determination? *See* Edward C. Dawson, *Qualified Immunity for Officers’ Reasonable Reliance on Lawyers’ Advice*, 110 NW. U. L. REV. 525, 526–27 (2016). Should it matter whether the officer was at fault at some point in the encounter? *Cf. Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1543–44 (2017) (rejecting the Ninth Circuit’s “provocation rule,” under which officers who use reasonable force may nonetheless be held liable “on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force”).

128. 84 U.S. 657 (1873).

129. *Id.* at 664. This view remains dominant in tort law. *See* 1 RESTATEMENT (THIRD) OF TORTS § 8 cmt. B (AM. LAW INST. 2010) (“The jury is assigned the responsibility of

support jury determinations of whether the constitutional rule was clearly established at the time an officer violated it. Jurors bring no particular wealth of expertise to the task of determining the clarity of constitutional norms.

The viability of the case-by-case approach does not depend solely on whether juries are competent to adjudicate the “clearly established law” issue.¹³⁰ That issue could be left up to the judge. But even if judges decide whether or not there is a “clearly established law” that speaks to the issue of qualified immunity, the case-by-case approach would exacerbate the social costs of constitutional tort litigation, and particularly the danger of overdeterrence of effective government. In ordinary tort law, the reasonable care standard is characterized by “featureless generality,”¹³¹ which “introduces a large element of uncertainty even into ostensibly routine cases.”¹³² Even when judges, rather than juries, adjudicate negligence issues, much uncertainty remains because a range of factors will bear on the decision the judge must consider. This “ordinary tort” approach may produce excessive caution on the part of officials across a range of cases in which the balance between competing factors is uncertain.

A more promising approach is to look for an alternative to *Harlow* that will keep the advantages of rules without *Harlow*'s often severe misalignment between the rule and the policies. One alternative, discussed in Part II, is to abandon immunity for a general rule of strict liability, imposed either on officers or governments.¹³³ Another alternative, described in Part III, is to reformulate qualified immunity doctrine by carving out categories of fact patterns in which the case for immunity is especially strong or weak, in order to retain the value of immunity while cutting its costs.¹³⁴ Like *Harlow* itself, and unlike the “ordinary tort” hypothesis, both of these alternatives give considerable weight to the value of rules. However, the main difference between

rendering such judgments partly because several minds are better than one, and also because of the desirability of taking advantage of the insight and values of the community, as embodied in the jury, rather than relying on the professional knowledge of the judge.”); see also Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 435 (1999) (discussing the important role that juries play in deciding normative issues).

130. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (noting that officers' conduct should be measured on objective reasonableness).

131. HOLMES, *supra* note 59, at 89.

132. EPSTEIN & SHARKEY, *supra* note 59, at 181.

133. See *infra* Section II.B.1.

134. See *infra* Sections II.A–B.

them is that the abolitionist view gives priority to the substantive goals of vindicating constitutional rights and deterring violations, while the categorical approach attempts to achieve a balance between the two sets of goals.¹³⁵

II. THE COSTS AND BENEFITS OF ABOLISHING OFFICIAL IMMUNITY

Some critics of qualified immunity call for its abolition or severe curtailment, either directly or by shifting the liability to local governments.¹³⁶ Three distinct reasons are advanced in support of this view. First, Professor William Baude has argued that qualified immunity is “unlawful,” because neither the text nor the common law background of § 1983 authorizes the defense.¹³⁷ Second, various studies support the conclusion that the empirical foundation on which the Court bases qualified immunity are weak.¹³⁸ Third, critics argue that the Court’s doctrine gives too much weight to the government official’s interest in immunity and too little weight to the plaintiff’s

135. See *infra* Part III (arguing that courts can take a middle ground between the pro-immunity rule camp and the immunity rule abolitionist camp by categorizing similar fact patterns into “high immunity” and “no immunity” groups).

136. See, e.g., Schwartz, *The Case Against Qualified Immunity*, *supra* note 35, at 1800 (asserting that the “Justices can end qualified immunity in a single decision, and they should end it now”). Blum quotes several commentators who take one or the other of these views and adds that she votes “with those who think it is time to revisit *Monell* and the Court’s mistaken rejection of respondeat superior liability.” Blum, *supra* note 35, at 963; see also JOHN C. JEFFRIES, JR., ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 180–81 (3d ed. 2013) (noting that many academic commentators “favor strict liability either of the officer defendant or the government employer,” and citing ample authority for that proposition). Note, however, that Professor Jeffries takes the contrary view. See, e.g., Jeffries, *Liability Rule*, *supra* note 22, at 242–50 (discussing “the case for requiring fault”).

137. See Baude, *supra* note 24, at 45, 88. Justice Thomas has expressed sympathy for Baude’s thesis. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring partly and concurring in the judgment) (endorsing Baude’s position). For reasons set out elsewhere, I believe Baude is mistaken. See *infra* Part III.

138. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L.J.* 2, 10 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*] (finding that “qualified immunity does not affect constitutional litigation against law enforcement in the way the Court expects and intends”); Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. REV.* 885, 889–90 (2014) [hereinafter Schwartz, *Police Indemnification*] (explaining how ubiquitous police indemnification undermines the assumption that police will be “overdeterred” from performing their duties without qualified immunity protecting them from personal financial liability).

interest in recovery.¹³⁹ This part of the Article uses the “proper balance” framework to challenge the “empirical evidence” and “value choices” aspects of the uncompromising “anti-immunity” position. On both fairness and incentives grounds, the case for an immunity defense remains strong. Section II.A examines the claim that empirical findings about the impact of immunity cast doubt on the supposed benefits of immunity and thereby support radical change in official immunity law. Section II.B acknowledges the argument that the imposition of liability on local governments would enable the courts to capture the vindication and deterrence benefits of liability at little or no cost, since individual officers would not be liable.

A. *The Empirical Case Against Qualified Immunity*

Harlow's version of qualified immunity rests, in part, on two empirical assumptions: (1) officials will be overly cautious and thus deterred from acting effectively in the public interest unless they are shielded from liability for damages; and (2) *Harlow*'s objective test will diminish the “social costs” of constitutional tort litigation by permitting many suits to be dismissed before trial and even without discovery.¹⁴⁰ Experience under the *Harlow* regime raised doubts about both of these propositions. If in fact the benefits of immunity are small, a strong case can be made that the resulting reduction in the vindication of constitutional rights and deterrence of violations, are not worth bearing. As a result, the argument goes, immunity should be abandoned.

1. *Two studies and their implications*

Joanna Schwartz, the author of studies that bear on both of the Court's empirical assumptions, argues that her work undermines the premises of qualified immunity in just this way. One of her projects examined the practice of government indemnification of police officers held liable for damages for constitutional torts.¹⁴¹ She gathered information about “litigation payments and indemnification decisions in forty-four . . . large [law enforcement] departments and thirty-seven . . . small and mid-sized departments,” which “employ

139. 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).

140. See *supra* notes 64–69 and accompanying text.

141. Schwartz, *Police Indemnification*, *supra* note 138, at 889.

approximately [twenty percent] of law enforcement officers across the country.”¹⁴² She found that “[p]olice officers are virtually always indemnified.”¹⁴³ That is, when they are held liable under § 1983, their employers pay the judgments.¹⁴⁴ To the extent her findings are valid and can be generalized to other government officers, they diminish the concern that officers need immunity or else they will act timidly for fear of liability.¹⁴⁵ After all, if officers do not actually pay damages, they will likely act less cautiously.

A recent study, conducted by Professor Schwartz, examines whether the Court in *Harlow* had a valid concern when it eliminated the subjective “bad faith” prong of official immunity.¹⁴⁶ According to *Harlow*, “substantial costs attend the litigation of the subjective good faith of government officials.”¹⁴⁷ These include “the general costs of subjecting officials to the risks of trial,” the difficulty of deciding “subjective intent” on summary judgment, and “broad-ranging discovery and the deposing of numerous persons,” inquiries which “can be peculiarly disruptive of effective government.”¹⁴⁸ Schwartz “reviewed the dockets of 1183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts” from Texas, Florida, Ohio, Pennsylvania, and California,¹⁴⁹ and found that “just 0.6% of cases [against law enforcement defendants]

142. *Id.*

143. *Id.* at 890.

144. For a discussion of some of the state law issues raised by indemnification statutes, see *Bryson v. City of Oklahoma City*, 627 F.3d 784, 791–92 (10th Cir. 2010) (holding that the Oklahoma statute does not allow the injured plaintiff to obtain indemnification payments directly from municipalities).

145. Other studies reach similar conclusions. 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, 77–78 (1999) (finding that most federal officials are indemnified); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1675–76, 1675 n.389 (2003) (discussing indemnification of corrections officers); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (finding that law enforcement agencies rarely gather and analyze information from lawsuits brought against them and their officers). Note that indemnification is always an option for governments seeking the benefits of bold, effective action by its officers and the avoidance of overdeterrence. The point is that, even if immunity is denied, a government can always choose to buy some of the benefits it is thought to bring.

146. See generally Schwartz, *How Qualified Immunity Fails*, *supra* note 138, at 9.

147. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

148. *Id.* at 816–17.

149. Schwartz, *How Qualified Immunity Fails*, *supra* note 138, at 9.

were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds.”¹⁵⁰ Though immunity still blocks relief in many cases and discourages prospective plaintiffs from bringing suits, Schwartz’s findings suggest that the *Harlow* test may well not diminish the costs of constitutional tort litigation by as much as the Court had expected.

Professor Schwartz’s findings challenge the viability of the current qualified immunity doctrine. The Court has said that the “‘clearly established’ standard protects the balance between vindication of constitutional rights and government officials’ effective performance of their duties.”¹⁵¹ Put in terms of the cost-benefit model the Court has endorsed, the indemnification study suggests that the “avoidance of overdeterrence” benefits of immunity are smaller than had been anticipated. That goal is already served by government reimbursement. Even before Schwartz’s indemnification study, the Court acknowledged the relation between indemnification and the anti-overdeterrence policy.¹⁵² It took account of the anti-immunity implications of indemnification when it rejected qualified immunity for private prison officers sued under § 1983, in part because they could be indemnified by their employers.¹⁵³ Professor Schwartz’s second paper on the impact of *Harlow* on social costs, suggests that the “avoidance of trial and discovery” benefits of the elimination of the subjective prong are small.¹⁵⁴ Professor Schwartz’s empirical studies thus cast doubt on the Court’s assessment of the cost and benefits of qualified immunity and suggest that the costs imposed override what little benefits qualified immunity provides.

150. *Id.* at 10. *See, e.g.*, *Greer v. City of Highland Park*, 884 F.3d 310, 316–18 (6th Cir. 2018) (plaintiffs’ factual allegations are sufficient to withstand a motion to dismiss the complaint for a Fourth Amendment violation); *Bonivert v. City of Clarkston*, 883 F.3d 865, 881 (9th Cir. 2018) (holding that issues of fact preclude summary judgment on the plaintiff’s Fourth Amendment claims); *Avina v. Bohlen*, 882 F.3d 674, 678–79 (7th Cir. 2018) (reversing summary judgment for defendants on plaintiff’s excessive force claim because there were issues of fact as to the reasonableness of the force used).

151. *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

152. *See Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (noting that indemnification mitigates the concern that officials are not deterred from service by the threat of private liability for damages).

153. *Id.* (contending that indemnification weighs against extending qualified immunity to private actors). *But cf. Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987) (suggesting that evidence of indemnification of officials would not justify elimination of qualified immunity).

154. Schwartz, *How Qualified Immunity Fails*, *supra* note 138, at 73.

2. *Skepticism about empiricism*

Though empirical studies of constitutional tort litigation deserve attention, they cannot by themselves resolve the qualified-immunity issue. Professor Schwartz focuses on law enforcement. Studies of other contexts, or scholars using other methodologies, may produce different outcomes. In addition, it is important to distinguish between the question of whether qualified immunity provides a cost or benefit and the question of how great that cost or benefit might be. Showing that indemnification decreases timidity does not suffice to show that timidity is an insignificant concern.¹⁵⁵ Showing that social costs remain despite *Harlow* does not suffice to show that they would not be greater without *Harlow*. Even if Schwartz's findings are valid across the whole field of constitutional tort litigation, as I suspect they are, other rationales for immunity remain valid. Professor Jeffries, in particular, has argued that immunity from damages "fosters the development of constitutional law . . . by reducing the costs of innovation."¹⁵⁶ Professor Fallon posits an "Equilibration Thesis," which holds that "courts charged with implementing constitutional rights or values sometimes view justiciability doctrines, merits doctrines, and remedial doctrines as an integrated unit."¹⁵⁷ An implication of this thesis is that eliminating qualified immunity could result in dilution of the content of substantive constitutional rights.¹⁵⁸

In addition, the idea that empirical studies might justify massive doctrinal change ignores the institutional role judges play in amending doctrine. Qualified immunity is a judge-made doctrine¹⁵⁹

155. For example, officers may want to avoid adverse publicity, or they may be concerned that liability will get them fired or at least hinder career advancement, or liability may have some collateral consequence, such as inability to obtain a mortgage. These possibilities emerged from interviews conducted by Professors Lewis and Eaton, in which they asked defense attorneys why officers did not make "offers of judgment" under Federal Rule of Civil Procedure 68. For a description of the study, see Harold S. Lewis, Jr. & Thomas A. Eaton, *Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723, 738–40 (2006) (introducing a symposium on Rule 68). The relevant interview responses are described by Professor Eaton in a transcript of the conference proceedings. See *Transcript—Session One: Background and Federal Judicial Interpretation of Rule 68*, 57 MERCER L. REV. 743, 754 (2006).

156. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) [hereinafter Jeffries, *Right-Remedy Gap*].

157. Fallon, *supra* note 23, at 482.

158. See *id.* at 486 ("[I]t now seems to me deeply mistaken to think that we can realistically imagine a world in which official immunity doctrines were abolished and in which further, equilibrating adjustments . . . did not also occur.").

159. See Levin & Wells, *supra* note 24.

and is certainly as subject to judicial reexamination as any other common-law doctrine. But it is also intimately connected to the law of constitutional remedies. Its abrupt termination would threaten the process values that inhere in the common law tradition, which favors incremental rather than abrupt change in judge-made law.¹⁶⁰ In most instances, courts can and should respond to new information and new conditions with incremental adaptation.¹⁶¹ That is the point of Holmes' aphorism that "[t]he life of the law has not been logic: it has been experience."¹⁶² The Court in *Harlow* acted in the spirit of this precept, even if it acted mistakenly, when it dropped the bad-faith prong of the qualified immunity doctrine based on its sense that "[t]he subjective element . . . has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial."¹⁶³ It was "now clear that substantial costs attend the litigation of the subjective good faith of government officials."¹⁶⁴ Taking the incremental approach of the common law, the Court retained other components of the qualified immunity defense while eliminating the subjective prong.¹⁶⁵ Professor Schwartz's findings suggest that the Court in *Harlow* may have been mistaken in thinking it had found a remedy for the problem it tried to solve. But the more realistic, and prudent, goal is not to eliminate qualified immunity—it is to undo the specific holding of *Harlow* and reinstate the bad faith prong. That is one element of the categorical approach described in Part III. In this and other respects, the categorical approach is more consistent with the norms of common law adjudication, as it modifies rather than uproots the current doctrine.

160. See Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 472–73 (1962) ("It is part of the common law tradition . . . that in so far as these breaks with precedent are accomplished by judicial decision rather than by statute they are in the nature of adjustment and adaptation of segments of doctrine. The more comprehensive breaks with the past are accomplished by statute, and the courts exercise their power of overruling precedent under an obligation of restraint.").

161. See ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 54–63 (1969) (discussing "evolutionary revision of legal doctrine in courts"). For more illustrations of this principle, see MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 107–08 (1988), which illustrates this theme with the charitable immunity doctrine and EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 9–27 (1949), describing the incremental changes that led to manufacturer liability for defective products.

162. HOLMES, *supra* note 59, at 5.

163. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982).

164. *Id.* at 816.

165. *Id.* at 818.

3. *Empirical studies and the fairness rationale*

Professor Schwartz's findings have no bearing on the fairness rationale for qualified immunity. From a fairness perspective, it does not matter whether the defense actually achieves the goal of reducing social costs. The fairness rationale bases the defense on "the injustice, particularly in the absence of bad faith,"¹⁶⁶ of imposing liability on an officer in the absence of "fair warning" that his act violates a constitutional right.¹⁶⁷ The core of this rationale is that when the law or the application of law to fact is unclear, it is unfair to impose liability on an official who, as a result, cannot reasonably foresee that his act violates the plaintiff's constitutional right.¹⁶⁸ As Holmes put the point in his defense of the negligence principle, "[a] choice which entails a concealed consequence is as to that consequence no choice."¹⁶⁹ This objection to liability does not depend on whether the "social costs" of constitutional tort litigation are diminished by qualified immunity. Nor is it necessarily met by findings that officers are typically indemnified. Liability may have other consequences for the officer's future employment prospects or personal life. Even if it does not, the vindication goal applies to both sides of the constitutional tort suit. An officer who is charged with a constitutional violation has a legitimate interest in vindication of his actions. The fact that he is indemnified does not eliminate the unfairness of liability without fault.

If Professor Schwartz's findings are confirmed, the likely (and, in my view, the appropriate) impact will not be abandonment, but rather reconstruction of qualified immunity, with greater emphasis on the dynamics of Professor Jeffries' "right-remedy gap" and on the fairness rationale. Framed in cost-benefit terms, what she has shown is that the benefits of immunity in cutting social costs are not as great as the

166. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

167. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

168. See HOLMES, *supra* note 59, at 77. It might be thought that the reference to the negligence principle is mistaken, because the officer actually commits an intentional tort when he deliberately uses force, or deliberately confines someone, or deliberately fires a government employee. But the state of mind question for the purpose of official immunity for constitutional torts is the officer's ability to appreciate that he is invading a constitutionally protected interest. Consider, for example, a hypothetical in which (1) an officer deliberately uses force against the plaintiff and believes that the force is appropriate; (2) the force is ultimately determined to be excessive, in violation of the Fourth Amendment; but (3) the officer had no fair warning that the force is excessive. The officer has violated a constitutional right, but he has not intended to violate the right, nor has he negligently done so.

169. HOLMES, *supra* note 59, at 76.

Court has thought them to be.¹⁷⁰ She has made the case for a less defendant-friendly doctrine, perhaps along the lines discussed in Part III.¹⁷¹

B. *Local Government Liability*

Many proponents of liability unfettered by immunity sidestep the fairness-to-officials objection. They propose that local governments¹⁷² be held liable for constitutional violations committed by their employees.¹⁷³ This proposal would extend liability well beyond current practice as well as current law. First, § 1983 does not entitle any officer to indemnification.¹⁷⁴ Second, under the current indemnification practice, governments typically pay for *some* of their employees' constitutional torts, but not all of them.¹⁷⁵ Under the current regime, they do not pay for violations of constitutional rights as to which the officer successfully asserts immunity.¹⁷⁶ However, the "broad liability" argument holds that local governments should be liable for *all* violations.¹⁷⁷

170. Schwartz, *How Qualified Immunity Fails*, *supra* note 138, at 58–59.

171. *Id.*

172. The discussion here focuses solely on local governments because neither state governments nor the United States can be sued at all under § 1983. Suits against the United States and federal officers are generally precluded because the statute by its terms requires action "under color of state law." 42 U.S.C. § 1983 (2012). Suits against states are precluded by *Quern v. Jordan*, 440 U.S. 332 (1979), which held that in enacting the statute Congress did not abrogate the states' sovereign immunity. *Id.* at 341.

173. See, e.g., Amar, *supra* note 35, at 811–13; see also *supra* note 172.

174. See *Allen v. City of Los Angeles*, 92 F.3d 842, 845 n.1 (9th Cir. 1996). Cf. *Davis v. Coakley*, 802 F.3d 128, 132–35 (1st Cir. 2015) (upholding refusal to indemnify an officer for punitive damages); *Payne v. Jones*, 711 F.3d 85, 95 n.7 (2d Cir. 2013) (citing cases where public servants were not indemnified).

175. See, e.g., Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1176 (2016).

176. See, e.g., Schwartz, *Police Indemnification*, *supra* note 138, at 890.

177. As described below, this goal may be partially accomplished through broader local government liability. Full government accountability would require imposing liability on state governments as well. At present, state governments cannot be sued at all, at least not by name and not for retrospective relief, because they are not deemed to be "persons" subject to suit within the meaning of § 1983, which imposes liability on "[e]very person" who violates rights. See *Quern*, 440 U.S. at 350. *Quern* is not a simple statutory ruling. It is based on the Eleventh Amendment principle that Congress may not impose liability on states unless the statute contains a clear statement that states may be sued. *Id.* at 343. It would be a challenge to read § 1983 to contain such a clear statement. The statute imposes liability on "[e]very person" who violates rights, without specifying that states may be sued. Sometimes an issue arises as to whether a particular officer, in carrying out a particular function, is a state or local actor. See, e.g., *McMillian v. Monroe Cty.*, 520 U.S. 781, 794 (1997) (holding that, in the

A defense of the categorical approach advocated in this Article cannot be complete without an examination of this alternative. Indemnification aside, the current doctrine *imposes* damages liability on local governments only in a limited range of circumstances.¹⁷⁸ The leading case is *Monell v. Department of Social Services*,¹⁷⁹ which holds local governments liable for constitutional violations caused by their “official policy” or “customs,”¹⁸⁰ categories that the courts generally read narrowly. Under the Court’s interpretation of § 1983 in *Monell*, local governments are not vicariously liable in suits for constitutional torts committed by their employees.¹⁸¹ In so holding, the Court focused on the language of § 1983 as originally passed, which held liable persons who “shall subject, or cause to be subjected any person” to the deprivation of rights.¹⁸² According to the Court, this language “cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.”¹⁸³ This is the rule that would need to be changed in order to expand liability for constitutional torts without lifting official immunity.¹⁸⁴ Given that *Monell* is a statutory precedent, not federal common law, the “institutional role” case against overruling the no vicarious liability holding may be stronger than with other constitutional tort issues.¹⁸⁵

circumstances, the Monroe County Sheriff was acting for the state, so that Monroe County could not be sued for his violation).

178. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

179. 436 U.S. 658 (1978).

180. See *id.* at 691–92, 694–95.

181. *Id.* at 694.

182. Section 1983 was originally passed as the Civil Rights Act of 1871 to assist the government in combatting Ku Klux Klan violence in the South after the Civil War. Civil Rights Act of 1871, 17 Stat. 13 (1871).

183. *Monell*, 436 U.S. at 692.

184. Some members of the Court have called for reexamination of the “no vicarious liability” rule. See *Bd. of Cty. Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 430–37 (1997) (Breyer, J., dissenting). In this opinion, Justice Breyer, joined by Justices Stevens and Ginsburg, argues for reexamination of that aspect of *Monell*. See *Shields v. Ill. Dep’t. of Corr.*, 746 F.3d 782, 791–92 (7th Cir. 2014) (questioning *Monell*’s reasoning). Scholars, too, have questioned *Monell*’s reasoning, especially its use of legislative history. See, e.g., Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 255–61 (1987).

185. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (noting that “[s]tatutory precedents . . . often enjoy a super-strong presumption of correctness”).

If *Monell's* “no vicarious liability” doctrine was overruled, local governments would be generally liable for their employees’ violations of constitutional rights. However, *Owen v. City of Independence*¹⁸⁶ held that the municipal government has no immunity defense—so the combined effect of *Owen* and *Monell* is that local governments are liable without fault, but they are liable only when the plaintiff can meet the “policy or custom” requirement.¹⁸⁷ To see how the proposal to institute vicarious liability would alter the current regime, it is helpful to briefly sketch in a rough way the distinction drawn by *Monell* and its progeny between “policy and custom,” for which governments are liable, and the other constitutional torts, for which governments are not liable.

Consider a hypothetical case in which a municipal police officer uses a taser on a motorist at a traffic stop, and the tasing is found to be excessive force in violation of the motorist’s Fourth Amendment rights.¹⁸⁸ Under the current approach, is the officer’s employer, the city, is liable if its written or unwritten policy authorizes police officers to use tasers without special need,¹⁸⁹ but not if it has no such policy and an officer uses a taser without the necessary justification.¹⁹⁰ The city may be liable in the absence of a written policy allowing indiscriminate use of tasers, if the plaintiff can show that a “final policymaker,” such as the police chief, has directed officers to use them,¹⁹¹ or if the chief knows about a “custom” among police officers and tolerates it.¹⁹² The local government may also be liable under *Monell* on an “inadequate training” theory if the plaintiff can show that officers have not received minimally adequate training and that this lack of training caused the violation.¹⁹³ Unless the plaintiff can bring his case within one of these categories, he has no legal right to relief from the local government.

186. 445 U.S. 622 (1980).

187. *Id.* at 638.

188. For illustrations of issues raised in stun gun litigation, see, for example, *Brand v. Casal*, 877 F.3d 1253 (11th Cir. 2017); and *Jones v. Las Vegas Metropolitan Police Department*, 873 F.3d 1123 (9th Cir. 2017).

189. See *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096–97 (9th Cir. 2013).

190. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that officers are only liable for constitutional violations when they are carried out in accordance with official policy).

191. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); see, e.g., *Kristofek v. Village of Orland Hills*, 712 F.3d 979, 987 (7th Cir. 2013).

192. *Bd. of City Comm’rs v. Brown*, 520 U.S. 397, 404 (1997); see, e.g., *Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014).

