QUALIFIED IMMUNITY IN LIMBO: RIGHTS, PROCEDURE, AND THE SOCIAL COSTS OF DAMAGES LITIGATION AGAINST PUBLIC OFFICIALS

DAVID L. NOLL*

Damages litigation against public officials implicates social costs that ordinary civil litigation between private parties does not. Litigation against public officials costs taxpayers money, may inhibit officials in the performance of their duties, and has the potential to reveal privileged information and decisionmaking processes. The doctrine of qualified immunity—that public officials are generally immune from civil liability for their official actions unless they have unreasonably violated a clearly established federal right—is designed to address these risks. The doctrine, however, demands an application of law to facts that, as a practical matter, requires substantial pretrial discovery. Federal courts have responded with a variety of novel procedural devices. This Note critiques those devices and suggests that courts confronted with a claim of qualified immunity should view their principal task as narrowing the universe of the plaintiff's claims, thus facilitating a discovery process structured around dispositive legal issues.

INTRODUCTION

Damages claims against public officials give rise to unique procedural problems. Consider two recent cases. *Crawford-El v. Britton* began when Leonard Rollon Crawford-El, an inmate serving a life sentence in the District of Columbia, gave an interview to a *Washington Post* reporter about conditions in the jail.[1] Some time later, after being transferred to a new prison, Crawford-El did not receive his belongings for several months.[2] Fearing that his property had been intentionally diverted, Crawford-El sued the prison's warden, alleging that the warden withheld his possessions "in order to retaliate for [Crawford-El's] 'legal troublemaking,' violating his First Amendment rights to freedom of speech and to petition for redress of grievances."[3] Litigation over Crawford-El's diverted property lasted

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[1] Crawford-El v. Britton, 523 U.S. 574, 578, 579 n.1 (1998).

[2] *Id.* at 578.

[3] Brief for Petitioner at 3, Crawford-El v. Britton, 523 U.S. 574 (1998) (No. 96-827), 1997 WL 33556962 at *2.

nearly a decade, requiring three appeals to the D.C. Circuit[4] and one to the U.S. Supreme Court.[5]

Iqbal v. Hasty[6] originated in the months after the 9/11 terrorist attacks. Javaid Iqbal was arrested on November 2, 2001 on immigration charges and imprisoned in the Metropolitan Detention Center (MDC) in Brooklyn, New York.[7] At the MDC, Iqbal claims he was beaten, subjected to abusive strip and body-cavity searches, and placed in extended solitary confinement.[8] Since it was unclear who was ultimately responsible for his abuse, Iqbal (aided by highly competent counsel)[9] filed a lawsuit against officials running up the Justice Department's chain of command.[10]

Despite the similarity between the two cases—both involve allegations by a prisoner that his conditions of confinement violate basic constitutional guarantees—*Crawford-El* and *Iqbal* illustrate fundamentally different risks of litigation against public officials. *Crawford-El*, a low-stakes suit about whether a prison warden harbored a forbidden state of mind, tied up the courts, the individual defendants, and the prison system for ten years. *Iqbal*, in contrast, arguably threatens to interfere with the government's basic capacity to fight terrorism by tying up high-level executive branch officials. As Judge Cabranes observed, concurring in a decision that upheld Iqbal's right to pursue discovery, the top officials named as defendants in Iqbal's lawsuit "may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates . . . at a time when [they] were trying to

[4] Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996) (en banc) (reporting appeal of qualified immunity claim), *vacated*, 523 U.S. 574 (1998); Crawford-El v. Britton, No. 94-7203, 1995 WL 761781 (D.C. Cir. Nov. 28, 1995) (reporting appeal of right-to-petition and procedural due process claims); Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991) (reporting appeal of heightened pleading issue).

[5] Crawford-El v. Britton, 523 U.S. 574 (1998).

[6] 490 F.3d 143 (2d Cir. 2007).

[7] *Id.* at 147–48.

[8] *Id.* at 149.

