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Qualified immunity is a judicially created doctrine that shields government officials from personal liability for civil damages. Courts applying the doctrine, which is heavily dependent on the facts of the case, must determine whether the government officials' conduct violated a clearly established statutory or constitutional right of which a reasonable person would have known. This inquiry is discretionary as judges must determine if the alleged violation was "clearly established," a term that the Supreme Court has defined in conflicting ways. Moreover, when federal judges conduct the qualified immunity inquiry at the Rule 12(b)(6) motion to dismiss stage, their decision is guided only by their discretionary interpretation of allegations in the complaint. Thus, plaintiffs face two layers of judicial discretion when defendants claim that they are entitled to qualified immunity in a Rule 12(b)(6) motion. This double discretion can lead to inconsistent results, as evidenced by the different approaches taken by circuit court judges in such situations.

This Note addresses the implications of this double discretion by examining the role judicial discretion plays in both (i) Rule 12(b)(6) motions as a result of the modern pleading standard and (ii) during the qualified immunity inquiry when judges define "clearly established." These examinations show that judges are granted with considerable discretion while determining the sufficiency of a complaint and while conducting a qualified immunity inquiry. This Note then reveals the implications of these discretions overlapping when judges engage in a qualified immunity analysis in the motion to dismiss stage. For example, this Note inspects Hart v. Hillsdale County*, 973 F.3d 627 (6th Cir. 2020), a 2-1 Sixth Circuit decision in which the dissenting judge disagreed with the majority's interpretation of the complaint and definition of "clearly established law." Finally, this Note proposes four solutions that would either eliminate this double discretion or help lead to more consistent judgments when qualified immunity is invoked in a Rule 12(b)(6) motion.*

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INTRODUCTION

The George Floyd protests pulled qualified immunity into the national spotlight.[1] The judicially created doctrine shields government officials from personal liability for civil damages when a court determines that their conduct failed to violate a clearly established statutory or constitutional right of which a reasonable person would have known.[2] The doctrine was intended to balance two important interests: (1) "the need to hold public officials accountable when they exercise power irresponsibly," and (2) "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[3] But some, including a federal judge, claim that

1. *See, e.g.*, Jay Schweikert, *Police Immunity Highlighted by George Floyd Protesters Must End, and Officers Must Pay*, CATO INST. (June 4, 2020), https://www.cato.org/publications/commentary/police-immunity-highlighted-george-floyd-protesters-must-end-officers-must [https://perma.cc/GS7R-KCDS] (discussing the need to reform or abolish qualified immunity); *see also* Nolan D. McCaskill, *Police Reforms Stall Around the Country, Despite New Wave of Activism*, POLITICO (Sept. 23, 2020, 8:35 PM), https://www.politico.com/news/2020/09/23/breonna-taylor-police-reforms-420799 [https://perma.cc/EY3R-59LR] (discussing recent calls for police reform, including qualified immunity).

2. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

3. *Id.*

this balancing act has failed, with the scales tipping heavily in favor of the latter interest.[4] As such, calls for the doctrine's reform or abolishment have been rampant.[5]

As qualified immunity was pulled into the national spotlight, I was researching how Seventh Circuit courts applied the doctrine in Rule 12(b)(6) motions. When applying the doctrine in Rule 12(b)(6) motions, Seventh Circuit courts operate in a specific manner.[6] These courts conduct qualified immunity inquiries when a defendant invokes the doctrine in a Rule 12(b)(6) motion.[7] But they almost always note one of three things: (1) dismissal under Rule 12(b)(6) on qualified immunity grounds is a "delicate matter;"[8] (2) complaints are "generally not dismissed under Rule 12(b)(6) on qualified immunity grounds" because the decisions rest so heavily "on the facts of the case;"[9] or (3) because of the plausibility standard, a tension exists

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4. *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 403–04 (S.D. Miss. 2020) ("A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; prison guards who forced a prisoner to sleep in cells 'covered in feces' for days; police officers who stole over $225,000 worth of property; a deputy who body-slammed a woman after she simply 'ignored [the deputy's] command and walked away'; an officer who seriously burned a woman after detonating a 'flashbang' device in the bedroom where she was sleeping; an officer who deployed a dog against a suspect who 'claim[ed] that he surrendered by raising his hands in the air'; and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother." (footnotes omitted)).

5. For examples of calls to Congress and the Supreme Court to abolish the doctrine, see Mukund Rathi, *Abolish Qualified Immunity*, JACOBIN (July 9, 2020), https://jacobinmag.com/2020/07/qualified-immunity-police-violence-shase-howse-supreme-court [https://perma.cc/8YD7-MGH7]; April Rodriguez, *Lower Courts Agree — It's Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity [https://perma.cc/5D8E-AYRL]. For a failed congressional bill attempting to immunity-proof 42 U.S.C. § 1983, see H.R. 7085, 116th Cong. (2020). *But see* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1959–66 (2018) (pointing to epistemological problems, problems of institutional competence, and lack of political will as the primary reasons hindering qualified immunity reform).

6. This Note is not limited to the Seventh Circuit. Other circuits have also noted that qualified immunity is a mismatch for Rule 12(b)(6) motions. *See, e.g.*, Wesley v. Campbell, 779 F.3d 421, 433–34 (6th Cir. 2015) ("[I]t is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although an officer's 'entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point,' . . . that point is usually summary judgment and not dismissal under Rule 12.").

7. *See* Hanson v. LeVan, 967 F.3d 584, 589 (7th Cir. 2020) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

8. Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000) ("We note that the dismissal of a § 1983 suit under Rule 12(b)(6) is a delicate matter that district courts should approach carefully."); *see also id.* at 775 (Easterbrook, J., concurring in part and concurring in the judgment) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal.").

9. Alvarado v. Litscher, 267 F.3d 648, 651 (7th Cir. 2001) ("Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: '[T]he plaintiff is not required initially to plead factual allegations that

"between developing the requisite facts for a well-informed qualified immunity determination and preserving a government official's right to avoid the burdens of pretrial matters" when analyzing qualified immunity as part of a Rule 12(b)(6) motion.[10]

These comments raised red flags. The courts themselves recognized that there was an inherent contradiction in dismissing a case on qualified immunity grounds—which heavily depends "on the facts of a case"[11]—on the basis of the complaint alone. Unlike at the summary judgment stage, judges on a motion to dismiss are not guided by evidence. They are guided only by their discretionary interpretation of allegations in the complaint.[12] Given that the qualified immunity analysis is discretionary—because a judge must determine if the alleged violation was "clearly established"[13]—plaintiffs face two layers of judicial discretion when defendants claim that they are entitled to qualified immunity in a Rule 12(b)(6) motion. This issue drove the question that this Note analyzes: What are the implications of this stacked discretion when federal judges conduct a qualified immunity analysis as part of a Rule 12(b)(6) motion?[14]

This Note proceeds in four parts. Part I details the history of qualified immunity, looks at how the doctrine has been altered over time and how it is now assessed, and examines the issues with defining clearly established law. Part II provides an overview of the modern pleading requirement and how it came into effect. Part III explores the issues with judicial discretion at both the pleading stage and during a qualified immunity analysis. This Part also examines what occurs when defendants

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anticipate and overcome a defense of qualified immunity.'" (citation omitted)).

10. Reed v. Palmer, 906 F.3d 540, 548 (7th Cir. 2018); *see also Hanson*, 967 F.3d at 589 ("Nor is [qualified immunity] always (if ever) the most suitable procedural setting to determine whether an official is qualifiedly immune, because immunity may depend on particular facts that a plaintiff need not plead to state a claim.").

11. *Alvarado*, 267 F.3d at 651.

12. See *infra* Section III.A for an analysis of the discretion granted to judges when interpreting a complaint during a Rule 12(b)(6) motion.

13. See *infra* Section III.B for an analysis of the discretion granted to judges when determining if a right is "clearly established."