193. *City of Canton v. Harris*, 489 U.S. 378, 391 (1989); see also *Brown*, 520 U.S. at 411 (recognizing an “inadequate hiring” theory).

The anti-immunity school would combine retention of *Owen* with reversal of the “no vicarious liability” rule. The city would be liable in all of the above scenarios, for any unconstitutional use of a taser, whether or not the law on taser use was clearly established, and whether or not the tasing was authorized by an ordinance, pursuant to a custom, approved by a policymaker, or the result of bad training. Put in terms of costs and benefits, the major advantages of this approach are, first, that rights are generally vindicated, more or less across the board, at least so long as the case involves acts by local government employees and not by state government officers.¹⁹⁴ Second, governments will internalize the costs of constitutional violations, and will thus have proper incentives to minimize them.¹⁹⁵ With respect to costs, the Court said in *Owen* that the “inhibiting effect” of the threat of liability “is significantly reduced, if not eliminated . . . when the threat of personal liability is removed.”¹⁹⁶ Unfairness “is simply not implicated when the damages award comes not from the official’s pocket, but from the public treasury.”¹⁹⁷

1. Incentives

Professor Alan Sykes’ economic analysis of ordinary tort law provides some support for the imposition of vicarious liability on governments for all constitutional violations committed by their employees in the course of employment.¹⁹⁸ Summarizing Sykes’ study, Professors Richard Epstein and Catherine Sharkey state that “[a]s between the employer and employee . . . the employer is usually the superior risk-bearer because of its greater access to insurance markets,” that “vicarious liability . . . reduces the risk that the insolvency of a particular

194. See *Owen v. City of Indep.*, 445 U.S. 622, 651 (1980) (“A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.”).

195. *Id.* at 651–52 (“The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights . . . [and] may encourage those in a policymaking position to institute internal rules . . . designed to minimize the likelihood of unintentional infringements on constitutional rights.”).

196. *Id.* at 656.

197. *Id.* at 654.

198. See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

employee will impose an uncompensated risk on a third party.”¹⁹⁹ Additionally, they found that “the doctrine reduces the need to have an extensive network of voluntary contracts between employees and employers,” and that “vicarious liability protects third parties who know that some firm employee is responsible for the loss, but cannot determine which one is responsible.”²⁰⁰ These rationales for vicarious liability seem equally applicable to constitutional torts, since the employer-employee relationship is similar to that of a private business. Still, the adoption of government strict liability would not eliminate all constitutional violations by local government officers, even if the incentives created by the liability rule work perfectly. Even in a strict liability regime, private businesses will take precautions only when the gain in accident prevention is greater than the cost of the precaution.²⁰¹ In the same way, a rational, wealth maximizing government would only stop the constitutional violations that cost the city more (in damages and litigation expenses) than the cost of preventing them, even if it were liable for all of violations. From an economic perspective, some constitutional violations, like some accidents, are not worth preventing.²⁰²

In addition, there are three incentive-based reasons to doubt whether the private law model can simply be transplanted into constitutional torts with no allowance for the officer’s fault or lack of it. One is that the problem of officials’ self-protective behavior does not vanish just because officials are not personally liable. Larry Kramer and Professor Sykes have examined municipal liability from an incentives-based perspective.²⁰³ Strict liability would have both pluses and minuses, because “[t]he prospect of liability will discourage actions that would ultimately prove constitutional as well as actions that

199. EPSTEIN & SHARKEY, *supra* note 59, at 629.

200. *Id.*

201. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 175 (4th ed. 1992) (noting that, under a cost-benefit test, “if [burden of precaution] is larger than [probable loss], the strictly liable defendant will not take precautions, just as under negligence”). It is doubtful that imposing liability despite lack of reasonable foreseeability will produce significant deterrence. See, e.g., *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909, 923 (Mass. 1998) (rejecting liability to warn of product risks “that were not capable of being known”).

202. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 369 (2000); see also GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 17–21 (1970) (repudiating the “myth” that society seeks to avoid accidents at all costs); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

203. See Kramer & Sykes, *supra* note 184, at 251, 267.

would ultimately prove unconstitutional.”²⁰⁴ Given the tradeoff, it is “impossible to know whether the inefficiencies of self-protective behavior by municipalities will exceed the efficiencies associated with a reduced number of constitutional torts.”²⁰⁵ Consequently, “the efficiency of municipal liability for good faith constitutional torts is very much in doubt.”²⁰⁶

The second reason for skepticism about the private-to-public transplant is that the *kinds* of incentives that matter to private actors may differ from the ones that count the most for government officials. In theory, if not always in practice, a private business bears the costs and captures the benefits of precautions and therefore will give those costs the weight they deserve in decision making. Government policymakers may not respond to the incentives created by liability rules in the same way businesses and individuals do.²⁰⁷ Among other differences, “[g]overnment does not behave like a wealth-maximizer . . . [r]ather, government internalizes only *political* incentives.”²⁰⁸ For example, a police commissioner may further his own interests in getting reelected by unduly vigorous policing, with the constitutional tort costs paid for by taxpayers.

The third problem with transplanting the private law respondeat superior model is based on Professor Jeffries’ insight that a right-remedy gap serves the systemic value in constitutional innovation.²⁰⁹ A static cost-benefit calculation cannot take the long run gain into account. A dynamic model is required. Over time, the effect of blanket local government liability would increase the costs of recognizing new constitutional protections and of maintaining the current ones. Professor Fallon’s “Equilibration Thesis” suggests that rights may be defined in ways that produce less rather than more constitutional protection.²¹⁰ According to Professor Jeffries, a limit on the availability of damages lowers the costs of recognizing new rights, and thereby “facilitates constitutional innovation and favors the future.”²¹¹ Some form of qualified immunity and some limits on local government liability may be justified even though “underdeterrence of

204. *Id.* at 299.

205. *Id.* at 299–300.

206. *Id.* at 300.

207. See Levinson, *supra* note 202, at 348–57.

208. *Id.* at 357.

209. Jeffries, *Right-Remedy Gap*, *supra* note 156, at 113.

210. Fallon, *supra* note 23, at 482.

211. Jeffries, *Right-Remedy Gap*, *supra* note 156, at 91.

constitutional violations is a cost and must be counted as such.”²¹² If Fallon and Jeffries are correct, the costs of a shift to strict government liability may be far larger than the critics of immunity suppose. The Court might define constitutional rights more narrowly if the monetary costs of rights were higher, and the result could be a weaker rather than a stronger set of constitutional guarantees.²¹³

2. *Fairness*

Fairness is not at issue when beneficiaries’ money damages is awarded from the public treasury. In *Owen*, the Court dismissed the notion that the value of fairness should constrain government liability.²¹⁴ The “public at large” gets “the benefits of the government’s activities,” and “the public treasury” should pay the constitutional tort costs of those activities.²¹⁵ He feared that harmful § 1983 judgments could endanger local governments and consequently could impose “severe limitation[s] on their ability to serve the public.”²¹⁶ In a long dissenting opinion, Justice Powell briefly addressed this topic, suggesting that “ruinous judgments” under § 1983 could be harmful to local governments, and could inflict “severe limitations” on their ability to serve the public.”²¹⁷

Justice Powell’s brief rejoinder relates only to the scope of “policy and custom” liability. As intended, he does not fully and precisely articulate the fairness objection to governmental liability for constitutional torts when unlimited by either policy or custom or any immunity defense. The point is not just that liability will threaten government finances. If a government acts in disregard for constitutional rights often enough and flagrantly enough, it may deserve to collapse under the weight of constitutional tort judgments. The stronger rationale for a fault rule is that the ethical objection to liability without fault applies to municipalities as well as to officers. Government is not an abstraction. It is the sum of all the persons who contribute to it and benefit from it. Thus, *Owen*’s strict liability rule,

212. *Id.*

213. *See* Fallon, *supra* note 23, at 481. Fallon elaborates: “[T]he social costs of rights and causes of action that have led the courts to develop immunity doctrines in our actual world would impel other, compensating changes in the law if immunity were abolished.” *Id.* at 486.

214. *See* *Owen v. City of Indep.*, 445 U.S. 622, 653 n.37 (1980).

215. *Id.* at 654–55.

216. *Id.* at 655.

217. *Id.*

even in its current limited form, favors the successful constitutional tort plaintiff over all other claims on government monies, including not only taxpayers but also the beneficiaries of government programs. Call this group “ordinary citizens” for short. The issue is which of these two groups—victims of constitutional violations or ordinary citizens—should, as a matter of fairness, bear the losses due to actions that are arguably proper at the time they are taken but are found to be constitutional violations with the benefit of hindsight.

Professor Daryl Levinson has asserted that “taxpayers do not ‘cause’ constitutional violations in any intuitive sense of causation, nor are they morally responsible for constitutional wrongdoing.”²¹⁸ One need not go that far in order to defend a fault rule. When government, through its employees, has fair notice that the acts of those employees may cross a constitutional line, the pro-plaintiff policies—vindication of constitutional rights and deterrence of violations—provide strong support for municipal liability. Holding taxpayers, as well as the beneficiaries of government, accountable for the faulty actions of government officials is fair despite the taxpayers’ and beneficiaries’ lack of responsibility for those acts. But when notice is lacking, it seems as unfair to impose liability on the ordinary citizens who finance and benefit from government as it is on the officer who unknowingly commits the violation. The facts of *Owen* are illustrative of such inequity. The City Council fired Owen, the chief of police, at a time when Supreme Court doctrine appeared to allow it to do so.²¹⁹ A few months later, the Supreme Court held, for the first time, that an employee like Owen may hold “property” and “liberty” interests protected by the Due Process Clause, and therefore may be entitled to a “due process” hearing in connection with dismissal.²²⁰ The City of Independence violated Owen’s rights, but the City and those it represented did not have fair notice that it had done so. The fairness objection to liability is that, incentive effects aside, it is not fair to hold a government liable for an act, just as it is unfair to hold an individual officer liable, without notice that the act may violate constitutional norms. It is not fair because the government is nothing more than the

218. Levinson, *supra* note 202, at 408.

219. *Owen*, 445 U.S. at 629.

220. *Compare* Bd. of Regents v. Roth, 408 U.S. 564, 573, 578 (1972) (recognizing that a plaintiff may be entitled to a hearing where his or her reputation or integrity is at stake, but failing to find that in the instant case), *with* Perry v. Sindermann, 408 U.S. 593, 599 (1972) (holding that the teacher’s due process rights may have been violated because he had enough facts to show a deprivation of property).

sum of all the people who pay for it and receive services from it, and strict liability holds all of them liable despite the lack of notice that they, through their government, were doing anything wrong.²²¹

III. A CATEGORICAL APPROACH

This Part of the Article describes and defends a middle ground between the Court's broad pro-immunity rule and the abolitionist view—what I call the “categorical approach.” The foundations of the argument lie in the principles developed in Parts I and II. One premise is that fairness and utility favor an immunity defense, but not necessarily the current regime's interpretation of the immunity doctrine, within which defendants win even if the unconstitutionality of their acts is clear. Another premise of the categorical approach is that the predictability and stability benefits of rules counsel against borrowing “ordinary tort” principles, but they do not necessarily require an immunity rule as broad as the rule of *Harlow*. The better path would be to retain the value of rule-based decision making by a categorical approach, in which distinctions would be drawn among fact patterns on the basis of one or a few features that justify putting them in a “no immunity” category or in a “high immunity” category. Qualified immunity is analogous to the categorical approach of First Amendment doctrine, in which some categories of speech receive a higher level of protection than others. In both areas, “[c]ategorization has the attraction of clarity and of providing guidance to judges and other government officials.”²²² Thus, the aim of making contextual distinctions is to carve out categories in which immunity would be denied, as well as categories in which the policies favoring immunity are powerful enough to justify a stronger, even an absolute, immunity.²²³

221. Cf. Fallon, *supra* note 23, at 498 (suggesting that “establishing sensible standards for municipal liability” would include not only vicarious liability but also “displacement of the holding in *Owen*,” to “permit otherwise suable entities to benefit in litigation from having good internal mechanisms for training their officials to respect constitutional norms and for disciplining those who run amok”).

222. SULLIVAN & FELDMAN, *supra* note 20, at 945–46 (explaining that the categorical approach to First Amendment doctrine “strives for ‘bright-line’ rules” to help determine when certain facts may trigger government justification before speech regulation).

223. Other techniques are also worth consideration. In some contexts, the optimal approach may be to concentrate on the way substantive constitutional law is formulated, see, for example, Fallon, *supra* note 23, at 490 (“In theory, it would be possible for the Supreme Court (or Congress) to make immunity . . . depend on the right that the official allegedly violated”); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 280, 281 (2000) (arguing that “the liability rule

The categorical approach gives weight to the specific factual and legal context in which an immunity issue arises.²²⁴ The question one asks in setting up categories is whether the policies on either side of the cost-benefit equation are comparatively strong or weak in a particular context. Section III.A discusses categories of cases in which the cost-benefit case for qualified immunity is especially weak. Section III.B turns to fact patterns in which the cost-benefit calculus may be so one-sided in the other direction that it supports even the award of absolute immunity.