[9] Iqbal is represented by Koob & Magoolaghan, Urban Justice Center, and Weil, Gotshal & Manges LLP. *Id.* at 146–47. Koob & Magoolaghan is a boutique civil rights firm specializing in prisoner's civil rights, employment discrimination, and disability rights. Noteworthy Cases Litigated by Koob & Magoolaghan, http://kmlaw-ny.com/cases.html (last visited Mar. 30, 2008). The Urban Justice Center is a legal services and advocacy organization. Urban Justice Center, About Us, http://www.urbanjustice.org/ujc/about/hub.html?id=PYNtXjez (last visited Mar. 30, 2008). Weil, Gotshal & Manges LLP is a preeminent Wall Street firm. Weil, Gotshal & Manges, http://www.weil.com/home_more.aspx (last visited Mar. 30, 2008).

[10] First Amended Complaint and Jury Demand, Elmaghraby v. Ashcroft, No. 04-CV-1809 (E.D.N.Y. 2004), 2004 WL 2410102.

cope with a national and international security emergency unprecedented in the history of the American Republic."[11]

Qualified immunity is designed to address both these risks. The doctrine, which establishes that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,"[12] seeks to "permit the resolution of many insubstantial claims" before trial, as well as to "avoid excessive disruption of government."[13]

In many civil rights cases, however, the threshold issue—whether the defendant violated a "clearly established constitutional or statutory right"—is a fact-intensive question. A complaint may be framed in general terms from which it is difficult to identify the specific right allegedly violated.[14] In some cases, only the defendant has access to information that establishes the propriety of her action, such as whether the circumstances known at the time justified a search or arrest.[15] Other times, as in *Iqbal*, only the defendant knows who she *is*.[16]

The fact-intensive character of the immunity inquiry places lower courts on the horns of a dilemma. If a court waits to make an immunity determination on a fully developed record, it risks sanctioning the harms (inconvenience, diverting officials from their duties, dulling their zeal) that qualified immunity is designed to prevent. If it decides the immunity question earlier—before full discovery—it risks resolving the issue incorrectly for want of evidence, potentially leaving constitutional wrongs unredressed.[17]

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[11] *Iqbal*, 490 F.3d at 179 (Cabranes, J., concurring).

[12] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (citing Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975)).

[13] *Harlow*, 457 U.S. at 818.

[14] *E.g.*, Crawford-El v. Britton, 844 F. Supp. 795, 799 (D.D.C. 1994) (describing Crawford-El's claim for "mental distress" caused by, among other things, "the stressful communications with officials and family members" and "the deprivation of pictures of loved ones" (citation and internal quotation marks omitted)), *vacated in part*, 93 F.3d 813 (D.C. Cir. 1996), *vacated*, 523 U.S. 574 (1998).

[15] *See, e.g.*, Creighton v. Anderson, 724 F. Supp. 654, 658 (D. Minn. 1989) (noting that crucial issue in case was whether defendant-officer's actions were reasonable based on "the information [he] possessed" (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987)), *aff'd*, 922 F.2d 443 (8th Cir. 1990).

[16] *Cf.* First Amended Complaint and Jury Demand, *supra* note 10, at ¶¶ 194–95 (alleging that many defendants were responsible for illegal conduct, presumably because of difficulty of determining, without discovery, who was in fact responsible for policies at issue).

[17] *See infra* Part I.B.

Presently, two procedural responses to this problem predominate in the lower courts. The first imposes additional burdens on the plaintiff before discovery but after the complaint, such as requiring her to adduce "specific factual allegations in order to protect the substance of the qualified immunity defense."[18] The second insists on the primacy of the ordinary burdens of notice pleading under the Federal Rules of Civil Procedure (Rules), while perhaps urging district courts to carefully manage discovery.[19] Under this second approach, qualified immunity must be established just as other affirmative defenses are—by the defendant,[20] by a preponderance of the evidence,[21] and with a prior opportunity for the plaintiff to conduct discovery.[22]

In this Note, I argue that neither of these mechanisms adequately addresses the risks that justify qualified immunity. The former fails to meaningfully limit the scope of discovery, while the latter fails to recognize the social costs implicated by damages suits against officials. I propose instead that courts confronted with claims of immunity should view their primary task as narrowing the universe of the plaintiff's claims, thus facilitating a well-structured discovery process. This process will minimize as much as possible the harms caused by litigation against public officials, while at the same time safeguarding important rights against governmental abuse.