14. While some commentators claim that qualified immunity is rarely handled in Rule 12(b)(6) motions, *see* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1916 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 48 (2017) (noting defendants raised qualified immunity at the pleading stage in only 13.9% of the cases in which the defense could be raised), it is far from uncommon for a claim to be dismissed on qualified immunity grounds as part of a Rule 12(b)(6) motion, *see, e.g.*, Valverde v. Folks, No. 1:19-cv-08080-MKV, 2020 WL 5849515 (S.D.N.Y. Sept. 30, 2020); Green v. Padilla, 484 F. Supp. 3d 1098, 1105–06 (D.N.M. 2020); Gotovac v. Trejo, 495 F. Supp. 3d 1186, 1186 (D.N.M. 2020); Thorpe v. City of Philadelphia, No. 19-5094, 2020 WL 5217396 (E.D. Pa. Sept. 1, 2020); Muslow v. Bd. of Supervisors, No. 19-11793, 2020 WL 4471647 (E.D. La. Aug. 4, 2020); Templeton v. Jarmillo, No. A-19-CV-00848-JRN, 2020 WL 5552619 (W.D. Tex. July 8, 2020); Rivera v. Monko, No. 3:19-CV-00976, 2020 WL 3441430 (M.D. Pa. June 23, 2020); Collins v. Garcia, No. 1-19-CV-1097-LY, 2020 WL 2733953 (W.D. Tex. May 26, 2020); Round v. City of Philadelphia, No. 19-3513, 2020 WL 2098089 (E.D. Pa. May 1, 2020); Haslinger v. Westchester County, No. 7:18-cv-05619(PMH), 2020 WL 2061540 (S.D.N.Y. Apr. 29, 2020).

claim that they are entitled to qualified immunity as part of a Rule 12(b)(6) motion. Finally, Part IV offers possible solutions to the issues brought to light in Part III.

I. QUALIFIED IMMUNITY

A. Qualified Immunity's History

Qualified immunity has changed significantly since it was created. The doctrine emerged from the Supreme Court's 1967 decision in *Pierson v. Rey*.[15] Originally, the doctrine was a good faith defense that protected government officials from liability for civil damages.[16] Thus, in the fifteen years following *Pierson*, "defendants seeking [qualified] immunity were required to show both that their conduct was objectively reasonable and that they had a 'good faith' belief that their conduct was proper."[17] But the doctrine—its inquiry and its purpose—changed into its modern-day counterpart with the Court's 1982 decision in *Harlow v. Fitzgerald*.[18]

In *Harlow*, the Court replaced the doctrine's subjective "good faith" prong with an objective reasonableness standard that insulates government officials "from liability for civil damages insofar as their conduct does not violate clearly established

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15. 386 U.S. 547, 555–58 (1967). In *Pierson*, the Court held that "the defense of good faith and probable cause" was available to police officers in an action under 42 U.S.C. § 1983. *Id.* at 557. This statute allows a plaintiff to bring suit against a party operating under the color of state law "to redress violations of 'rights, privileges, or immunities secured by the [United States] Constitution and [federal] laws.'" Butler v. Elle, 281 F.3d 1014, 1021 (9th Cir. 2002) (quoting 42 U.S.C. § 1983). Additionally, government officials facing a *Bivens* action, *see* Ashcroft v. Al-Kidd, 563 U.S. 731 (2011), or a civil conspiracy action under 42 U.S.C. § 1985(3), *see* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017), may claim qualified immunity as a defense.

16. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803 (2018) (noting the Court created the doctrine to "protect government officials acting in good faith from financial liability").

17. *Id.* at 1814 (citing Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982)). After *Pierson*, qualified immunity was extended to virtually all government officials and was eventually allowed to be asserted in any constitutional context. *See Harlow*, 457 U.S. at 818 n.30 (noting "it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials'" (citation omitted)); Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 186–87 (2008) ("Following *Pierson*, the Court extended this 'reasonable mistake' defense to virtually all executive agents, including governors, school officials, presidential aides, and federal law enforcement agents." (footnotes omitted)).

18. 457 U.S. 800 (1982). In *Harlow*, "the Court completely reformulated qualified immunity . . . , replacing the inquiry into subjective malice . . . with an objective inquiry into the legal reasonableness of the official action. *Harlow* clearly expressed . . . that the general principle of qualified immunity it established would be applied 'across the board.'" Anderson v. Creighton, 483 U.S. 635, 645 (1987) (citation omitted); *see also* Brown, *supra* note 17, at 187 (noting the doctrine no longer questions whether a government official made a reasonable mistake, but instead whether a government official reasonably should have known that their conduct was lawful).

statutory or constitutional rights of which a reasonable person would have known."[19] Additionally, the Court established a new goal for qualified immunity—protecting government officials from the burdens of discovery and trial in "insubstantial" cases.[20] The Court reiterated this goal in *Pearson v. Callahan*,[21] and has pushed this rationale as the reason for lower courts to resolve qualified immunity questions at the earliest possible stage in the litigation.[22]

Following *Harlow*, modern federal courts are tasked with answering two questions to determine if qualified immunity applies: (1) do the facts allege a violation of a statutory or constitutional right; and (2) at the time of the violation, was that right "clearly established" such that a reasonable government official would have known that such conduct was unlawful.[23] Although the Supreme Court previously required courts to determine the constitutional violation prong first,[24] the

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19. *Harlow*, 457 U.S. at 818 (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978)). The Court believed that altering the doctrine would help "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* Additionally, the Court hoped to "provide[] ample protection to all but the plainly incompetent or those who knowingly violate the law" by changing the standard. Malley v. Briggs, 475 U.S. 335, 341 (1986).

20. *Harlow*, 457 U.S. at 815–18. This has led to the modern-day trend of courts focusing on the doctrine's "presumed ability to shield government officials from burdens associated with discovery and trial." Schwartz, *supra* note 16, at 1803; *see also* Schwartz, *supra* note 14, at 15 (describing the Supreme Court's recent qualified immunity decisions). For an argument that qualified immunity does not actually shield government officials from the burdens of litigation, see Schwartz, *supra* note 16, at 1808–11.

21. 555 U.S. 223, 231 (2009) ("[T]he 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials be resolved prior to discovery." (alteration in original) (quoting *Anderson*, 483 U.S. at 640 n.2)).

22. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam) (noting the Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation"). Members of the federal judiciary have criticized the Court's use of qualified immunity. *See, e.g.*, Nelson v. City of Albuquerque, 283 F. Supp. 3d 1048, 1107–08 n.44 (D.N.M. 2017) ("[T]he Supreme Court has crafted their recent qualified immunity jurisprudence to effectively eliminate § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong."); *see also* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT MAG. (Fall 2017), https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983 [https://perma.cc/ENK2-KB6B] ("The Supreme Court's message to lower courts is clear: think twice before allowing a government official to be sued for violating an individual's constitutional rights. As a result, the lower federal courts are disposing of cases based on qualified immunity at an astonishing rate.").

23. *See* Hanson v. LeVan, 967 F.3d 584, 592 (7th Cir. 2020) (citing *Harlow*, 457 U.S. at 818).

24. Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."). The Court determined that this was necessary in order to move the law forward. *See id.* ("In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set

Court removed this requirement in its 2009 decision *Pearson v. Callahan*.[25] In *Pearson*, the Court determined that lower court judges could choose which prong to address first.[26] Because the defendant is entitled to qualified immunity if either inquiry is answered in the negative,[27] in the post-*Pearson* world, a district court judge may begin with the second inquiry[28]—whether the allegedly violated right was "clearly established" at the time of the alleged conduct.[29]

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forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.").

25. 555 U.S. 223 (2009).

26. *Id.* at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

27. *See* Cummings v. Dean, 913 F.3d 1227, 1239 (10th Cir. 2019) ("[I]f the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense." (quoting A.M. v. Holmes, 830 F.3d 1123, 1134–45 (10th Cir. 2016))); Thurairajah v. City of Fort Smith, 925 F.3d 979, 982–83 (8th Cir. 2019) ("If we find that either prong is not satisfied . . . then qualified immunity will apply."); *see also* Allen v. Miller, 815 F. App'x 185, 186 (9th Cir. 2020) ("Failure to meet either prong is sufficient to sustain the defendant's qualified immunity defense." (citing *Pearson*, 555 U.S. at 236)).

28. For a detailed history of qualified immunity sequencing—including a discussion of the implications of the Court's decision in *Pearson*—see Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468 (2011). Judges may prefer to begin with the second inquiry in order to save judicial and party resources. *See id.* at 480–82. But beginning with the second inquiry keeps constitutional law from being advanced. *See id.* at 478–80.