This Article's claim is not that this categorical approach would resolve all of the current objections to qualified immunity. Some cases, for example *Brown v. Elliott*,²²⁵ do not fall within any of the special categories this Article identifies. As a result, *Harlow* would continue to govern those cases. In some fact patterns, issues would arise as to which, if any, of the categories may apply. Some fact patterns will raise hard issues about which category the case falls into. Some fact patterns may push for inclusion in both an expansive and a restrictive category. In these ways, the categorical approach adds complexity to the doctrine. But it would also provide useful guidance and structure to the analysis of qualified immunity issues. The benefits of a more finetuned approach are, on balance, worth the added complications.

A. *Six Weak Immunity Categories*

This Section describes six fact patterns in which the pro-immunity policies of fairness to defendants and avoiding overdeterrence are comparatively weak. In terms of the "proper balance" between the costs and benefits of immunity, this pattern of weakness does most of the work of justifying exceptions to *Harlow*. The anti-immunity goals of vindicating constitutional rights and deterring subsequent violations seem more or

for money damages should vary with the constitutional violation at issue," and, "[t]o that end, qualified immunity should lose its fixed doctrinal content"). For discussion of contexts in which a right-specific approach may be feasible, see Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 REV. LIT. 65, 97–98 (2009) (arguing that Fourth Amendment "excessive force" doctrine should be more rule-oriented); Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 944 (2001) (arguing that the First Amendment rights of public employees should be more rule-like and less governed by balancing tests).

224. See *supra* note 222 and accompanying text.

225. See *supra* notes 117–118.

less constant across most of these categories.²²⁶ Thus, the *relative* strength of vindication and deterrence is greater in these fact patterns.

1. *Collateral issues*

Ziglar falls into a category in which the case for immunity is unconvincing. When the lack of clarity relates to an issue other than the constitutional or statutory validity of the officer's conduct, the fairness and "social costs" arguments are weak, if they exist at all. The complaint in *Ziglar* alleged equal protection violations that were clearly established at the time the officials acted.²²⁷ They had the "fair warning" to which defendants are entitled, and their conduct did not put them to a choice between excessive caution and bold, effective government action.²²⁸ The uncertainty related only to whether the defendants could be sued under the conspiracy statute for conduct that they and everyone else know is unconstitutional.²²⁹ It is not far-fetched to compare immunity based on that lack of certainty to lack of certainty as to whether the plaintiff can obtain personal jurisdiction, or as to whether "state action" is present. The argument for a categorical rule that excludes a defense is that the cost-benefit balance favors the plaintiff's side across the whole set of such "collateral issue" cases. Given the weak pro-immunity policies, the pro-plaintiff goals of vindication of rights and deterring constitutional violations should control the outcomes in this set of cases.

The facts of *Hernandez v. Mesa*,²³⁰ decided a week after *Ziglar*, illustrate the aforementioned situation where pro-plaintiff goals should control the outcome. In that case, Jesus Mesa, a United States border guard standing on the United States side of the Mexican border, shot and killed Jesus Hernandez, an unarmed fifteen-year-old Mexican boy, who was standing on the Mexican side of the border.²³¹ The boy's parents brought a *Bivens* suit, in which they alleged violations of his Fourth and Fifth Amendment rights.²³² In the per curiam opinion, the Court remanded for consideration of the *Bivens* issue in

226. Note, however, that those goals may be especially strong when the plaintiff can establish the officer's bad faith, which is the second of the six fact patterns.

227. See *supra* note 19 and accompanying text.

228. See *supra* note 59 and accompanying text.

229. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–67 (2017).

230. 137 S. Ct. 2003 (2017) (per curiam).

231. *Id.* at 2004.

232. *Id.* at 2005.

light of *Ziglar*.²³³ Additionally, the Court reviewed the lower court's ruling "that Mesa was entitled to qualified immunity,"²³⁴ on the Fifth Amendment claim because of lack of clarity as to the applicability of the Fifth Amendment to a cross-border shooting of a non-U.S. citizen.²³⁵

Uncertainty on that issue is collateral to the duties imposed on Mesa by the Fifth Amendment. The outcome should turn on whether the Fifth Amendment rules are sufficiently clear. The Fifth Amendment claim is that the shooting was a deprivation of Hernandez's liberty without due process of law, in violation of the substantive component of due process.²³⁶ The leading case is *Sacramento County v. Lewis*.²³⁷ In that case, the Court denied liability because the injury was not intentional, but it also said that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level" that would offend substantive due process.²³⁸ Even if Fifth Amendment protections are *less stringent* at the border,²³⁹ that rule may be sufficiently clear and broad to enable Hernandez's parents to overcome a qualified immunity defense, provided they can prove that the shooting was unprovoked.²⁴⁰ For present purposes, however, that issue can be set aside. The thrust of this Article's argument is that the lack of clarity on which the lower court relied—as to whether the Fifth Amendment applies *at all* to cross-border shootings—is collateral to the fairness and avoidance of overdeterrence rationales for immunity.

233. *Id.* at 2006–07. On remand, the Fifth Circuit held that a foreign national may not sue federal law enforcement officials under *Bivens* for an injury that occurs on foreign soil. *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc).

234. *Ziglar*, 137 S. Ct. at 2007.

235. *See Hernandez v. United States*, 785 F.3d 117, 120–21 (5th Cir. 2015) (en banc) (per curiam).

236. *Id.* at 120.

237. 523 U.S. 833 (1998).

238. *Id.* at 849.

239. *Cf. Boumediene v. Bush*, 553 U.S. 723, 755–64 (2008) (discussing the extraterritorial application of the Constitution).

240. The per curiam opinion in *Hernandez* noted that "Hernandez's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts." *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017). The significance of this reference to Mesa's lack of knowledge of Hernandez's ties to the United States is not spelled out in the opinion. The Court may have intended to say that Mesa's lack of knowledge would preclude official immunity, such that the shooting clearly violated the Fifth Amendment, no matter what those ties were.

2. *The relevance of “bad faith”*

Harlow held that officers are immune from damages unless they violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁴¹ This canonical statement of the rule leaves open an important question: What if an officer believes he is violating the Constitution, and in fact he is violating the Constitution, even though a reasonable officer in his position would not have known? Two sentences in the majority opinion suggest that the officer cannot assert immunity if he “knew or reasonably should have known” his act violates the plaintiff’s constitutional right.²⁴² Justice Brennan, in a concurring opinion joined by Justices Marshall and Blackmun, cites those sentences in support of a rule that the *Harlow* “standard would not allow the official who *actually knows* that he was violating the law to escape liability.”²⁴³ On the other hand, some aspects of Justice Powell’s opinion for the Court pointed in the other direction. Its main theme was that the bad faith prong increased the cost of constitutional tort litigation and must be eliminated, since it authorized a fact-intensive inquiry into the actual state of mind of the defendant.²⁴⁴ That inquiry made the discovery process especially burdensome and raised an obstacle to disposition of cases on summary judgment.²⁴⁵ Justice Brennan’s concurrence did nothing to allay these concerns, as he found it “inescapable . . . that some measure of discovery may sometimes be required to determine exactly what a public official did ‘know’ at the time of his actions.”²⁴⁶ The issue remained open after *Harlow*, as Justice Powell did not respond to Justice Brennan on this point.

Five years later, however, the Court definitively rejected Justice Brennan’s position in *Anderson*. The issue in this case was whether an FBI agent could be held liable for an illegal search, when an officer could have reasonably believed the search was valid, but plaintiffs could show that this defendant believed it violated the Fourth Amendment, as indeed it did. The Court said that *Harlow* had “completely reformulated qualified immunity . . . replacing the inquiry

241. 457 U.S. 800, 818 (1982).

242. *Id.* at 815, 818.

243. *Id.* at 821 (Brennan, J., concurring).

244. *Id.* at 816–17 (explaining how fact-intensive inquiries made the discovery process especially burdensome and raised an obstacle to disposition of cases on summary judgment).

245. *Id.*

246. *Id.* at 821 (Brennan, J., concurring).

into subjective malice . . . with an objective inquiry into the legal reasonableness of the official action.”²⁴⁷ The officer’s “subjective beliefs about the search [were] irrelevant.”²⁴⁸ The *Harlow* ruling became a hardline rule that qualified immunity inquiries focus solely on the state of the law at the time of the constitutional violation, thus excluding evidence of a defendant’s impermissible motives or reckless disregard of a plaintiff’s constitutional rights.²⁴⁹ This rule blocks plaintiffs with valid constitutional claims from recovering from defendants who do not deserve protection.²⁵⁰

From the perspective of achieving the proper balance between the costs and benefits of immunity, this holding is doubtful. Justice Brennan’s alternative seems to accommodate the competing interests better than the *Anderson* approach. The pro-liability “vindication of rights” and “deterrence of violations” policies are at their strongest when the officer acts in bad faith, that is, without a sincere belief in the validity of his action.²⁵¹ In cases where officers act in bad faith, the defendant has no standing to complain about unfairly imposed liability, even if the law is sufficiently unclear enough that others acting in good faith could have believed they were acting properly. The holding is consistent with *Harlow*’s concerns about discovery and trial costs.²⁵² Those concerns are valid, especially since the costs must be incurred even when the defendant has *not* acted in bad faith. But developments since *Harlow* should be considered in evaluating its current status. The concerns that gave rise to the deletion of the subjective prong may not be as great now as they were in 1982. A few years after *Harlow*, in *Celotex Corp. v. Catrett*,²⁵³ the Court heightened the

247. 483 U.S. 635, 645 (1987).

248. *Id.* at 641.

249. *See, e.g.*, *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (noting that the test is objective); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (emphasizing that pretext does not preclude immunity).

250. *Archer v. Chisholm*, 870 F.3d 603, 615 (7th Cir. 2017) (“[E]ven officers who knowingly or recklessly submit an affidavit containing falsehoods may receive qualified immunity if they show an objectively reasonable basis for believing that the affidavit still demonstrated probable cause.”); *Pompeo v. Bd. of Regents*, 852 F.3d 973, 982 (10th Cir. 2017) (“[S]ubjective good faith or bad faith of government actors is ordinarily relevant to the objective inquiry whether a reasonable officer would have realized that his conduct was unlawful.”).

251. *See* Jeffries, *What’s Wrong*, *supra* note 110, at 868–69 (arguing that egregious misconduct should not be immunized, even if the law is not “clearly established”).

252. *See supra* note 244 and accompanying text.

253. 477 U.S. 317 (1986).

standard for defeating summary judgment.²⁵⁴ In particular, it held that a party opposing summary judgment must “make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” whether or not the summary judgment movant has produced an affidavit or other proof.²⁵⁵ After *Celotex*, a plaintiff charging bad faith cannot avoid summary judgment without offering proof at that stage of the case. Justice Kennedy has suggested that this development has “alleviated” the problem that had carried so much weight in *Harlow*.²⁵⁶ Qualified immunity is a judge-made rule. Acting in the common law tradition, the Court is fully authorized to modify it in the light of changed conditions.

Experience with *Harlow* suggests that, even if trial and discovery costs persist after *Celotex*, the Court’s rule is not effective at reducing those costs. As we have seen,²⁵⁷ Schwartz’s empirical study of § 1983 litigation found that just 3.2% of § 1983 cases were dismissed before trial on qualified immunity grounds.²⁵⁸ In an earlier study of *Bivens* cases, Alexander Reinert reported that qualified immunity led to dismissals of only two percent of them over a three year period.²⁵⁹ Professor Schwartz found that “[q]ualified immunity is raised infrequently before discovery begins.”²⁶⁰ Defendants prevailed on some claims at summary judgment, but “additional claims or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial.”²⁶¹ Evidently, plaintiffs’ lawyers responded to *Anderson* by drafting complaints that cannot be disposed of on summary judgment under the standards set forth in

254. *Id.* at 322–23.

255. *Id.*

256. *See* *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). Further protection is provided by *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that “pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth”). By enabling judges to reject a case deemed to be implausible on a motion to dismiss the complaint, *Iqbal* facilitates dismissals of cases in which the complaint asserts bad faith but provides no specifics. *See, e.g., Saldivar v. Racine*, 818 F.3d 14, 18 (1st Cir. 2016). Note that the district court may dismiss the case before the plaintiff has had a chance to engage in discovery.

257. *See supra* note 146 and accompanying text.

258. Schwartz, *supra* note 35, at 1809.

259. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

260. Schwartz, *How Qualified Immunity Fails*, *supra* note 138, at 9.

261. *Id.* at 10.