The Note proceeds as follows: Part I surveys the risks and costs of litigation against public officers in greater depth, describes the existing qualified immunity doctrine, and elaborates on the procedural dilemma created by that doctrine as it stands. Part II reviews and critiques the responses of lower courts to the dilemma presented by qualified immunity. Part III makes the argument that narrowing the scope of plaintiffs' claims—in particular by identifying the specific legal claims on which the plaintiff is most likely to prevail—is the key to managing the social costs of litigation against public officials. I con-

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[18] Thomas v. Independence Twp., 463 F.3d 285, 289 (3d Cir. 2006). For further examples, see *infra* note 153.

[19] *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 178 (2d Cir. 2007) (denying motion to dismiss but mandating "carefully limited and tightly controlled discovery").

[20] *See, e.g.*, Henry v. Purnell, 501 F.3d 374, 378 (4th Cir. 2007) (collecting authorities concerning proper burden of proof for immunity claims and holding that defendant bears burden); *see also* FED. R. CIV. P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . .").

[21] *See, e.g.*, *Henry*, 501 F.3d at 378.

[22] *See* FED. R. CIV. P. 56(f)(2) (providing that where party opposing summary judgment "cannot present facts essential to justify its opposition," court may "order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken"). For an argument that Rule 56(f) should be read to limit discovery prior to summary judgment, see *infra* Part III.C.

clude by describing two potential (and very different) mechanisms for doing that.

I
PUBLIC OFFICER LITIGATION AND OFFICIAL IMMUNITY

A. Liability Standards

This Part provides an overview of the policy considerations behind qualified immunity, as well as the procedural dilemma that the doctrine creates for trial courts.

Public officials in the United States may be sued for violating a person's constitutional rights under 42 U.S.C. § 1983 or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[23] and its progeny. Section 1983, enacted as part of the Ku Klux Klan Act of 1871,[24] allows individuals to sue state officers for civil rights violations; *Bivens*, a cause of action first recognized by the Supreme Court in 1971, allows individual suits against federal officers.[25] In the 1980 case of *Gomez v. Toledo*, the Court held that "two—and only two—allegations are required" for a plaintiff to state a claim under § 1983:[26] first, that "some person has deprived him of a federal right",[27] and second, that the person "acted under color of state or territorial law."[28] Successfully pleading a claim under *Bivens* is more difficult,[29] but for vio-

[23] 403 U.S. 388 (1971).

[24] Ch. 22, § 1, 17 Stat. 13, 13 (1871). For a detailed history of the Ku Klux Klan Act and § 1983's enactment, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141–56 (1977).

[25] While § 1983 and *Bivens* both authorize a damages remedy for constitutional violations, there are important differences between the two causes of action. Briefly, § 1983 is a general cause of action triggered by the violation of any constitutional right, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 & n.5 (1970), while *Bivens* applies only where a federal court, in the exercise of its general federal question jurisdiction, can infer a damages remedy when "compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted," *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in judgment).

[26] 446 U.S. 635, 640 (1980).

[27] *Id.*

[28] *Id.*

[29] *Bivens* held that an implied damages remedy is unavailable if (1) there are "special factors counseling hesitation in the absence of affirmative action by Congress," 403 U.S. at 396, or (2) the plaintiff can avail herself of an alternative remedy "equally effective in the view of Congress," *id.* at 397. Thus, to survive a motion to dismiss, a plaintiff may be required to show as a matter of law that relief under *Bivens* is not precluded. Most litigation has focused on the latter condition. *See, e.g.*, Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 549–51 (S.D.N.Y. 2004) (dismissing *Bivens* claim against IRS because of comprehensive remedial system provided by Internal Revenue Code), *aff'd*, 409 F.3d 106 (2d Cir. 2005); Richmond v. Potter, No. 03-00018, 2004 WL 5366540, at *14, *15 (D.D.C. Sept. 30, 2004) (dismissing postal employee's *Bivens* claim against former supervisors because Federal Employee's Compensation Act provided alternative remedy), *aff'd*, 171 F. App'x 851 (D.C. Cir. 2005); Williams v. Dep't of Veteran Affairs, 879 F. Supp. 578, 586

lations of Fourth Amendment, Eighth Amendment, and Fourteenth Amendment rights, allegations similar to those required under § 1983 are sufficient.[30]