29. While the Court made *Saucier*'s protocol nonmandatory to conserve judicial and party resources, *see* 555 U.S. at 236–37, it also noted that *Saucier*'s protocol was beneficial for examining why decisions were being made in certain instances and helping develop constitutional precedent, *see id.* at 236. Studies indicate circuit courts are less likely to find constitutional violations of rights that were not clearly established post-*Pearson* than pre-*Pearson*. *See* Aaron L. Nielsen & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37–38 (2015) (noting post-*Pearson* studies "found that circuit courts found constitutional violations of rights that were not clearly established in 3.6%, 7.9%, and 2.5% . . . of the total claims reviewed," whereas pre-*Pearson* studies "found rates ranging from 6.5% to 13.9% during the *Saucier* mandatory sequencing regime"). Ultimately, clearly established law is developed by circuit courts and the Supreme Court, not district courts. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011) ("[A] district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States; and . . . falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'" (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999))).

B. The Struggle to Define "Clearly Established"

Despite creating the modern qualified immunity standard, the Supreme Court has struggled to define what is "clearly established."[30] Thus, lower courts are left to determine if qualified immunity applies based on a broad range of possible definitions.[31] The Court has repeatedly stated that clearly established law (1) "should not be defined 'at a high level of generality,'"[32] and (2) must be "'particularized' to the facts of the case."[33] Accordingly, in order for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[34]

However, the Court has also stated that "officials can . . . be on notice that their conduct violates established law . . . in novel factual circumstances."[35] In *Hope v. Pelzer*, the Court determined that cases involving "fundamentally" or "materially" similar facts—while providing strong support for concluding a law is clearly established—are unnecessary for such a finding.[36] The Court indicated that a right could be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights."[37] But the Court limited this statement and explained:

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30. *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 946 (2015) (noting the numerous Supreme Court cases that parties cite to define a "clearly established" right).

31. *See* Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 455 (2000) ("Given the somewhat blurry definition of 'clearly established law,' the definition a court chooses—be it narrow, requiring plaintiffs to point to cases with extreme factual similarity, or broad, allowing plaintiffs to point to cases with only marginal factual similarity—determines the outcome of the court's inquiry, i.e., whether the government actor can be held civilly liable for his or her conduct."); *see also* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633, 651–56 (2013) (discussing the struggle to define "clearly established" law).

32. White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft*, 563 U.S. at 742) (noting this is a "longstanding principle"). The Court feared that if it allowed clearly established law to be defined at a high level of generality, plaintiffs "would be able to convert the rule of qualified immunity that [the Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Anderson v. Creighton, 483 U.S. 635, 639 (1987).

33. *White*, 137 S. Ct. at 552 (citing *Anderson*, 483 U.S. at 640).

34. *Anderson*, 483 U.S. at 640. The *Anderson* Court continued: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (citation omitted). The Court has noted that plaintiffs can meet this burden by citing to "cases of controlling authority in their jurisdiction at the time in question which clearly established the rule on which they seek to rely," or by identifying "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." Wilson v. Layne, 526 U.S. 603, 604 (1999).

35. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

36. *Id.*

37. *Id.* at 740 (quoting United States v. Lanier, 520 U.S. 259, 269 (1997)).

> This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."[38]

Ultimately, while a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate."[39]

These conflicting signals have led the Court to reverse several lower court denials of qualified immunity in recent years—for example, in *White v. Pauly*, the Court reversed after determining "the lower court 'misunderstood the "clearly established" analysis' and 'failed to identify a case where an [official] acting under similar circumstances as [the defendant] was held to have violated'" the statutory or constitutional right in question.[40]

C. Invoking Qualified Immunity

Notably, qualified immunity does not automatically arise in a suit. When plaintiffs file a claim under 42 U.S.C. § 1983,[41] they do not have the burden of anticipating a qualified immunity defense.[42] Instead, defendants have the burden of raising the doctrine as an affirmative defense.[43]

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38. *Id.* at 740–41 (quoting *Lanier*, 520 U.S. at 270–71) (citation omitted in original).

39. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); *see also* District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) ("The 'clearly established' standard . . . requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' This requires a high 'degree of specificity.' We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.' A rule is too general if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.'").

40. Schwartz, *supra* note 16, at 1815 (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017)).

41. The same is true for other actions against government officials, including *Bivens* actions and civil conspiracies under 42 U.S.C. § 1985(3).

42. Gomez v. Toledo, 446 U.S. 635, 635 (1980) (noting a "plaintiff is not required to allege that the defendant acted in bad faith in order to state a claim for relief" in an action under 42 U.S.C. § 1983). Thus, qualified immunity is irrelevant to the "existence of the plaintiff's cause of action." *Id.* at 640.

43. *Id.* at 640 ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant. It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful." (citations omitted)). While the *Harlow* court changed the qualified immunity test, it reaffirmed that qualified immunity "is an affirmative defense that must be pleaded by a defendant official." 457 U.S. 800, 815 (1982); *see also* Siegert v. Gilley,

Defendants can raise the doctrine at various points in the litigation—within "a motion to dismiss, a motion for judgment on the pleading,[44] a motion for summary judgment (either before or after discovery) or as a defense at trial."[45] However, the Supreme Court has clarified that the defense "is effectively lost if a case is erroneously permitted to go to trial."[46] Thus, the Court has "stressed" that the qualified immunity inquiry should be handled at the earliest stage possible in the litigation.[47]

Defendants commonly invoke qualified immunity in motions for summary judgment and motions to dismiss.[48] When the defense is asserted, "the critical issue is whether the defendant official violated federal law that was clearly established at the time she acted."[49] At the summary judgment stage, judges may look at "matters

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500 U.S. 226, 231 (1991) ("Qualified immunity is a defense that must be pleaded by a defendant official."); Crawford-El v. Britton, 523 U.S. 574, 587 (1998) (noting "qualified immunity is an affirmative defense and that 'the burden of pleading it rests with the defendant'"). Unlike other affirmative defenses that protect defendants from liability, qualified immunity is intended to protect defendants from both liability and suit. *See* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 141–42 (2012) (discussing qualified immunity's role as an affirmative defense).

44. While Rule 12(c) motions are fundamentally different than Rule 12(b)(6) motions, their standards are identical. *See* Waller v. Hanlon, 922 F.3d 590, 599 (5th Cir. 2019). Thus, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" in order to survive a Rule 12(c) motion. *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). As such, courts face the same stacked discretion when determining if a defendant is entitled to qualified immunity in both Rule 12(b)(6) and Rule 12(c) motions. *See id.* at 599–601; *see also* Clark v. Stone, 475 F. Supp. 3d 656, 665 (W.D. Ky. 2020) (holding defendants were entitled to qualified immunity on three claims as part of a motion for judgment on the pleadings because plaintiffs' complaint failed to establish violations of clearly established law). Because this stacked discretion appears in both motions, the question this Note analyzes can be extended to situations when defendants claim that they are entitled to qualified immunity in Rule 12(c) motions.

45. Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 159 (2007). For an in-depth look at the use of—and problems with—qualified immunity at trial, see Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018).

46. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("[Qualified immunity is] an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial."); *see also id.* ("[Qualified immunity is] an entitlement not to stand trial or face the other burdens of litigation.").

47. *See* Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam) ("[The Court has] repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *see also id.* at 228 ("Immunity ordinarily should be decided by the court long before trial.").

48. For an in-depth look at the issues surrounding qualified immunity's application at the summary judgment stage, see Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1 (1997).

49. Duvall, *supra* note 43, at 139. Kenneth Duvall's piece covers the burden of persuasion in qualified immunity cases. *See id.* at 142–48. The First, Second, Third, Ninth, and D.C. Circuits place the burden on the defendant to establish the defense; the Fifth, Sixth, Seventh,

outside the pleadings" to conduct their inquiry.[50] But on a Rule 12(b)(6) motion, judges may view only "the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice."[51] Thus, when defendants invoke qualified immunity in a motion to dismiss, a district judge must determine if the plaintiff's allegations assert a violation of clearly established law.[52]

II. PLEADING STAGE REQUIREMENTS

The issues with applying qualified immunity as part of a motion to dismiss begin with the pleading stage requirement itself. Per Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court's interpretations of Rule 8(a)(2) have established exactly what a complaint must provide to survive a motion to dismiss in federal court.[53]

A. From Notice Pleading to Twombly *and* Iqbal

The modern pleading requirement, "plausibility pleading," was established by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[54] and *Ashcroft v. Iqbal*.[55] Prior to *Twombly* and *Iqbal*, federal courts followed the liberal notice pleading requirement established by the Court's 1957 decision in *Conley v. Gibson*.[56] In *Conley*, the Court interpreted Rule 8(a)(2) to require only "'a short and plain

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Tenth, and Eleventh Circuits place the burden on the plaintiff to establish that the defendant violated the plaintiff's clearly established constitutional right; the Fourth Circuit places a portion of the burden on both parties—the defendant must establish that the allegedly violated law was not clearly established, while the plaintiff must establish that the defendant violated a constitutional right (the Eighth Circuit reverses these burdens). *Id.* at 143–45. While these different burdens are significant, they have little impact on the issues discussed in this Note. Regardless of the burden of persuasion, a judge must still find that a complaint plausibly alleges the violation of a clearly established right.