Celotex.²⁶² In addition, they may sue for prospective relief, or they may name local governments as defendants.²⁶³ Qualified immunity is not a defense in either context.²⁶⁴

3. *Two bites at the apple*

In *Anderson v. Creighton*, the Court held that an officer could successfully assert qualified immunity for a search that violated the Fourth Amendment.²⁶⁵ The officer may argue, first, that the search was reasonable, and second, that he made a reasonable mistake as to the reasonableness of the search, even if the search was not reasonable. As Justice Stevens put it in dissent, he is allowed “two bites at the apple.”²⁶⁶ This rule was extended to all Fourth Amendment cases in *Saucier v. Katz*.²⁶⁷ The issue in that case was how qualified immunity should be applied when persons arrested by the police assert that the officers used excessive force.²⁶⁸ *Graham v. Connor*²⁶⁹ had held that the general Fourth Amendment test is whether the officer’s actions were “objectively reasonable.”²⁷⁰ The qualified immunity test is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”²⁷¹ The issue in *Saucier* was whether the officer is entitled to argue “reasonableness” twice, or only once.²⁷² Thus, the plaintiff argued that *Graham* “sets forth an excessive force analysis indistinguishable from qualified immunity, rendering the separate immunity inquiry superfluous.”²⁷³ But the Court, following *Anderson*, ruled that the two inquiries are distinct.²⁷⁴ Across the whole range of Fourth Amendment issues, the officer may prevail on either of two distinct grounds: (1) that the force, arrest, or search was “reasonable,” and therefore not a Fourth Amendment violation, or (2)

262. *Id.* (explaining how plaintiffs may sue for prospective relief or name local governments as defendants to survive summary judgment as qualified immunity is not a defense in these contexts).

263. *Id.*

264. *Id.*

265. 483 U.S. 635, 641 (1987).

266. *Id.* at 664 n.20 (Stevens, J., dissenting) (citation omitted).

267. 533 U.S. 194 (2001).

268. *Id.* at 197.

269. 490 U.S. 386 (1989).

270. *Id.* at 388.

271. 533 U.S. at 202.

272. *Id.* at 199–200.

273. *Id.* at 204.

274. *Id.* at 206.

that the force, arrest, or search was improper, but he made a reasonable mistake in determining the activity was permissible.²⁷⁵

The Court's reasoning is unassailable insofar as it reflects the logical structure of a constitutional tort case.²⁷⁶ Since the substantive constitutional "reasonableness" issue and the immunity "reasonableness" issue are in fact distinct, the resolution of the constitutional issue cannot, by itself, resolve the immunity issue. Under the Fourth Amendment, unreasonableness of the conduct does not exclude an argument that the mistake as to the reasonableness of the conduct was itself a reasonable mistake.²⁷⁷ One criticism of this test is that, logic aside, it is hard for judges and juries to keep the two questions separate, at least in cases in which the Fourth Amendment and the immunity issues both seem to turn on "reasonableness."²⁷⁸ For present purposes, the more important objection is that the "cumulation of messages . . . has led many lower courts to reject civil liability for excessive force in circumstances where such liability seems fully justified."²⁷⁹

As a matter of costs and benefits, the case for "two bites at the apple" is strong in some contexts but weak in others. In Anderson's case, the search was objectively reasonable given the information the officer had to establish probable cause and thus provides a strong example for the aforementioned approach. It is strong in *Anderson's* "probable cause" fact pattern. The body of Fourth Amendment doctrine bearing on probable cause to search or to arrest includes a consideration of a myriad factors, including, for example, the reliability of informants, the type of crime, and the existence of "exigent circumstances" that would obviate the need to a warrant, among others.²⁸⁰ The evaluation of all of these factors by a police officer who does not have a law degree (or even one who does) may not yield a clear answer in the

275. See *id.*; see, e.g., *Kisela v. Hughes*, No. 17-467, slip op. at 3–5 (U.S. Apr. 2, 2018) (per curiam); *Hurt v. Wise*, 880 F.3d 831, 841 (7th Cir. 2018); *Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017); *Wilber v. Curtis*, 872 F.3d 15, 20–21 (1st Cir. 2017); *Jones v. Fransen*, 857 F.3d 843, 850–52 (11th Cir. 2017). Despite having two chances to win, some officers do lose these excessive force and false arrest cases. See, e.g., *Stephens v. DeGiovanni*, 852 F.3d 1298, 1326–28 (11th Cir. 2017) (excessive force); *Graham v. Gagnon*, 831 F.3d 176, 184–86 (4th Cir. 2016) (arrest without probable cause).

276. See *Jeffries, Liability Rule*, *supra* note 22, at 265.

277. *Id.*

278. See 533 U.S. at 210 (Ginsburg, J., concurring in the judgment) (asserting that "[t]he two-part test today's decision imposes holds large potential to confuse").

279. *Jeffries, Liability Rule*, *supra* note 22, at 267–68.

280. See Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 286–87 (1988).

circumstances of a given search.²⁸¹ If an officer gets it wrong, but makes a reasonable mistake, it is unfair to second-guess the decision, and it is likely to lead officers to steer clear of searches that are close to the constitutional line. Thus, both the fairness and “avoiding overdeterrence” policies are in play.

But the rationale for a second bite at the apple is weaker in excessive force cases, in which both the Fourth Amendment issue and the qualified immunity issue turn on “reasonableness.” If the goal of immunity is to achieve a “proper balance” between competing policies, the core problem with *Saucier* is not the confusion it creates, nor is it simply the impact it has on outcomes. These are symptoms of a more basic objection: to a substantial degree, showing sufficient lack of reasonableness satisfies demonstrating fairness to the officer in establishing a Fourth Amendment violation.²⁸² In an excessive force case like *Saucier*, that showing cannot be made unless the officer has not only invaded the plaintiff’s interests in bodily integrity and personal security, but has acted unreasonably in doing so. Fairness to the officer is largely achieved without proof of a *second* layer of unreasonableness, i.e., that the officer not only acted unreasonably in violation of the Fourth Amendment, but made an unreasonable mistake in thinking he was allowed to use force. As a matter of avoiding overdeterrence, the policy argument against official immunity is that the officer *already* has the protection he needs in order to use force, in the form of the Fourth Amendment requirement that the force be “unreasonable” in order to trigger Fourth Amendment protection. For these reasons, “qualified immunity would impart only a very slight addition to the protection built into the constitutional standard for excessive force.”²⁸³

281. See, e.g., *Manners v. Cannella*, 891 F.3d 959, 968–72 (11th Cir. 2018). Note, however, that defendants are sometimes found liable despite having had two bites at the apple. See, e.g., *Cozzi v. City of Birmingham*, 892 F.3d 1288, 1294 (11th Cir. 2018).

282. See *Saucier*, 533 U.S. at 205 (giving officers discretion because they often have to make rapid decisions).

283. Jeffries, *Liability Rule*, *supra* note 22, at 267. Nonetheless, the current qualified immunity doctrine is especially protective of police officers in Fourth Amendment cases, because the application of the Fourth Amendment “interest-balancing test” to a given set of facts will often be uncertain, and the officer will then prevail on the immunity prong of the case. See, e.g., *Sumpter v. Wayne Cty.*, 868 F.3d 473, 485 (6th Cir. 2017) (explaining how officers are granted wide latitude when their actions scrutinized under interest balancing).

This theme is illustrated by the Supreme Court's award of immunity in *Kisela v. Hughes*.²⁸⁴ In that case, an officer shot at a woman who was carrying a knife because he believed she was threatening someone else.²⁸⁵ Suppose the belief was mistaken. If the mistaken belief were nonetheless reasonable, there would be no Fourth Amendment violation.²⁸⁶ But suppose the belief was unreasonable, so that the shooting was a violation of the woman's Fourth Amendment rights. The officer still escapes liability if he can show that he reasonably believed the shooting was justified. In *Kisela*, the defense may yield a bit of "avoiding overdeterrence" benefit, and a bit more protection for officers against imposition of liability without fair warning. If the provision of an extra shield against liability were costless, the marginal benefit added by immunity might tip the scale in favor of a defense, even in "two bites at the apple" excessive force cases. But that marginal benefit comes at the expense of the pro-liability policies of vindication of constitutional rights and deterrence of violations. The case against *Saucier* is that in this "two bites at the apple" context, the benefits of a qualified immunity defense are comparatively small, while the costs are as great as they always are when plaintiffs are denied a victory on the merits on account of official immunity.

4. *Unwarranted reliance on circuit precedent*

In *Lane v. Franks*,²⁸⁷ the substantive issue arose when Edward Lane, a government employee, was fired for giving truthful testimony pursuant to a subpoena at a criminal trial.²⁸⁸ That criminal prosecution concerned a public corruption scandal that Lane discovered at work. The Eleventh Circuit had dismissed his § 1983 suit on the ground that Lane's testimony was not protected speech, and that, even if it were protected speech, the constitutional rule was unclear at the time Lane was fired.²⁸⁹ On the First Amendment issue, the Court held

284. No. 17-467, slip op. at 8 (U.S. Apr. 2, 2018) (per curiam).

285. *Id.* at 6.

286. See, e.g., *Horton v. Pobjecky*, 883 F.3d 941, 948–51 (7th Cir. 2018) (discussing how during an armed robbery when one assailant made threats with a gun, it was reasonable to assume the other three assailants also were armed).

287. 134 S. Ct. 2369 (2014).

288. *Id.* at 2377.

289. *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. Appx. 709, 711–12, 711 n.2 (11th Cir. 2013) (per curiam).

unanimously that the testimony was protected speech.²⁹⁰ The leading cases in the area are *Pickering v. Board of Education*²⁹¹ and *Connick v. Myers*.²⁹² Taken together, these cases held that an employee could not be fired for speech on a matter of public concern unless the disruptive impact of the speech outweighed its value.²⁹³ As applied to Lane's case, the testimony "clearly" met the "speech as a citizen on a matter of public concern" prong.²⁹⁴ Ever since *Pickering*, the Court has recognized that a public employee's speech concerning his employment holds special value because of the insight gained regarding public concern through his profession.²⁹⁵ Moreover, public employee speech is evidently important in cases such as a public corruption scandal.²⁹⁶ Accordingly, holding that that the speech required to prosecute a public official for corruption may never be the basis for a retaliation claim under the First Amendment is "antithetical to our jurisprudence."²⁹⁷ On the balance of interests prong, the employer's interests on the *Pickering* scale are completely absent, as the employer neither asserted nor demonstrated any government interest to the contrary.²⁹⁸

However, this case also presents a qualified immunity issues as Lane sought damages in a § 1983 suit against the supervisors.²⁹⁹ Despite the unanimous holding that the testimony was protected by the First Amendment, the Court held, again unanimously, that the officials were immune.³⁰⁰ The stumbling block was *Garcetti v. Ceballos*,³⁰¹ which had held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First

290. See *Lane*, 134 S. Ct. at 2380–81 (stating that because the government did not demonstrate any interest that justified treating the employee differently, the employee's speech was protected under the First Amendment).

291. 391 U.S. 563 (1968).

292. 461 U.S. 138 (1983).

293. See *id.* at 154 (holding that the government interest in wanting to prevent disruptive office behavior outweighed an employee's internal policy grievance); see also *Pickering*, 391 U.S. at 574–75 (finding that absent proof that the statements made were knowingly false or recklessly made, the statements cannot be the basis for dismissal).

294. *Lane*, 134 S. Ct. at 2378.

295. *Id.* at 2379.

296. *Id.* at 2380.

297. *Id.*

298. *Id.* at 2381.

299. *Id.* at 2376.

300. See *id.* at 2383 (holding that Franks had qualified immunity because it was uncertain whether Lane's testimony was entitled to First Amendment protection).

301. 547 U.S. 410 (2006).

Amendment purposes.”³⁰² Ceballos, an assistant district attorney had been denied a promotion and had suffered other adverse actions for statements he made to other prosecutors and law enforcement officials, in which he found fault with an affidavit and urged dismissal of a criminal case.³⁰³ This type of “pursuant to official responsibilities” statement, the Court held, was not covered by the Court’s precedent in *Pickering* and *Connick*.³⁰⁴ After *Garcetti*, the Eleventh Circuit applied the holding to situations in which the employee did not speak as *part* of the job, but rather about information *learned* on the job.³⁰⁵ On the First Amendment merits, the Court in *Lane* decisively rejected this reading of *Garcetti* because “[t]he sworn testimony in this case is far removed from the . . . internal memorandum [at issue in *Garcetti*].”³⁰⁶ For that matter, “*Garcetti* said nothing about speech that simply relates to public employment.”³⁰⁷ In a concurring opinion joined by Justices Scalia and Alito, Justice Thomas likewise gave short shrift to the Eleventh Circuit’s reasoning.³⁰⁸ He noted that *Garcetti*’s “unprotected speech” holding applied “when a public employee speaks ‘pursuant to’ his official duties.”³⁰⁹

Despite the Court’s repudiation of the Eleventh Circuit’s precedents, it held that the defendants were entitled to rely on them.³¹⁰ The Court devoted a single sentence to explain why. It said that at the time of the firing, “no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.”³¹¹ The Court did not attempt to reconcile this ruling with its earlier observation that “the Eleventh Circuit read *Garcetti* far too broadly,”³¹² or with Justice Thomas’s view that the substantive issue in *Lane* “require[d] little more

302. *Id.* at 421.