Various rationales have been offered for permitting individuals to recover damages for a violation of their constitutional rights. One is that "'where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'"[31] A somewhat more sophisticated account suggests that a damages remedy is a necessary, if perhaps suboptimal, means of assuring that public officials comply with the Constitution.[32] For courts confronted after the fact with a violation of an individual's constitutional rights, a damages remedy (with its intrinsic power to deter) may be the only way of guaranteeing that the illegal conduct does not recur. Justice Harlan's famous concurrence in *Bivens*—which interestingly refers to "people in Bivens' shoes," not just Bivens himself[33]—reflects this rationale, as do more recent decisions.[34] And, of course, damages also serve to compensate victims of official wrongdoing. As the Court once observed, the legal system's "concept of damages" reflects a straightforward theory of rights: "'The cardinal principle . . . is that of *com-*

(E.D. Va. 1995) (dismissing *Bivens* claim against Department of Veteran Affairs because Privacy Act directly addressed allegedly unlawful conduct).

30 *See* Carlson v. Green, 446 U.S. 14, 17–18, 24–25 (1980) (allowing *Bivens* action for alleged Eighth Amendment violation); Davis v. Passman, 442 U.S. 228, 243–44 & 244 n.22 (1979) (allowing *Bivens* action for alleged Fourteenth Amendment violation); *Bivens*, 403 U.S. at 395 (allowing *Bivens* action for alleged Fourth Amendment violation). *But see* Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72–74 (2001) (restricting *Bivens* relief under Eighth Amendment where state tort law provides alternative remedy).

31 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

32 Consider Chief Justice Rehnquist's opinion for the Court in *Malesko*. There, the Court signaled a reluctant acceptance of *Bivens* for violations of the Fourth Amendment, Eighth Amendment, and the Fifth Amendment's procedural due process clause. *Cf. Malesko*, 534 U.S. at 74 (identifying *Bivens*'s "core purpose" as "deterring individual officers from engaging in unconstitutional wrongdoing"). The *Malesko* Court's limited endorsement of *Bivens* stands in sharp contrast to then-Justice Rehnquist's views two decades earlier, viz., that "[t]he policy questions at issue in the creation of any tort remedies, constitutional or otherwise, involve judgments as to diverse factors that are more appropriately made by the legislature than by this Court in an attempt to fashion a constitutional common law." *Carlson*, 446 U.S. at 51 (Rehnquist, J., dissenting). For a recent restatement of the argument that something like *Bivens* is required by the Constitution to protect individual rights, see Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

33 403 U.S. at 410 (Harlan, J., concurring).

34 *E.g.*, *Malesko*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); FDIC v. Meyer, 510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*.").

pensation for the injury caused to plaintiff by defendant's breach of duty.'"[35]

B. Social Costs

In the context of ordinary civil litigation between two private parties, the total (or "social") cost of litigation is generally limited to the cost of litigating the claim, the cost to the public of providing a dispute resolution system, and the cost created by an incorrect decision.[36] Damages litigation against public officers, however, implicates several additional costs.[37] As the case law on qualified immunity suggests, these additional costs should be assessed when deciding how to adjudicate a claim against a government official for damages.[38]

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[35] Carey v. Piphus, 435 U.S. 247, 254–55 (1978) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1 (1956)).

[36] The basic framework is set out in Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399–400 (1973). Posner identifies two general types of costs a procedural system imposes: "error costs" are "the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it"; "direct costs" are the costs "of operating the legal dispute-resolution machinery," such as "lawyers', judges', and litigants' time." *Id.* The purpose of legal procedure is to minimize the sum total of both. *Id.* This approach to procedure is not uncontroversial. For an attack on many of its underlying assumptions, see generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (critiquing procedural changes, particularly increased reliance on summary judgment, motivated by efficiency concerns).