50. Thompson v. Cope, 900 F.3d 414, 425 (7th Cir. 2018); *see also* Reed v. Palmer, 906 F.3d 540, 549 (7th Cir. 2018) (noting "the court looks to the evidence before it . . . when conducting the [qualified immunity] inquiry" at the summary judgment stage (alteration in original) (quoting Behrens v. Pelletier, 516 U.S. 299, 309 (1996))).

51. Hanson v. LeVan, 967 F.3d 584, 590 (7th Cir. 2020) (quoting Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)).

52. *See id.* (quoting *Behrens*, 516 U.S. at 306); *see also id.* ("[A] complaint may be dismissed under Rule 12(b)(6) on qualified immunity grounds where the plaintiff asserts the violation of a broad constitutional right that had not been articulated at the time the violation is alleged to have occurred." (quoting Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000))). For examples of judges determining if a plaintiff's allegations assert a violation of clearly established law, *see infra* text accompanying notes 103–113.

53. *See infra* Section II.A for an overview of the Supreme Court's interpretations of Rule 8(a)(2).

54. 550 U.S. 544 (2007).

55. 556 U.S. 662 (2009).

56. 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[57] Thus, the Court determined that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[58] In the fifty years following *Conley*, the majority of federal courts viewed its "no set of facts" language as the pleading bar.[59]

However, in 2007, the pleading bar changed when the Court embraced an altered pleading standard in *Twombly*.[60] In *Twombly*, an antitrust case, the Court dismissed a complaint because it failed to provide "enough facts to state a claim to relief that is plausible on its face."[61] The Court determined that a complaint needs to provide more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to show that a plaintiff is entitled to relief.[62] The Court then stated that a complaint must provide factual allegations that "raise a right to relief above the speculative level."[63] In developing its holding, the Court expressly rejected a literal reading of the *Conley* "no set of facts" language as a pleading standard.[64]

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57. *Id.* at 47 (footnote omitted).

58. *Id.* at 45–46. Courts were not to consider the merits of the case under the *Conley* standard: "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'" Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515–16 (2002) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

59. *See* Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007) (noting the "no set of facts" language from *Conley* has been cited no less than 10,000 times by federal courts), *rev'd sub nom. Iqbal*, 556 U.S. 662.

60. 550 U.S. 544 (2007).

61. *Id.* at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."). In response to Justice Stevens' dissent—in which he claimed that the Federal Rules pleading standard "does not require . . . the pleading of facts," *id.* at 580 (Stevens, J., dissenting)—the majority stated: "While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out in detail the facts upon which he bases his claim,' Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3 (majority opinion).

62. *Id.* at 545.

63. *Id.*

64. *See id.* at 560–63. Specifically, the Court took issue with a "focused and literal reading" of the language in *Conley* because it would allow "a wholly conclusory statement of claim [to] survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 561.

Although questions over *Twombly*'s reach (some speculated that it was limited to antitrust cases)[65] created uncertainty about pleading requirements,[66] these questions were answered two years later with the Court's decision in *Ashcroft v. Iqbal*.[67] In *Iqbal*, the Court expressly stated that its interpretation of Rule 8 in *Twombly* provided the pleading standard for "all civil actions."[68]

The Court also provided the new standard for a complaint to survive a motion to dismiss.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[69]

Along with this standard, the Court determined that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[70] Thus, lower courts could begin their motion to dismiss analysis by identifying the pleadings that were mere conclusions and thus not entitled to the assumption of truth.[71] Only factual allegations were to be given the assumption of truth and used to determine if the complaint "plausibly" showed that the pleader was

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65. *See, e.g.*, Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) ("This Colloquy Post argues that *Twombly* changed antitrust law by modifying the elements of an antitrust conspiracy claim, but did not rework pleading rules across the board."). Even the Court itself appeared to deny that *Twombly* was a departure from the previous fifty years of pleading requirements. *See* Erickson v. Pardus, 551 U.S. 89, 93 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Twombly*, 550 U.S. at 555)).

66. *See* Zena D. Crenshaw-Logal, *The Official End of Judicial Accountability Through Federal Rights Litigation:* Ashcroft v. Iqbal, 35 AM. J. TRIAL ADVOC. 125, 125 (2011) ("Until *Iqbal*, it was not clear that the Supreme Court categorically retired 'notice pleading' as prescribed by its 1957 decision *Conley v. Gibson*."); *see also* Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach."); Allison Sirica, Comment, *The New Federal Pleading Standard*, 62 FLA. L. REV. 547, 550 (2010) (noting it was unclear after *Twombly* if the heightened pleading standard was restricted to complex litigation or if it applied generally to all civil actions).

67. 556 U.S. 662 (2009).

68. *Id.* at 684 (noting the *Twombly* decision was based on the Court's "interpretation and application of Rule 8," and "[t]hat Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts'").

69. *Id.* at 678 (citations omitted).

70. *Id.* (noting "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient).

71. *Id.* at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

entitled to relief.[72] Recognizing this analysis would be context specific, the Court granted lower court judges the ability to draw on their own "judicial experience and common sense" to determine the sufficiency of a complaint.[73]

III. JUDICIAL DISCRETION

Discretion is necessary in an effective judicial system.[74] But discretion is imperfect. Judges are endowed with discretion both (1) when determining the sufficiency of a complaint,[75] and (2) when conducting a qualified immunity analysis.[76] Thus, when defendants claim that they are entitled to qualified immunity as part of a Rule 12(b)(6) motion, two tiers of judicial discretion come into play. This Part examines how discretion plays a role in both determinations and the problems that arise when these discretions stack.

This Part proceeds in three sections. Section A discusses issues with judicial discretion following *Twombly* and *Iqbal*. Section B then discusses issues with judicial discretion in a qualified immunity analysis. This Section covers issues with defining "clearly established law." Finally, Section C discusses issues with the stacked discretion that arises when qualified immunity is invoked in a Rule 12(b)(6) motion.

A. The Impact of Twombly and Iqbal

Under the common law, judges were traditionally viewed as "gatekeepers" who ensured jurors were only exposed to relevant matters—such as when determining if scientific expert testimony is admissible.[77] But some scholars claim that the Court's decisions in *Twombly* and *Iqbal* placed federal judges into a different and larger

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72. *Id.*

73. *Id.* (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)) ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

74. *See* Aharon Barak, *On Society, Law, and Judging*, 47 TULSA L. REV. 297 (2011) (arguing judicial discretion, which he defines as "choosing between two legitimate options," is necessary in a legal interpretive system).

75. *See infra* Section III.A for an overview of the discretion granted to judges when determining a complaint's sufficiency.

76. *See infra* Section III.B for an overview of the discretion granted to judges when conducting a qualified immunity analysis.

77. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) (holding the Federal Rules of Evidence "assign . . . the trial judge [with] the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand").

role,[78] which they speculate may have negative implications for certain classes of litigants.[79]

When the *Iqbal* Court declared that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,"[80] it granted district court judges significant discretion in determining the sufficiency of a complaint.[81] Because judging the plausibility of a complaint requires a judge to consider alternative explanations,[82] some scholars believe this decision is influenced by a judge's background knowledge and assumptions, which may be vulnerable to the biasing

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78. *See, e.g.*, Crenshaw-Loga, *supra* note 66, at 128 (claiming *Iqbal* places "federal judges beyond the role of gatekeepers"); *see also* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 120 (2010) (noting the fear that *Iqbal* "confers unwarranted discretion on judges . . . to determine which cases proceed to discovery"). *But see* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 83 n.314 (2010) (referring to Rule 12(b)(6) motions as a gatekeeper that grants district court judges with the discretion to influence who can have a meaningful day in court).

79. Numerous scholars claim that *Twombly* and *Iqbal* provide district court judges with too much discretion, which permits them to dismiss undesirable claims—i.e., civil rights claims. *See* Charles B. Campbell, *Elementary Pleading*, 73 LA. L. REV. 325, 346–47, 347 n.166 (2013) (listing several law review articles that discuss *Iqbal*'s effect on judicial discretion); *see also* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 30 (2011) ("*Iqbal* provides [district judges] with new discretion to decide whether claims of discrimination are plausible, and these judges exercise this new discretion with a minimal amount of oversight . . . .").

80. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). The Court's announcement that a reviewing court should "draw on its judicial experience and common sense," *id.*, drew ire from several scholars for providing district courts with too much discretion. *See* Campbell, *supra* note 79, at 375–76 n.340 (listing law review articles that discuss the impact of the Court's statement); *see also* Noll, *supra* note 78, at 120 ("[C]ommentators maintain that *Iqbal*'s admonition to analyze the plausibility of the plaintiff's claim in light of 'judicial experience and common sense' confers unwarranted discretion on judges—particularly district judges—to determine which cases proceed to discovery and, ultimately, decision on the merits."); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (finding the *Iqbal* Court's reliance on "judicial experience and common sense" is highly troublesome because no evidentiary record exists to discipline a judge's subjectivity when they "assess[ ] the plausibility of a complaint in connection with a motion to dismiss").

81. *See* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 39 n.322 (2010) ("Experience and common sense inherently invite a subjective analysis."); *see also* Miller, *supra* note 78, at 26 (arguing judicial experience and common sense are "highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning"). *But see* Henry S. Noyes, *The Rise of the Common Law of Federal Pleading:* Iqbal*,* Twombly*, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 859 (2012) (arguing application of "judicial experience" does not require a district court judge to "make a *subjective* determination of the merits of the claim" but instead "to develop a common law of federal pleading standards that will be improved and refined over time").

82. *See* Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702, 711 (7th Cir. 2008) ("The plausibility of an explanation depends on the plausibility of the alternative explanations.").

effect of that judge's cultural predispositions.[83] Thus, in the post-*Iqbal* world, what a particular judge finds to be sensible or plausible may dictate if a federal case survives the pleading stage.[84] Accordingly, scholars have shown that the likelihood of a complaint surviving a motion to dismiss may be heavily influenced by the characteristics or background of the judge determining its sufficiency.[85]

The impact of this discretion may be most prevalent when a judge must determine whether a specific allegation is factual or conclusory.[86] *Twombly* and *Iqbal* enabled district court judges to parse complaints and accept "allegations of fact" as true while "ignoring conclusory allegations."[87] As Justice Stevens pointed out in his dissent in *Twombly*, this discretion comes with a major downside—one person's "factual allegations" are another's "conclusion."[88] Near-identical complaints may face inconsistent rulings based on different judges' subjective views on what is "plausible."[89] Looking no further than *Iqbal* itself, the nine highest ranking Justices

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83. *See* Burbank, *supra* note 80, at 118 (citing Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 767–71 (2007)).

84. *See id.*; *see also* Alex Reinert, *The Impact of* Ashcroft v. Iqbal *on Pleading*, 43 URB. LAW. 559, 582–84 (2011) (discussing the confusion caused by the new plausibility pleading requirements); Ramzi Kassem, *Implausible Realities:* Iqbal's *Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1465 (2010) ("Since *Iqbal*, what constitutes ample facts, and whether those facts appear plausible, are matters left to the presiding judge's discretion—whereas one judge may subjectively regard a claim as fanciful or implausible, another may permit a similar claim to proceed.").

85. Scholars have noted a possible influence of judges' backgrounds and perceptions in discrimination claims. *See* Quintanilla, *supra* note 79, at 5 ("White and Black judges apply *Iqbal* differently: White judges dismissed Black plaintiffs' claims of race discrimination at a higher rate (57.5%) than did Black judges (33.3%)."); *see also* Kassem, *supra* note 84, at 1459–60 ("[O]ne study found that plaintiffs who appeared before African American judges with a racial discrimination claim were likely to be successful 46% of the time, while similarly situated plaintiffs who appeared before judges of other races considered together, including white judges, were likely to win only 22% of the time. Another study found that African American judges found in favor of African American plaintiffs in discrimination cases 50% of the time, while white judges found in favor of African American plaintiffs only 10% of the time." (footnotes omitted)).

86. *See* Miller, *supra* note 78, at 25, 25 n.89 ("It is now fairly common for federal courts to channel words used in *Iqbal* and characterize allegations as merely 'formulaic,' 'conclusory,' 'speculative,' 'cryptic,' 'generalized,' or 'bare.'"). The ambiguity of the standard has not helped district courts make these determinations. *See* Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. Rev. 1217, 1257 (2008) ("Virtually everyone (except, perhaps, the five Justices in the majority in *Twombly*) regards plausibility as an ambiguous standard.").

87. Burbank, *supra* note 80, at 112–16.

88. *Id.* at 115 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 574–75 (2007) (Stevens, J., dissenting)).

89. For a federal judge's opinion on the inconsistencies the plausibility standard may cause, see Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1346 (11th Cir. 2010) (Ryskamp, J., dissenting) ("When plausibility is based on a judge's common sense and experience, different judges will have different opinions as to what is plausible, resulting in a totally

split on whether the plaintiff's allegations were conclusory:[90] five deemed they were,[91] while the remaining four determined they established a plausible claim.[92] Thus, scholars claim that application of the *Twombly* and *Iqbal* pleading doctrine has necessarily led to inconsistent results.[93]

Additionally, several scholars have speculated that the discretion established by *Twombly* and *Iqbal* may lend itself to abuse.

> [P]lausibility pleading . . . has granted virtually unbridled discretion to district court judges. This enhanced discretion has sparked a concern that some judges will allow their own views on various substantive matters to intrude on their decision making and no longer will feel bound by the four corners of the complaint, as historically was true.[94]

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subjective standard for determining the sufficiency of a complaint.").

90. *See* Miller, *supra* note 78, at 30 (2010) ("For instance, the *Iqbal* majority decided that its 'judicial experience' and 'common sense' refuted Iqbal's claims of intended invidious discrimination by government officials. Yet the four dissenting Justices . . . disagreed and found that his allegations established a plausible claim of constitutional violations.") (footnotes omitted).

91. *See* Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009).

92. *See id.* at 694–99 (Souter, J., dissenting).

93. *See, e.g.*, Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1540 (2013) ("One may concede that the prior Rule 12(b)(6) practice accorded wide discretion to trial courts (and thus also produced non-uniform, indeterminate results) and still conclude that the *Twombly* and *Iqbal* two-step involves novel doctrinal applications that create great instability in the legal decision-making."); *see also* Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 22 (2012) ("[A]nother distinct reason that interpreting *Iqbal* has posed significant difficulty is because the Court has, without clear acknowledgment, abandoned the historical understanding of the words 'conclusory' and 'plausible.' Thus, it is not simply that the Court has ushered in a new pleading regime, but that the Court has done so without coming up with a new way of describing what purpose pleading is serving."); Kassem, *supra* note 84, at 1446 ("Though [*Iqbal*] nowhere disclaims fealty to Federal Rule of Civil Procedure 8(a)(2)'s requirement of a short and plain statement nor does it reject the notion that such statements must be accepted as true, it strays from that standard by injecting indeterminate and, ultimately, subjective metrics into the threshold determination.").

94. Miller, *supra* note 78, at 22; *see also* Burbank, *supra* note 80, at 115 ("The discretionary power of the judge to follow his or her personal preferences in deciding the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded."). Professor Miller also noted the earlier fears of Professor Richard L. Marcus, who "cautioned that a threshold filtering system based on individual judicial discretion . . . would depend on 'the very real attitudinal differences among judges,' who, lacking the benefit of a developed record, would feel free to decide motions on instinct." Miller, *supra* note 78, at 22 (quoting Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 482–83 (1986)). Conversely, for an overview on judicial discretion and an explanation on why it is a necessity, see Barak, *supra* note 74, at 301 (stating judicial discretion is necessary because "[t]he ambiguous and vague nature of language . . . , and the lack of consensus regarding the rules of interpretation, their sources and the internal relationships between them, require the recognition of interpretative discretion").