303. *Id.* at 413–15.

304. *See id.* at 424 (distinguishing expressions made pursuant to one’s official responsibilities from those made outside the scope of employment).

305. *See, e.g.,* *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009) (expressing concern that an employer could request information in his official capacity and then gain protection for whatever statements he makes regarding that information).

306. *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014).

307. *Id.*

308. *Id.* at 2383–84 (Thomas, J., concurring).

309. *Id.* at 2383 (quoting *Garcetti*, 547 U.S. at 421–22).

310. *See id.* at 2282–83 (stating that because Eleventh Circuit precedent was unclear, the defense of qualified immunity cannot be defeated).

311. *Id.* at 2381.

312. *Id.* at 2379.

than a straightforward application of *Garcetti*.³¹³ Instead, the Court merely recounted the holdings of the Eleventh Circuit cases and concluded that “[a]t the time of Lane’s termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection.”³¹⁴

The Court shifted its tone more than once. Having found, initially, that “the Eleventh Circuit read *Garcetti* far too broadly,” and then having found a lack of “clear notice,” the Court next asserted that “[t]here [was] no doubt that the Eleventh Circuit incorrectly concluded that Lane’s testimony was not entitled to First Amendment protection.”³¹⁵ Despite the lack of doubt, “the question was not ‘beyond debate’ at the time Franks, the supervisor who fired Lane, acted.”³¹⁶

The explanation for these equivocations is that the Court gives weight to circuit precedent in applying the “clearly established law” principle,³¹⁷ and does so even in the face of Supreme Court rulings to the contrary. Consequently, even if a circuit rule is “no doubt” mistaken, it will protect the officer from liability for damages. Officers are certainly entitled to look to the law of the circuit on matters the Supreme Court has not addressed. But the Court gives too much deference to the circuits in cases like *Lane*. The Supreme Court’s balancing test set forth by *Pickering* and *Connick* has roots in the fundamental First Amendment principle that speech bearing on self-government receives a high level of protection.³¹⁸ The application of that principle will occasionally present hard questions, but Lane’s case was not one of them. Few, if any, competent lawyers could have doubted that the First Amendment protected Lane’s truthful, subpoenaed trial testimony on public corruption. Despite the Eleventh Circuit precedent that read *Garcetti* broadly, that point was sufficiently clear to provide the notice necessary to satisfy the qualified immunity policies. *Garcetti*’s distinction between speech “pursuant to”

313. *Id.* at 2383 (Thomas, J., concurring).

314. *Id.* at 2382–83.

315. *Id.* at 2383.

316. *Id.*

317. See *Wilson v. Layne*, 526 U.S. 603, 614–15, 617 (1999) (diminishing petitioner’s claim because petitioner did not provide any controlling cases to support the rule on which petitioner relies).

318. See, e.g., *Stough v. Gallagher*, 967 F.2d 1523, 1529 (11th Cir. 1992) (stating that encouraging people to vote for a candidate is a critical part of self-government and is greatly valued under the First Amendment).

official duties and other speech by government employees may not be sufficiently clear to mark the protected/unprotected border for *every* instance of government employee speech. But it is clear from *Garcetti*'s "pursuant to official duties" rationale that testimony compelled under subpoena in a criminal case is not covered by *Garcetti*'s holding.

Lane may belong to a category of cases in which reliance on circuit court precedent is unreasonable.³¹⁹ The Court should recognize an exception to *Harlow* for cases that fall into this category, if only to discourage reliance on *Lane* in situations in which Supreme Court precedent clearly establishes unconstitutionality but defendants can cite dubious lower court decisions.³²⁰ Under the categorical approach, reliance on circuit court precedent would be unavailing in such a case no matter how strongly the circuit court cases support the defense. To put the rationale for this rule in cost-benefit terms: there is no occasion to accommodate the competing constitutional tort policies³²¹ because there is no uncertainty at all as to the place of the Supreme Court at the top of the hierarchy of courts. Thus, the fairness concern is weak when the Supreme Court doctrine is sufficiently clear to provide "fair warning"³²² even if circuit precedent is to the contrary. For the same reason, a clear Supreme Court ruling eliminates the gray area that sometimes produces overly cautious government action, and it does so even if circuit court precedent seems to allow the officer to go further. In this type of case, the plaintiff-friendly policies of vindication of rights and deterrence of violations should control the outcome.

5. *Distinctions without differences*

In many constitutional tort cases, the "clearly established law" issue is more accurately described as "clearly established application of law

319. See *Lane*, 134 S. Ct. at 2381 (noting that the circuit court precedent did not make unreasonable the belief that one could fire an employee based on his or her testimony).

320. The converse situation, in which circuit court precedent states a clear rule which the defendant violates, but Supreme Court cases cast doubt on the lower court precedent, does not raise any exception to *Harlow* issues. See, e.g., *Kisela v. Hughes*, No. 17-467, slip op. at 6 (U.S. Apr. 2, 2018) (per curiam) (noting that the lower court made errors in its conclusion based on its own precedent). The defendant simply argues that under *Harlow* the circuit court precedent does not clearly establish the unconstitutionality of his act, and that this is so even if the circuit court precedent is correct.

321. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (weighing the social costs against the effect on public officials).

322. See *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002) (explaining that a defendant was entitled to a fair warning that his conduct was depriving a victim of one of the victim's constitutional rights).

to fact,” because “the right cannot be defined at a high level of generality; instead, the key is whether the specific conduct has been clearly established as a constitutional violation.”³²³ For example, the Fourth Amendment authorizes police officers to use “reasonable” force to subdue suspects.³²⁴ In “excessive force” cases, the issue is whether the officer has gone too far.³²⁵ Since the reasonableness of the use of force depends on the circumstances of each particular encounter, and since the law developed in connection with one circumstance may not clearly establish the law for another circumstance, officers often have grounds for an assertion of qualified immunity.³²⁶ The strength of those grounds will vary from one case to the next because some factual variations have legal significance while others do not. The Supreme Court’s formulation of the qualified immunity rule invites courts to tilt the analysis in favor of immunity in close cases. It requires that “every reasonable official would have understood that what he is doing violates [the] right,”³²⁷ and that “existing precedent must have placed the . . . question beyond debate.”³²⁸

Some courts award qualified immunity even when the legal or factual distinction is slight. For example, in *A.M. v. Holmes*,³²⁹ a thirteen-year-old seventh grader disrupted class by burping, laughing, and refusing to stop when told to do so.³³⁰ His classmates were entertained but the teacher was not.³³¹ She called the school resource officer—a police officer assigned to the school—who arrested the boy, put him in handcuffs, and took him to a juvenile detention facility.³³² The boy and his parents sued under § 1983 for a Fourth Amendment violation but a divided Tenth Circuit panel granted the officer

323. *Lincoln v. Maketa*, 880 F.3d 533, 537 (10th Cir. 2018) (citing *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)).

324. *See, e.g., Wardlaw v. Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993).

325. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (stating that a determination of the reasonableness of force must include analysis of the circumstances surrounding the use of force).

326. *See Wells*, *supra* note 223, at 95–98 (explaining the difficulties in discerning a standard due to different precedential signals stemming from unique circumstances).

327. *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011)).

328. *Al-Kidd*, 563 U.S. at 741.

329. 830 F.3d 1123 (10th Cir. 2016).

330. *Id.* at 1129.

331. *Id.*

332. *Id.* at 1130.

qualified immunity.³³³ Though earlier cases had held that an arrest would be improper in similar circumstances, the majority distinguished those cases, as they involved a different criminal statute.³³⁴ In his dissent, then-Judge Gorsuch pointed out that “the relevant language of the two statutes is *identical*.”³³⁵ Similarly in *Coffin v. Brandau*,³³⁶ a police officer came to the plaintiff’s house with a summons but without an arrest or search warrant.³³⁷ The law was clear that he could not enter the front door without a warrant or consent.³³⁸ However, he entered the door of the attached garage instead.³³⁹ The Eleventh Circuit held that the entry violated the Fourth Amendment but granted qualified immunity anyway, on the ground that under Fourth Amendment principles a reasonable person might distinguish a garage door from a front door.³⁴⁰ Lastly in *Gilmore v. Hodges*,³⁴¹ a hearing-impaired prisoner sued for failure to provide him with batteries for his hearing aids.³⁴² Although Eighth Amendment precedents clearly established that denial of dentures, eye glasses, and prostheses amounted to cruel and unusual punishment, the Eleventh Circuit found no clearly established rule against denial of hearing aids.³⁴³

While pro-immunity values are comparatively weak across cases that differ from earlier plaintiff-friendly rulings, the constitutional norms remain the same and therefore do not support a finding of surprise.³⁴⁴

333. *See id.* at 1129, 1151 (reasoning that the law at the time of the incident would not have put a reasonable police officer on notice that his actions constituted a Fourth Amendment violation).

334. *See id.* at 1143–45 (distinguishing the present criminal statute because the statute the student relied on did not include provisions regarding interfering with the educational process).

335. *Id.* at 1170 (Gorsuch, J., dissenting).

336. 642 F.3d 999 (11th Cir. 2011) (en banc).

337. *Id.* at 1004.

338. *See id.* at 1009 (stating that the Fourth Amendment’s protections are at the highest in the home).

339. *Id.* at 1005.

340. *See id.* at 1017–18 (discussing the officers’ reasonable conclusion that they could enter the garage to make the arrest based on the circumstances).

341. 738 F.3d 266 (11th Cir. 2013).

342. *Id.* at 268–69.

343. *Id.* at 274–75.

344. *See, e.g.,* *Simon v. City of New York*, 893 F.3d 83, 97–98 (2d Cir. 2018) (rejecting qualified immunity because “the factual distinction advanced here—that the defendants acted on a material witness warrant, not a criminal arrest warrant—is irrelevant. Any warrant must be executed in reasonable conformity with its terms—a rule so integral to Fourth Amendment doctrine that we are untroubled that no case has previously applied it to a material witness warrant”).

The Supreme Court could recognize this systematic imbalance by adopting a rule that immunity should not be awarded when there is a factual distinction but the distinction does not reflect a legally significant difference.³⁴⁵ In *Hope v. Pelzer*, it seemed to do just that. An earlier binding case had held that chaining a prisoner to a fence for a long period of time as punishment would violate the Eighth Amendment right against cruel and unusual punishment.³⁴⁶ In *Hope*, prison guards had chained the prisoner to a hitching post, and the Eleventh Circuit applied qualified immunity on the theory that precedent cases did not clearly establish an Eighth Amendment violation for chaining a prisoner to a hitching post.³⁴⁷ The Supreme Court rejected the Eleventh Circuit's "rigid overreliance on factual similarity"³⁴⁸ and held that the key issue is "fair warning."³⁴⁹ But the Court soon turned away from the plaintiff-friendly approach it had taken in *Hope*. Its "subsequent decisions veered back toward requiring precedential specificity."³⁵⁰

345. For example, it might have applied this principle in *Kisela v. Hughes*, No. 17-467, slip op. at 1 (U.S. Apr. 2, 2018) (per curiam). An earlier case had held that a police officer may not use deadly force against a person who acts erratically and disobeys officers' commands, but who is not threatening anyone. In *Kisela*, the most important new wrinkle is that the plaintiff was carrying a kitchen knife. The majority held that this factual difference justified qualified immunity. *Id.* at 7. Justice Sotomayor, in dissent, argued that this was a distinction without a difference. *See id.* at 9–11 (Sotomayor, J., dissenting) (analogizing this case to precedent); *see also* *Thompson v. Rahr*, 885 F.3d 582, 585, 587 (9th Cir. 2018). In this case, the majority awarded qualified immunity to an officer who, according to the plaintiff's account, pointed a gun at the plaintiff in the course of a traffic stop and threatened to kill him. Earlier cases had held that similar conduct would violate the Fourth Amendment, and the majority agreed that the officer committed a Fourth Amendment violation. In his dissent, Judge Christen argued that the officer had "fair notice," *id.* at 595, despite the "minor factual differences" between the two cases. *Id.* at 594.

346. *See Hope v. Pelzer*, 536 U.S. 730, 742 (2002) (citing *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)).

347. *Id.* at 733.

348. *Id.* at 742.

349. *Id.* at 739–41.