Similarly, some commentators have interpreted *Twombly* and *Iqbal* as invitations to lower courts "to screen out complaints in disfavored classes of cases, whether they are disfavored because of their perceived discovery burdens or for some other reason."[95]

B. Defining "Clearly Established"

The Supreme Court's inability to define what is "clearly established" has given federal judges significant discretion to determine if a plaintiff's allegations give rise to qualified immunity. The lack of guidance the Supreme Court has offered for defining the contours of "clearly established" law has led to inconsistent results. Eleventh Circuit Judge Charles R. Wilson opined:

> [T]he way in which courts frame the question, "was the law clearly established," virtually guarantees the outcome of the qualified immunity inquiry. Courts that permit the general principles enunciated in cases factually distinct from the case at hand to "clearly establish" the law in a particular area will be much more likely to deny qualified immunity to government actors in a variety of contexts. Conversely, those courts that find the law governing a particular area to be clearly established only in the event that a factually identical case can be found, will find that government actors enjoy qualified immunity in nearly every context.[96]

In his article, Wilson broke cases down into three sections to show how defining "clearly established" varies among individual judges and circuits. First, Wilson showed that judges looking over the same case could come to opposite conclusions based on how they defined "clearly established" law.[97] Wilson then revealed that the

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95. Burbank, *supra* note 80, at 117. Perhaps no class of cases has seen a greater increase in dismissal than race discrimination cases. *See* Quintanilla, *supra* note 79, at 5 ("The dismissal rate increased from 20.5% pre-*Twombly* to 54.6% post-*Iqbal* for Black plaintiffs' claims of race discrimination—a 2.66 times increase. . . . For Black pro se plaintiffs' claims, the dismissal rate increased from 32.0% before *Twombly* to 67.3% under *Iqbal*, representing a 2.10 times increase."). But the impact of a judge's ideology is likely modest at most. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 396 (2007) ("[E]ven studies documenting the influence of politics find that ideological factors explain only a fraction of case outcomes. . . . [W]hile many empirical studies have shown that political preferences influence lower court decisionmaking, they also suggest that the effect of ideology is modest." (footnote omitted)).

96. Wilson, *supra* note 31, at 475.

97. *See id.* at 455–59 (focusing on the difference between the majority and dissenting opinions in *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000)). In *Doe*, the majority framed their inquiry more broadly and pointed to general search-and-seizure principles to find that the right was clearly established. 225 F.3d at 452–53. In her dissent, Judge Karen J. Williams took aim at the majority's general inquiry and disagreed that the plaintiff's right was clearly established at the time the case was filed: "The majority's error in declining to consider whether Doe's legitimate expectation of privacy was clearly established is underscored by this level of

inquiry into "clearly established law" varied greatly between the circuits: "while some courts will liberally infer rules of law from analogous situations, thereby clearly establishing the relevant right in a circuit, other courts require nearly identical parity of facts before a right will be considered 'clearly established.'"[98] Finally, Wilson—again looking across the circuits—noted that some courts will extend their inquiry from factually analogous cases to factually analogous principles in order to find "clearly established law."[99]

Accordingly, the rates of granting qualified immunity vary greatly between individual judges.[100] Thus, plaintiffs facing a qualified immunity defense will be at the whims of (1) how the circuit in which their complaint is filed guides judges to define "clearly established law," and (2) how the specific judge handling their case elects to define "clearly established law." While one plaintiff may draw a more broadly defining court and thus have a greater likelihood of seeing their claim move forward, another may draw a more narrowly defining court and thus have a decreased likelihood of proceeding with their claims.

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extreme generality at which the majority is forced to couch its inquiry." *Id.* at 458 (Williams, J., concurring in part and dissenting in part).

98. *See* Wilson, *supra* note 31, at 460–66. Wilson noted two cases in which courts were willing to infer rules from analogous situations: Feist v. Simonson, 222 F.3d 455, 464 (8th Cir. 2000) (employing "a flexible standard in determining whether a right is clearly established, requiring some factual correspondence with precedent and demanding that government officials respect general, well-established principles of law"), *overruled on other grounds by* Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001) (en banc); Amaechi v. West, 237 F.3d 356, 362 (4th Cir. 2001) ("The exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established. Such precise precedent is not what the particularity principle mandates. Rather, the particularity principle mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established.") (citation omitted), and one in which a court applied a "bright-line" rule to determine if the right was clearly established: Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002). *See* Wilson, *supra* note 31, at 460–66.

99. Wilson, *supra* note 31, at 467–70. Wilson pointed to two cases in which courts used broad definitions of "clearly established" to determine their result: Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (finding a right was clearly established based upon cases with minimal factual similarity); Miller v. Kennebec County, 219 F.3d 8 (1st Cir. 2000) (finding a right was clearly established despite no case law relating to the specific facts of the case). Wilson, *supra* note 31, at 467–70. Wilson also pointed to a case in which a court used an extremely narrow definition of clearly established: Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (finding a right was not clearly established despite a factually similar case because the unconstitutionality of the defendant's actions would not have been "apparent" to him). Wilson, *supra* note 31, at 470–72.

100. A 2008 study revealed significant variation in the rates for granting qualified immunity by individual Eleventh Circuit judges. *See* Brown, *supra* note 17, at 216 (listing rates for grants of qualified immunity by individual judges, which ranged from the lows of ten percent and sixteen percent to the highs of sixty-nine percent and seventy-eight percent).

C. Qualified Immunity in Rule 12(b)(6) Motions

Although judges continue to claim that plaintiffs are not held to a higher pleading standard for qualified immunity in Rule 12(b)(6) motions,[101] the fact that judges continue to contemplate whether a complaint plausibly alleges the violation of a "clearly established right" says otherwise.[102] Because this analysis is conducted at this stage in the litigation, plaintiffs are subject to a stacked discretion. Both the judge's discretionary interpretation of the plaintiff's complaint and the judge's discretionary interpretation of "clearly established law" impact whether a plaintiff's claim survives the qualified immunity inquiry.

A Sixth Circuit case, *Hart v. Hillsdale County*,[103] provides an example of the issues this stacked discretion can cause.[104] In *Hart*, a two-to-one decision, the Sixth Circuit affirmed the district court's denial of the defendant's motion to dismiss on qualified immunity grounds.[105] The majority interpreted the plaintiff's false arrest and malicious prosecution claims to allege plausible violations of "clearly established law."[106] The majority focused on a previous Sixth Circuit case, *Bunkley*

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101. *See* Hanson v. LeVan, 967 F.3d 584, 597 (7th Cir. 2020) (rejecting a heightened pleading standard when the defendant raises qualified immunity because the current pleading standard "imposes on the plaintiffs no obligation to initially 'anticipate and overcome a defense of qualified immunity' in their complaint"); Johnson v. Moseley, 790 F.3d 649, 656 (6th Cir. 2015) (stating the court was "not enforcing a 'heightened pleading requirement'" by requiring the plaintiff to "allege facts describing how each defendant's conduct violated a federally protected right under clearly established law").

102. *See Hanson*, 967 F.3d at 590 (reiterating that "a complaint may be dismissed under Rule 12(b)(6) on qualified immunity grounds where the plaintiff asserts the violation of a broad constitutional right that had not been articulated at the time the violation is alleged to have occurred" (quoting Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000))); *Johnson*, 790 F.3d at 653 ("Since the defendant officers have raised the qualified immunity defense, plaintiff bears the burden of showing that defendants are not entitled to qualified immunity. At the pleading stage, this burden is carried by alleging facts plausibly making out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a reasonable officer would have known that his conduct violated that right." (citation omitted)).

103. 973 F.3d 627 (6th Cir. 2020).

104. Although district court judges make qualified immunity determinations as part of 12(b)(6) motions more frequently, viewing court of appeals decisions provides a more direct comparison between how judges looking over the same complaint engage in the qualified immunity inquiry. For other examples of court of appeals judges disagreeing about qualified immunity decisions as part of Rule 12(b)(6) motions, see Marvaso v. Sanchez, 971 F.3d 599 (6th Cir. 2020) (holding defendants were not entitled to qualified immunity, whereas the dissent argues the defendants were entitled to qualified immunity even if the plaintiffs' factual allegations were accepted as true); Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019) (reversing district court and granting defendant officer's qualified immunity claim, whereas the dissent argues the defendant officer's conduct was clearly established); Kiesling v. Holladay, 859 F.3d 529 (8th Cir. 2017) (reversing district court and granting defendant officer's qualified immunity claim, whereas the dissent argues the defendant officer's conduct was clearly established).

105. *See Hart*, 973 F.3d at 635–43.