350. Jeffries, *Liability Rule*, *supra* note 22, at 257; *see, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 194, 197–98, 201 (2004) (per curiam). In *Brosseau*, the Court awarded qualified immunity to an officer who had used deadly force against a man who evaded the officer and drove away. *Id.* at 597–98, 600. The main Supreme Court precedent, *Tennessee v. Garner*, 471 U.S. 1 (1985), required that the officer reasonably believed his target posed a danger to the officer or others. *Id.* at 3. The Court seemed to hold that *Garner* was not sufficient to provide the necessary warning.

“Fair warning” is too vague a concept to guide and constrain decision making. Its content depends on a decision maker’s conception of fairness, which can depend on a wide array of contextual factors. “Distinctions without differences” is more rule-like, because it directs courts to deny qualified immunity unless they are persuaded that a later case differs in a legally significant way from the earlier one. The retreat from *Hope* might have been resisted more effectively if the Court had articulated a “distinctions without difference” rule instead of putting all of its weight on the norm of “fair notice.” As Frederick Schauer has pointed out, “rule-bound decisionmaking is inherently . . . conservative, in the nonpolitical sense of the word.”³⁵¹ Judges inclined to stray would have at least been obliged to advance arguments as to why the rule should not apply to the case at hand.

This is a weaker constraint than the first four, because it does not identify a circumstance that would resolve the immunity issue by itself. It may not compel different outcomes in cases like *Kisela, A.M.*, *Coffin*, and *Gilmore*, but it would at least furnish the plaintiff’s lawyer a means for drawing the court’s attention to the relevant question. *Kisela, A.M.*, *Coffin*, and *Gilmore* are cases in which the prior law lays down a clear constitutional line, which provides both fair warning and the guidance needed to allay undue caution. In cases of this type, courts may have to decide, based on the facts of that particular case, whether a given distinction actually reflects a difference. But the articulation of a category still has value, because it provides crucial guidance to the adjudicator.³⁵² It focuses the argument on the legally significant feature of the situation. For example, in a case like *Coffin*, the officer may argue that a garage door is not really like a front door, because the garage is not central to the dwelling. The plaintiff’s answer to this line of reasoning is that the settled law on front doors gives the fair warning to which the officer is entitled, as there is no legally significant difference, for Fourth Amendment purposes, between front doors and attached garage doors. The rule would direct the court to concentrate on *that* issue, and to refrain from speculation of the kind invited by *Ashcroft v. Al-Kidd*³⁵³ and *Reichle v. Howards*³⁵⁴ as to whether “every” officer would have understood that the entry violated the Fourth Amendment, or whether the issue is “beyond debate.” The

351. See Schauer, *supra* note 21, at 542.

352. See SCHAUER, *supra* note 75, at 113 (discussing the guidance function of rules).

353. 563 U.S. 731 (2011).

354. 566 U.S. 658 (2012).

“distinctions without differences” rule would remind the court that the immunity issue is not whether a distinction *can* be drawn but whether the distinction is warranted by the fair warning goal of official immunity. The mere availability of a front door/garage door distinction does not cast doubt on the conclusion that the officer had sufficient notice to satisfy the fairness and social costs goals served by qualified immunity.

6. *Ineluctable inferences*

Closely related to “distinctions without differences” is the situation in which well-settled general principles support liability. But there is no prior case with similar facts, and thus no occasion for the court to draw a distinction, even one that does not reflect a legally significant difference. Many courts tend to grant qualified immunity in this type of case.³⁵⁵ For example, in *Robles v. Prince George’s County*,³⁵⁶ the Fourth Circuit granted immunity to police officers who left an arrestee tied to a pole in a parking lot in the middle of the night when they could not find a place to take him.³⁵⁷ The court acknowledged that earlier cases involving unjustified physical restraints on pretrial detainees put the officers on notice that “they were acting inappropriately.”³⁵⁸ Unfortunately for Robles, none of them involved tying someone to a pole.³⁵⁹ Thus, for the Fourth Circuit, the officers’ Fourth Amendment violation was not “clearly established.”³⁶⁰ Professor Jeffries cites this case as an illustration of the current misalignment between the immunity policies and the application of *Harlow*.³⁶¹ The specific problem it illustrates is that, “[i]n searching for clearly established *law*,

355. See, e.g., *Knopf v. Williams*, 884 F.3d 939, 949 (10th Cir. 2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)) (stating the proposition that rejection of immunity depends on “identify[ing] a case where an [official was] acting under similar circumstances”).

356. 302 F.3d 262 (4th Cir. 2002).

357. *Id.* at 271.

358. *Id.*

359. See generally *Putman v. Gerloff*, 639 F.2d 415, 418 (8th Cir. 1981) (involving plaintiffs who were handcuffed together and left in a sitting position for twelve hours); see also *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 304 (5th Cir. 1987) (involving a plaintiff who was tied to a chair for an entire school day); *Fisher v. Wash. Metro. Transit Auth.*, 690 F.2d 1133, 1136 (4th Cir. 1982) (concerning a plaintiff who was detained naked in view of members of the opposite sex).

360. *Robles*, 302 F.3d at 271.

361. See Jeffries, *Liability Rule*, *supra* note 22, at 255.

courts seek precedents similar on the *facts*.³⁶² They do this despite the Supreme Court's admonition in *Hope* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."³⁶³

An advantage of a categorical approach is that the articulation of a rule to that effect would elevate the status of inference-drawing. Assuming *Robles* is the typical case, the question of whether there is fair warning is often ignored in practice, but nonetheless appears to be the question lower courts ought to ask.³⁶⁴ The creation of a special category would heighten its salience. As with "distinctions without differences" it would channel the debate over immunity more effectively than the current broad rule. The plaintiff's lawyer would be enabled to call the court's attention to the "ineluctable inferences" rule and the officer would lose unless he has a convincing rebuttal.

Consider *Mirabella v. Villard*³⁶⁵ as an illustration of how this rule may influence qualified immunity litigation. Maureen and John Mirabella had quarreled with a neighbor over the neighbor's use of property that belonged to Montgomery Township.³⁶⁶ After complaining to the local authorities without success, the Mirabellas sent the Board of Supervisors an email, informing them that they would sue the neighbor and would name the Township as an indispensable party.³⁶⁷ Joseph Walsh, Chairperson of the Board of Supervisors, responded with an email in which he told the Mirabellas to have no further contact with him or other Township employees, on any topic or for any reason.³⁶⁸ The Mirabellas then sued Walsh and other officials under § 1983.³⁶⁹ They alleged, among other things, that Walsh's email amounted to retaliation for the exercise of their First Amendment rights.³⁷⁰ The defendants did "not dispute that the Mirabellas . . . engaged in constitutionally protected speech . . . when they protested

362. *Id.* at 253 (emphasis added).

363. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also* *Stephens v. DeGiovanni*, 852 F.3d 1298, 1316, 1327 (11th Cir. 2017) (following *Hope* on "obvious clarity").

364. *See* Jeffries, *Liability Rule*, *supra* note 22, at 253 (suggesting that "[t]he distortion that now attends qualified immunity can be seen in many lower court decisions").

365. 853 F.3d 641 (3d Cir. 2017); *see also* *Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018) (stating that "novel technology, without more, does not entitle an officer to qualified immunity").

366. *Mirabella*, 853 F.3d at 646–47.

367. *Id.* at 647.

368. *Id.*

369. *See id.* at 648.

370. *Id.*

the Township's failure to protect the open space and threatened litigation."³⁷¹ Nor was there any dispute over the settled rule that retaliation for the exercise of a constitutional right is a constitutional violation.³⁷² Furthermore, the "no contact" email, which "barred the Mirabellas from communicating directly with their local government, for any reason, . . . was retaliatory."³⁷³

Nonetheless, the Mirabellas lost on qualified immunity grounds.³⁷⁴ The court could not find any cases that clearly established the "right to be free from a retaliatory restriction on communication with one's government, when the plaintiff has threatened or engaged in litigation against the government."³⁷⁵ Under the "ineluctable inference" rule, the inquiry would focus on fair warning. Failure to find a case on point would not be fatal to the plaintiff's case.³⁷⁶ In light of the clearly established right against retaliation for the exercise of the clearly established free speech right, the issue would be whether those principles gave Walsh fair warning that his email was retaliatory. Walsh may still have a good defense, but he will not have a good defense just because the Mirabellas cannot cite a prior case.

371. *Id.* at 649.

372. *Id.* ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006))).

373. *Id.* at 650.

374. *See id.* at 657 (holding that although the Mirabellas alleged a violation of their First Amendment right to petition the government for redress of grievances, the right was not clearly established under the qualified immunity analysis).

375. *Id.* at 653.

376. *See, e.g., Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018). Sims, a seventeen-year-old, was accused of child pornography for sending a photograph of his erect penis to his fifteen-year-old girlfriend. *Id.* at 259. An officer obtained a search warrant that would authorize an order that Sims masturbate in front of officers so that they could obtain a photograph of his erect penis. *Id.* Sims sued for a Fourth Amendment violation. *Id.* at 260. Despite the lack of a case on point, the court rejected qualified immunity: "Because there was no justification for the alleged search to photograph Sims' erect penis and the order that he masturbate in the presence of others, we conclude that well-established Fourth Amendment limitations on sexually invasive searches adequately would have placed any reasonable officer on notice that such police action was unlawful We further observe that the [defendant] is not entitled to invoke qualified immunity simply because no other court decisions directly have addressed circumstances like those presented here." *Id.* at 264.

B. Two Strong Immunity Categories

The logic of the cost-benefit model implies that it may, in some circumstances, favor broader, rather than narrower, official immunity. In the two contexts discussed in this section, the pro-defendant “avoiding overdeterrence” and “fairness to defendants” interests are especially strong, and thus may justify absolute immunity for officials, rather than *Harlow*’s qualified immunity. The two contexts discussed here involve cases in which: (1) high officials are sued for actions related to national security; and (2) cases in which the plaintiff obtains prospective relief. As with the six “anti-immunity” categories, my aim is to show that there are grounds for distinctive treatment of these fact patterns. Whether those grounds are *strong* enough is a separate question, and one for the Supreme Court to resolve. In any event, the Court, with the aid of history, has already identified some categories in which the cost-benefit calculation supports an absolute immunity, namely those in which the actor exercises a prosecutorial, judicial, or legislative function,³⁷⁷ as well as official actions taken by the President of the United States.³⁷⁸ Thus, the issue explored in this Section is whether the national security and prospective relief contexts are sufficiently analogous to these previously established categories to warrant similar treatment.

1. Absolute immunity for “executive officers” in national security cases

In *Harlow*, the Court left open the possibility that it would make an exception to its blanket qualified immunity rule for executive officers, including Presidential aides.³⁷⁹ It said that “[f]or aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.”³⁸⁰ Since *Harlow*, that question has remained open in the development of qualified immunity doctrine. In *Ziglar*, the Court returned to this

377. See Fallon, *supra* note 23, at 492 (explaining that the Supreme Court “has held that officials sued for performing judicial, legislative, and prosecutorial functions possess absolute immunity from damages liability” while “[o]fficials performing nearly all other functions receive qualified immunity”).

378. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (establishing that “[i]n view of the special nature of the President’s constitutional office and functions,” there must be absolute Presidential immunity “from damages liability for acts within the ‘outer perimeter’ of his official responsibility”).

379. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

380. *Id.* at 812.

theme, but it did so in a somewhat different context. It took the step of giving three of the defendants a special label, calling them “Executive Officials.”³⁸¹ These included former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar.³⁸² In explaining its rejection of a *Bivens* suit, the Court emphasized its role in high-level policy making. The special costs of authorizing a damages cause of action in this context included “inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged.”³⁸³ Courts would be required “to interfere in an intrusive way with sensitive functions of the Executive Branch.”³⁸⁴ In this particular case, Abbasi’s complaint related to “sensitive issues of national security,” which are “the prerogative of Congress and the President.”³⁸⁵ When Justice Kennedy turned to the qualified immunity issue raised by the § 1985(3) claim, he referenced this earlier “Executive Officials” discussion and added that “open discussion among federal officers is to be encouraged, so that they can reach consensus on the policies a department of the Federal Government should pursue.”³⁸⁶ If private suits for damages were allowed in this context, “the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies.”³⁸⁷ As the Court cautioned, “[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national security policy.”³⁸⁸

In its opinion, the Court raised this concern to support the denial of a *Bivens* cause of action on most of the claims, as well as the award of qualified immunity on the § 1985(3) claim.³⁸⁹ The logic of this rationale may not be so limited. The Court’s reasoning, with its emphasis on the distinctive disadvantages of allowing suits against high level “Executive Officials” in national security cases, may have

381. Ziglar v. Abbasi, 137 S. Ct. 1843, 1853 (2017).

382. *Id.*

383. *Id.* at 1860.

384. *Id.* at 1861.

385. *Id.*

386. *Id.* at 1868.

387. *Id.*

388. *Id.* at 1861.