106. *See id.* at 640–42 (determining the plaintiff plausibly alleged a violation of his clearly

v. City of Detroit,[107] to hold that the law was "clearly established."[108] In doing so, the majority found broad similarities between the plaintiff's factual allegations and the facts of *Bunkley*.[109] Conversely, the dissent took issue with the majority's interpretation of the complaint.[110] The dissent felt that the majority looked beyond the plaintiff's factual allegations to come to its conclusion.[111] With his interpretation of the plaintiff's complaint, the dissenting judge took a narrower approach to defining "clearly established law" and looked at the specific details of *Bunkley* to contrast the case with his version of the plaintiff's factual allegations.[112] By doing so, the dissent found that the plaintiff had failed to plausibly allege violations of "clearly established law."[113]

As *Hart* shows, reasonable judges can differ on their interpretation of both a plaintiff's complaint and "clearly established law." While *Hart* was decided by a panel of judges on appeal, it can easily be reimagined as three separate plaintiffs bringing identical causes of action to three separate district court judges. Following the outcome in *Hart*, if the defendants were to invoke qualified immunity in Rule 12(b)(6) motions in all three cases, two of these plaintiffs would see their claims proceed, while the other would have their claims dismissed. If not for this stacked discretion, all three plaintiffs may see their claims survive.[114]

IV. SOLUTIONS

Constitutional civil rights plaintiffs are currently subject to the whims of this stacked discretion. However, several solutions exist that could resolve portions of this stacked discretion for future constitutional civil rights plaintiffs. This Part will focus on four of these solutions: (1) abolishing qualified immunity in Rule 12(b)(6) motions; (2) readopting the doctrine's original "good faith" standard; (3) abolishing qualified immunity in its entirety; and (4) the Supreme Court providing clarity for the "clearly established" prong. Each potential solution would enable prospective litigants to better predict whether they have a claim that could survive a qualified immunity inquiry at the motion to dismiss stage.

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established constitutional rights for his false arrest claim); *see also id.* at 642–43 (determining the plaintiff plausibly alleged a violation of his clearly established constitutional rights for his malicious prosecution claim).

107. 902 F.3d 552 (6th Cir. 2018).

108. *See Hart*, 973 F.3d at 642.

109. *See id.* (focusing on how, in both situations, the officers failed to perform an investigation or ask any questions).

110. *See id.* at 647–54 (Readler, J., dissenting).

111. *See id.* at 647 ("[T]he majority opinion . . . [rewrote] Hart's complaint, articulating a factual theory nowhere to be found in the complaint. The majority opinion manufactures a theory that the State Police database was historically poorly maintained and thus known by local officers to be error-laden, meaning it would have been reckless for officers to rely on the database. While spread throughout the majority opinion, that theory is nowhere to be found in Hart's complaint (and the majority, tellingly, does not cite any allegation to that effect).").

112. *See id.* at 653–54 (breaking down the specific factual details in *Bunkley* and contrasting them with the specific factual allegations from the plaintiff's complaint).

113. *See id.* at 652.

114. The plaintiffs' claims could still be dismissed on other grounds.

A. Abolish Qualified Immunity in Rule 12(b)(6) Motions

The most direct solution to this issue would be abolishing qualified immunity in Rule 12(b)(6) motions. This solution would both (1) remove the stacked discretion and (2) allow for the factual development that is necessary to determine if a defendant is entitled to qualified immunity.[115] At the same time, defendant officials could still move to dismiss pending claims if the plaintiffs failed to plausibly allege violations to their constitutional or statutory rights.[116]

Even without qualified immunity in Rule 12(b)(6) motions, courts would still be able to maintain the doctrine's current goal of limiting the burdens of discovery for government officials. Dicta from the Court's decision in *Crawford-El v. Britton*[117] inadvertently offers guidance into how this solution could work.[118] The *Crawford-El* Court examined ways that a district court could curb discovery to maintain the goals of qualified immunity.[119] Focusing on the broad discretion to tailor discovery granted by Rule 26 of the Federal Rules of Civil Procedure,[120] the Court proposed multiple options for district court judges: the judge could (1) allow the "plaintiff to take only a focused deposition of the defendant before allowing any additional discovery," or

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115. Numerous cases point out the significance of the factual inquiry to a qualified immunity determination. *See, e.g.*, Reed v. Palmer, 906 F.3d 540, 548 (7th Cir. 2018) (noting the qualified immunity defense "closely depends 'on the facts of the case'"); *see also* Hanson v. LeVan, 967 F.3d 584, 590 (7th Cir. 2020) (noting that qualified immunity may depend on particular facts that the plaintiff does not need to allege to state a claim).

116. Thus, government officials would still have an avenue to dismissal through a Rule 12(b)(6) motion. *See, e.g.*, Pooler v. Wilson, 452 F. Supp. 3d 428, 432–34 (D.S.C. 2020) (dismissing plaintiff's Section 1983 claims because she failed to allege that her constitutional rights were violated). Additionally, government officials would still be able to seek dismissal on the basis of other doctrines—for example, the *Heck* doctrine. *See, e.g.*, Waller v. Smith, 403 F. Supp. 3d 164, 169–71 (W.D.N.Y. 2019) (dismissing a plaintiff's Section 1983 claim because it was barred by the *Heck* doctrine).

117. 523 U.S. 574 (1998).

118. While the *Crawford-El* Court was concerned with the ways in which federal trial judges could exercise their discretion in cases where the plaintiff files a complaint that requires proof of a wrongful motive (state of mind), *see id.* at 597–98, the Court's ideas match the discovery options available to trial judges in a world without qualified immunity at the motion to dismiss stage.

119. *See id.* at 598–600.

120. The Court cites to provisions of Rule 26(b)(2), Rule 26(c), and Rule 26(d). *See id.* at 598–99. Under Rule 26(b)(2), the trial court may alter the limits on the number of depositions and interrogatories, limit the length of depositions under Rule 30, and the number of requests under Rule 36. In addition, the court may limit the "frequency or extent of use" of other discovery methods permitted by the Rules if the court determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." FED. R. CIV. P. 26(b)(2). Under Rule 26(c), "the court may limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects, as required 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Crawford-El*, 523 U.S. at 599 (quoting FED. R. CIV. P. 26(c)). Under 26(d), "the court may . . . set the timing and sequence of discovery." *Id.* (quoting FED. R. CIV. P. 26(d)).

(2) focus discovery on objective factual questions before proceeding to any other inquiries.[121] Essentially, a district court judge would be able to "give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took."[122] Thereby, a judge would "facilitate prompt and efficient resolution of the lawsuit"—as the evidence was gathered, the defendant would be able to "move for partial summary judgment on objective issues that are potentially dispositive."[123] Thus, courts could continue to balance the competing interests of the modern qualified immunity doctrine without contemplating dismissal of the case on a Rule 12(b)(6) motion.[124]

B. Readopt the Subjective "Good Faith" Standard

Another possible solution would be to abolish the "clearly established" prong of the qualified immunity inquiry and replace it with the doctrine's original "good faith" standard. Under the original test, establishing immunity "depend[ed] on facts peculiarly within the knowledge and control of the defendant."[125] The test focused "not only on whether the official ha[d] an objectively reasonable basis for that belief, but also on whether '[t]he official himself [was] acting sincerely and with a belief that he [was] doing right.'"[126] The Supreme Court recognized that a plaintiff would not have any way of knowing whether the defendant had such a belief; thus, the Court placed no burden on the plaintiff to plead past the defense.[127]

Because "[t]he existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know,"[128] factual development is necessary under the original qualified immunity test. Thus, courts could not dismiss a plaintiff's complaint on qualified immunity grounds under the original test. Reverting the test to its original inquiry would both maintain qualified immunity's original purpose—protecting government officials acting in good faith from civil damages[129]—and ensure plaintiffs no longer face the stacked discretion that they are currently subject to when defendants invoke the doctrine in a Rule 12(b)(6) motion.[130]

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121. *Crawford-El*, 523 U.S. at 599.

122. *Id.* at 600. This would align with the Court's goal for qualified immunity as it would allow for the defense to be resolved as early as possible. *Id.*

123. *Id.* at 599. The *Crawford-El* Court did point out, however, that a judge would still be able to "postpone ruling on a defendant's summary judgment motion if the plaintiff needs additional discovery to explore 'facts essential to justify the party's opposition.'" *Id.* at 599 n.20 (quoting FED. R. CIV. P. 56(f))

124. *See supra* text accompanying note 3.

125. Gomez v. Toledo, 446 U.S. 635, 641 (1980).

126. *Id.* at 635 (quoting Wood v. Strickland, 420 U.S. 308, 321 (1975)).

127. *Id.* (noting that imposing a pleading burden on plaintiffs for a defendant's subjective belief, which plaintiffs would likely have no way of knowing, would "be contrary to the established practice in analogous areas of the law").

128. *Id.*

129. *See supra* note 16 and accompanying text.

130. Simultaneously, the Court's desire for qualified immunity to protect government officials from the burdens of discovery and trial could be maintained as well. Section IV.A provides a look at a world without qualified immunity in Rule 12(b)(6) motions. Courts could

C. Abolish Qualified Immunity Entirely

A third solution would be to abolish qualified immunity in its entirety. Given that qualified immunity is intended to protect government officials from the financial and time hardships in insubstantial cases,[131] eliminating the doctrine entirely may appear to be an overreach as a solution to the qualified immunity problem at the motion to dismiss stage. However, at least one scholar—Joanna Schwartz—has argued that qualified immunity is unnecessary to protect government officials from either the financial or time hardships that come with being sued.[132]

Schwartz revealed that, even if qualified immunity were to be eliminated, law enforcement officers should not be afraid of civil liability because "[a] combination of state laws, local policies, and litigation dynamics ensures that officers are virtually never required to pay anything toward settlements and judgments entered against them."[133] Citing to a previous study that she conducted, Schwartz explained that of the 9225 cases resulting in a payment to the plaintiffs that she studied, individual officers (1) paid a portion of the settlement in only 0.41% of the cases and (2) paid only 0.02% of the total rewarded to plaintiffs.[134]

Additionally, Schwartz revealed that the doctrine struggles to protect government officials from the burdens of discovery and trial in "insubstantial" cases. In a separate

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take the same approach if the "good faith" standard was reimplemented, with district judges using their broad discretion under Rule 26 to tailor discovery in a manner that least burdens the government official. *See supra* text accompanying notes 115–121.

131. *See supra* notes 19–20 and accompanying text.

132. *See* Schwartz, *supra* note 16, at 1803–11 (detailing how qualified immunity fails to achieve its policy goals to protect law enforcement officers). Additionally, Schwartz's article explains how qualified immunity fails to protect against overdeterrence. *See id.* at 1811–14. In *Harlow*, the Supreme Court claimed, in part, that qualified immunity would be able to protect against superfluous civil actions that deter capable citizens from pursuing and accepting public office and that deter public officials from taking regular action. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Schwartz's article offers three explanations for why qualified immunity fails to protect against overdeterrence: (1) studies indicate that officers infrequently think about being sued while performing their regular duties; (2) evidence suggests that people are deterred from becoming officers for reasons other than the threat of civil damages (i.e., negative publicity about the police); and (3) even if it is assumed that the threat of civil damages does deter officers from carrying out their duties and average citizens from becoming officers, qualified immunity—in practice—does little to shield public officials from civil damages and the burdens of discovery and trial. *See* Schwartz, *supra* note 16, at 1811–14. In providing these explanations—and perhaps of greater significance—Schwartz reported that studies indicate a large number of officers believe that lawsuits deter unlawful behavior by other officers and that officers should be subject to civil damages. *See id*. at 1811–1812, 1812–13 nn.99–100.

133. Schwartz, *supra* note 16, at 1805.

134. *See id.* at 1805–06. Of the more than $9.3 million that were awarded as punitive damages in the cases that Schwartz studied, officers did not pay a dollar. *See id.* at 1805. When an officer did pay a portion of the damages, the median contribution was $2250—and no officer paid greater than $25,000. *See id.* at 1806. In all, of the forty-four jurisdictions that Schwartz studied, only five required an officer to pay a portion of the judgment or settlement. *See id.* For further information on the original study, see Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

study that included 1183 Section 1983 lawsuits that were filed against law enforcement officers,[135] Schwartz found that less than five percent of cases were dismissed on qualified immunity grounds at either the motion to dismiss or summary judgment stage.[136] In all, defendants moved to dismiss on qualified immunity grounds in only 13.9% of the cases in which it could be raised as a defense.[137] Even when the defendant raised qualified immunity as part of a motion to dismiss, courts were three times more likely to dismiss the case on other grounds.[138]

Given that qualified immunity arguably fails to accomplish its intended goals, abolishing the doctrine in its entirety can be viewed as a legitimate solution to the stacked discretion issue found when defendants raise qualified immunity in a Rule 12(b)(6) motion. Doing so would remove plaintiffs from the unpredictability of a judge's interpretation of "clearly established" law, while defendants would retain access to other avenues for seeking early dismissal of frivolous claims.[139]

D. Clarify "Clearly Established"

At the very least, the Supreme Court should clarify what is "clearly established" law. This clarity would allow prospective plaintiffs to better know the likelihood that their claims would proceed and provide lower court judges with helpful guidance for their qualified immunity inquiries.

As "clearly established" is presently defined, it is ambiguous and thus the cause of significant confusion.[140] Current signals on how to define "clearly established" include: (1) "'clearly established law' should not be defined 'at a high level of generality;'"[141] (2) "clearly established law" must be "'particularized' to the facts of the case;"[142] or (3) "the contours of the right must be sufficiently clear that a

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135. For further information on the original study, see Schwartz, *supra* note 14, at 11.

136. *See* Schwartz, *supra* note 16, at 1809. Additionally, when qualified immunity was granted, it was only dispositive in 64.2% of the cases. *See id.* at 1810. Thus, even when officials were granted qualified immunity, claims against them remained in over one-third of the cases.

137. *See id.* at 1810. Defendants included qualified immunity defenses in only one-third of their motions to dismiss. *See id.*

138. *See id.* Although courts were more likely to grant summary judgment motions on qualified immunity grounds, this trend remained: even when the defendant invoked qualified immunity in a summary judgment motion, the court was more likely to grant the motion on other grounds. *See id.*

139. *See supra* note 116 and accompanying text.

140. *See* Blum, *supra* note 30, at 945–61 ("The question of 'what makes the law clearly established' is riddled with contradictions and complexities."); *see also* Golodner v. Berliner, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue.").

141. White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

142. *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

reasonable official would understand that what he is doing violates that right."[143] Thus, the Court should provide a clear test for lower courts to follow.

The Court could specifically tell lower courts to narrowly or broadly define a "clearly established" right and instruct them on how to look at factually analogous situations or principles.[144] Although prospective litigants would prefer the Court to define "clearly established" more broadly,[145] any clarity would benefit both future plaintiffs and defendants.[146] Plaintiffs would better know whether they have a viable claim that would survive to trial, while defendants would better know whether to seek early dismissal on qualified immunity grounds.

CONCLUSION

Recent calls for the reform to—or abolishment of—qualified immunity have been abundant.[147] This Note discussed the additional hurdle that constitutional civil rights plaintiffs face when a defendant invokes qualified immunity in a Rule 12(b)(6) motion. When defendants raise qualified immunity in a Rule 12(b)(6) motion, plaintiffs currently face a stacked discretion. First, the judge interprets the plaintiff's complaint. Then, the judge interprets "clearly established law." Finally, the judge determines if their interpretation of the plaintiff's complaint plausibly alleges a violation of the judge's interpretation of clearly established law.

This situation is problematic for plaintiffs. Federal judges are forced to make a fact-dependent discretionary decision—whether qualified immunity applies—based on their discretionary interpretation of a plaintiff's complaint. This stacked discretion easily allows for inconsistent results. As evidenced in *Hart*, judges placed in this situation can disagree over (1) which allegations are "factual;" (2) how to define "clearly established" law; and thus (3) whether the "factual" allegations plausibly allege a violation of "clearly established" law.[148] Therefore, this Note proposed several solutions to address this situation—namely, (1) abolishing the doctrine in Rule 12(b)(6) motions; (2) readopting the doctrine's original "good faith" standard; (3) abolishing the doctrine in its entirety; or (4) the Supreme Court providing clarity for the doctrine's "clearly established" prong. Although these solutions are imperfect, each would ensure that constitutional civil rights plaintiffs receive more consistent judgments.

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143. *Anderson*, 483 U.S. at 640.

144. *See supra* Section III.B for an overview of the different ways that judges define a clearly established right and how that impacts a litigant's likelihood of proceeding with their claims.

145. The more broadly "clearly established" is defined, the more likely a litigant's claim will survive a qualified immunity inquiry. *See id.*

146. Because judges would better know what precedent to look to and how to interpret it, a clear definition would greatly reduce the likelihood of future litigants encountering a divided court like the one found in *Hart v. Hillsdale County*. *See supra* notes 103–13 and accompanying text.

147. *See supra* note 5 and accompanying text.

148. *See supra* notes 103–13 and accompanying text.