389. *Id.* at 1868–69.

implications beyond the *Bivens* and § 1985(3) contexts.³⁹⁰ Instead of qualified immunity, the cost-benefit calculus underlying official immunity doctrine may justify absolute immunity, at least for some acts by Executive Officials. Both as a matter of fairness and effective government, the costs of liability may be especially great in this context.

The Court's reasoning on the § 1985(3) claim seems to treat the "Executive Officials" theme as a freestanding ground for immunity, separate from the "lack of clarity on intrabrand conspiracies" prong of the analysis. The "Executive Officials" prong makes no reference to lack of clarity in the law, and thus suggests that this concern exists even if the legal doctrine is clearly established. In that event, the general *Harlow* rule would be unhelpful in protecting high officers from personal liability, yet the pro-immunity case for "Executive Officials and national security" would still be strong. The Court does not call it an absolute immunity, but as a functional matter it seems to be accurately characterized as one. In the Court's absolute immunity doctrine, the key issue is not whether the law is clearly established, but whether the officer's function is one that needs special protection. *Ziglar's* rationale for the immunity of executive officers in national security decision-making may be best understood as a ruling that high-level executive policy making is one of those functions.

The need to shield federal "Executive Officials" from liability for damages for some aspects of high level policy making may well apply to actions by state officials as well. The Court's anti-*Bivens* holding does not address that concern, as that holding has no force in suits against state officers. Since those officers can be sued pursuant to a statutory cause of action under § 1983, the whole *Bivens* doctrine is irrelevant in such actions. If the "high level national security policy making" objection to liability is valid in the context of suits against federal officials, it should be presumptively available in suits against state officials as well, provided they can show that the activity in question is sufficiently similar to national security decision making. As the Court pointed out in another context, "[t]he pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials."³⁹¹ Immunity doctrine, not *Bivens* doctrine, is the means by which that principle can be implemented.

390. *Id.* at 1866, 1868.

391. See *Butz v. Economou*, 438 U.S. 478, 500 (1978). The issue in *Butz* was whether federal officials were entitled to absolute immunity for actions similar to those for

Should the Court recognize this absolute immunity rule, a question would arise as to its scope: would it apply only to national security decisions and similar decisions by high ranking state officers, or would it cover all high-level decisions? The Court's language in *Ziglar*, encouraging wide-reaching immunity for high ranking government officials dealing with sensitive issues of national security, suggests a broader meaning. But two Supreme Court cases hold otherwise. In *Scheuer v. Rhodes*, the Court rejected absolute immunity for a state governor for decisions made in connection with deploying the National Guard to suppress campus unrest.³⁹² Citing *Scheuer*, the Court rejected absolute immunity for the Secretary of Agriculture in *Butz v. Economou*.³⁹³ The Court explained that absolute immunity "would seriously erode the protection provided by basic constitutional guarantees."³⁹⁴ The cost of immunity is especially great when the official holds a high rank because "the greater power of such officials affords a greater potential for a regime of lawless conduct."³⁹⁵ *Butz* and *Scheuer* are solid precedents that courts would need to be overcome if they do not want to confine the hypothesized absolute immunity to the national security context. In my view, *Butz* and *Scheuer* were rightly decided. Thus, the immunity doctrine suggested by *Ziglar's* reasoning should be confined to an absolute immunity for national security matters and not allowed to spill over into other forms of high-level decision making.

2. Vindication and deterrence by prospective relief

In some constitutional tort suits the vindication and deterrence benefits of liability are comparatively small, because those goals can be obtained, at least to some extent, without an award of damages. In this set of fact patterns, the *Lyons* rule will not preclude prospective relief,³⁹⁶ because the violation is continuing or a recurrence is sufficiently likely.³⁹⁷ The plaintiff who succeeds on the merits obtains an especially powerful remedy—an injunction or a declaratory judgment that should put a stop to the illegality, rather than merely putting a price

which state officials only received qualified immunity. *Id.* The Court ruled that they were not. *Id.*

392. 416 U.S. 232, 247–49 (1974).

393. 438 U.S. 478 (1978).

394. *Id.* at 505.

395. *Id.* at 506.

396. See *supra* notes 92–98 and accompanying text.

397. *Id.*

on it.³⁹⁸ That ruling will not only affirm the plaintiff's rights but also deter future constitutional violations. "Defendants will likely be better deterred from continuing to commit constitutional violations through the use of injunctions or declaratory judgments, as opposed to the damages remedy, because such judgments can be enforced without bringing entirely new lawsuits. An example of this is through contempt judgments against officials who do not comply."³⁹⁹

Vindication of rights is compromised when damages are denied, as they are when immunity is successfully asserted. But the Court's rules on damages do not favor large awards in any event. Those rules follow the common law model. Under them, plaintiffs must prove damages, and the Court has explicitly rejected jury instructions that would authorize recovery for the value of the constitutional right.⁴⁰⁰ Since denials of constitutional rights often produce few tangible losses, few plaintiffs are able to obtain very large awards.⁴⁰¹ Even a small or nominal award serves the vindication goal when no other relief is

398. See *Bell v. Hood*, 66 S. Ct. 773, 777 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

399. See, e.g., *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2016 WL 3916704, at *1, *6-7 (D. Ariz. July 20, 2016) (finding that the district court did not violate the Tenth Amendment when it imposed three civil contempt charges against Sheriff Joseph Arpaio and the Maricopa County Sheriff's Office for various constitutional violations against the plaintiffs (inmates in the Maricopa County Jail), because the court had "previously fashioned less intrusive remedies, but those remedies were not effective due to [d]efendants' deliberate failures [to adhere to the court orders] and manipulations").

400. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (rejecting jury instructions that asked the jury to compensate for the deprivation of constitutional rights on the basis that it would require the jury to base its decision on a "subjective perception of the importance of constitutional rights as an abstract matter"); see also *Carey v. Piphus*, 435 U.S. 247, 263-64, 264 n.20 (1978) (holding that although distress caused by the denial of a constitutional right is compensable under § 1983, compensatory damages cannot be awarded without "proof that such injury actually was caused," and the jury must be properly instructed as such).

401. Large awards are available in some cases, for example, when a plaintiff is severely beaten by police officers, or jailors, or other inmates. But incidents of this type rarely involve requests for prospective relief, as they are not ongoing or threatened violations, and hence do not fall within the rule I propose. That said, I cannot exclude the existence of cases in which a litigant has suffered significant damages by illegal conduct that could give rise to prospective relief. Under the rule I propose, that litigant may choose to pursue only damages, omit any request for prospective relief, and leave that litigation strategy to others.

available.⁴⁰² The situation is different when the plaintiff obtains prospective relief. In practice if not in theory, the vindication costs of disallowing recovery of damages are comparatively small in such cases.⁴⁰³

Put in terms of the cost-benefit model of qualified immunity, plaintiffs achieve significant vindication and deterrence when they obtain prospective relief. The benefits of supplementing that relief with a damages award are comparatively small. Conversely, the cost of immunity is comparatively small. At the same time, the benefits of immunity may be especially strong in prospective relief cases. In an influential article, Professor Jeffries described one systemically important benefit: the shield against liability for damages “facilitates constitutional change by reducing the costs of innovation.”⁴⁰⁴ Immunity implies that the long run benefits of constitutional evolution are purchased at the cost of denial of damages to those who have been injured under the old regime, now understood to have violated their constitutional rights.⁴⁰⁵ Thus, the overall level of constitutional protection may be higher rather than lower in a regime of official immunity than without immunity.⁴⁰⁶ Courts can undertake law reform without worrying that officers will be liable in damages for conduct that is now deemed unconstitutional.⁴⁰⁷ The larger point here is that all of constitutional tort law is of distinctly secondary importance from the perspective of constitutional innovation. Prospective relief, such as injunctions and declaratory judgments, as opposed to damage awards, are the main weapons for achieving constitutional change, because such relief is often broader in its scope, available to a wider range of plaintiffs, and subject to continuing oversight by judges.⁴⁰⁸

402. See Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 726–28 (2014) (“Despite the fact-intensive legal issues [constitutional tort] cases usually present, and the ensuing risk of losing on account of official immunity, plaintiffs persist in bringing them. It appears that the desire to have one’s day in court against officers and governments is strong enough to overcome the obstacles to recovery and the meager monetary rewards of victory.”).

403. *Id.* at 728 n.85 (citing Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 71–74 (2010)) (discussing the value of tort litigation aimed primarily at vindication of rights, or “insulted honor,” as opposed to monetary rewards, as it empowers people to hold governments accountable, especially in cases of intentional torts where government actors believe they can harm without consequence).

404. Jeffries, *Right-Remedy Gap*, *supra* note 156, at 90.

405. *Id.* at 98–100, 105–10.

406. See Fallon, *supra* note 23, at 484, 488.

407. See Jeffries, *Right-Remedy Gap*, *supra* note 156, at 99–100, 113.

408. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–95 (1976).

For these reasons, the cost of immunity may be especially low and the benefits of immunity may be especially high in litigation in which plaintiffs seek both prospective relief and damages. Professor Jeffries advanced his rationale for the “right-remedy gap” in support of the current qualified immunity rule.⁴⁰⁹ But the logic of his argument is not so limited. The rationale for an *absolute* immunity from damages in such cases is that the cost-benefit comparison is sufficiently pro-immunity to support one.⁴¹⁰ The benefits of allowing plaintiffs to win damages as well as prospective relief are too small to justify the availability of backward-looking relief, even for plaintiffs who can prove that the officers they sue have violated clearly established law.⁴¹¹

Adoption of such a rule would not necessarily mean that plaintiffs who obtain injunctive relief automatically forfeit damages claims. Some or all of the anti-immunity rules discussed in Section III.A, above, may override it. In particular, the “bad faith” rule may supersede the prospective relief rule, so that damages would still be available to the plaintiff who can show not only a violation of clearly established law but also malice or recklessness or intent to violate constitutional rights. Consider, for example, a sheriff who abuses the Latino population after being told by a federal judge that his actions violate the Constitution and that he must stop.⁴¹² The availability of prospective relief against the sheriff should not stand in the way of a recovery of damages as well.

CONCLUSION

Discussions of qualified immunity have become unnecessarily polarized.⁴¹³ According to the Supreme Court, qualified immunity is available unless “every” similarly situated officer would have known the act was unconstitutional.⁴¹⁴ It protects “all but the plainly incompetent

409. Jeffries, *Right-Remedy Gap*, *supra* note 156, at 90–91 (emphasis added) (arguing that “the requirement of fault facilitates constitutional innovation and favors the future,” but adding that Jeffries’ support of the doctrine does not mean that he “endorse[s] the precise contours of existing law” in that the Supreme Court presently requires “*too much* fault as a condition of constitutional tort liability”).

410. *Id.* at 105.

411. *Id.* at 98–99, 104–05.

412. *See supra* note 398 and accompanying text.

413. Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1943 (2018) (discussing the discourse over qualified immunity as between those who advocate for “hard rules,” which offer more predictability and limit discretion, and “softer standards,” which theoretically should provide more fairness and flexibility).

414. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011).

and those who knowingly violate the law,” or it applies unless the constitutional issue is “beyond debate.”⁴¹⁵ In its current form, the doctrine protects far more official misconduct than its underlying aims would support. Critics of qualified immunity are equally adamant. They demand that the defense be eliminated or that local governments be held strictly liable for constitutional violations by their employees.⁴¹⁶ In a recent article, Professor Alan Chen argues that “there is little hope for resolution of the doctrine’s central dilemmas short of either abandoning immunity or making it absolute.”⁴¹⁷

This article may not resolve the doctrine’s central dilemmas, but it does propose an alternative to both the status quo and the strict liability approach. The chief problem with immunity is not that the policies underlying it are unworthy. Even if the social costs grounds on which the Court relies are empirically dubious, the value of fairness to defendants supports a principle that officers and governments should not be held liable without fault. There may be other grounds for recognition of an official immunity defense, which are as yet unarticulated or only vaguely understood. The stronger objection to current qualified immunity law is that the Court has formulated the doctrine as a general rule, which cannot be convincingly justified either by the immunity policies or by the benefits of stating law in the form of rules. Perhaps a better approach would be the implementation of targeted rules that eliminate qualified immunity in the cases in which the costs of immunity do not outweigh the benefits, instead of retaining the current doctrine or shifting to strict liability entirely. These targeted rules should also include those aimed at granting executive officials an absolute immunity in cases in which the benefits of a bar to liability outweigh the costs.

415. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Al-Kidd*, 563 U.S. at 741.

416. See Chen, *supra* note 413, at 1961–62 (detailing a study that found that the scope of police officer indemnification is “nearly universal,” and in a broader sense often times cases are dismissed in qualified immunity grounds, even when qualified immunity could be raised).

417. *Id.* at 1938 (“Among these problems are continuing disputes over the degree to which discovery is permissible prior to resolving immunity claims, the coherent implementation of supposedly transsubstantive summary judgment procedures, and the continuing consumption of substantial resources by the adjudication of qualified immunity claims.”).