[37] For more comprehensive surveys of the costs of public officer litigation, see PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS ch. 4 (1982) (discussing distribution of costs), Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, pt. II.B (noting forms of risk-minimizing behavior likely to be engaged in by public officers) [hereinafter Schuck, *Suing Our Servants*].

[38] At the outset, it is important to emphasize that the discussion that follows merely summarizes the social costs reflected in the case law on qualified immunity. Some commentators have questioned whether damages litigation against public officials actually creates these social costs, an empirical question this Note does not address. *See, e.g.*, 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, 102 (1997) ("[T]here is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics."); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 95 (1989) ("[W]e have no real empirical evidence of the effects that expansive liability would have on local administration . . . ."). For present purposes, it is enough that members of the Supreme Court perceive the costs to be real. Also worth mentioning is the distinction between a risk and a cost. While the case law tends to skirt the concepts, *see, e.g.*, Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (recognizing complete immunity because liability "would dampen the ardor of all but the most resolute, or the most irresponsible, [officials] in the unflinching discharge of their duties"), not all risks impose expected losses worth minimizing, *see, e.g.*, PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 45, 151 (Kenneth R. Foster et al. eds., 1993) (discussing "hazards

Damages litigation gives rise to unique negative externalities. Consider a hypothetical, based loosely on *Iqbal*, in which a mid-level Justice Department lawyer, sued for her personal role in the development of an allegedly unconstitutional policy, is required to comply with discovery requests (depositions, responses to interrogatories, document productions, and so on). Discovery will produce several direct costs: The lawyer will not simultaneously be able to perform her primary responsibilities (a concern that assumes particular importance if she serves a critical public function);[39] she will avail herself of government resources, such as legal and informal assistance from other government employees, that are unavailable to private litigants;[40] and, except in cases of clear illegal conduct, the government will most likely indemnify her for any eventual settlement or damages award.[41]

Beyond these direct costs, the case law recognizes four categories of indirect costs of damages litigation against public officials. In contrast to the opportunity costs of haling a government employee into court and indemnifying her against a judgment, these costs are far more difficult to measure. Moreover, they generally reflect the assumption on the part of the courts that negative systemic effects follow from allowing a "culture" of litigation against government officials to develop.[42]

The first indirect cost is the risk that the "fear of personal monetary liability and harassing litigation will unduly inhibit officials in the

whose very existence is somehow in doubt" and "*real* risk[s] that [have] provoked disproportionate public concern").

[39] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982) (noting that inquiries into officials' motivations "can be peculiarly disruptive of effective government"). For examples of the opportunity costs of deposing high-level officials, particularly the President, see *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982) ("Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."), and United States v. Nixon, 418 U.S. 683, 705–06 (1974) (holding that executive privilege has constitutional underpinnings because public dissemination of remarks can "temper candor"). In *Clinton v. Jones*, 520 U.S. 681 (1997), the Court mistakenly predicted that Paula Jones's sexual harassment suit against President Clinton was "highly unlikely to occupy any substantial amount of [Clinton's] time." *Id.* at 702.

[40] *See, e.g.*, 13 C.F.R. § 114.110 (2007) (providing that government will pay legal fees for certain civil suits against Small Business Administration employees); 28 C.F.R. § 50.15 (2007) (same, Department of Justice); 32 C.F.R. § 516.30 (2007) (same, Army); 38 C.F.R. § 14.605(b) (2007) (same, Department of Veterans Affairs). *See also* Lant B. Davis et al., *Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–11 (1979) (reporting, based on sample of Connecticut cases, that police officers sued under § 1983 almost always received free counsel and almost never paid damages out of pocket).

[41] *See* Davis et al., *supra* note 40, at 810–11.

[42] For a number of sources describing and decrying the general litigation culture in the United States, see Miller, *supra* note 36, at 985 & n.5.

discharge of their duties."[43] A leading statement of the problem was delivered more than a half century ago by Judge Learned Hand.[44] He argued that in the abstract, there is no legitimate reason that an official "guilty of using his powers to vent his spleen upon others" should escape liability.[45] But Hand noted that denying recovery may nonetheless be in the public interest:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[46]

Characteristically, Hand recognized that for the purposes of determining whether a particular class of claims should be allowed, the aggregate costs and benefits are what matters, not the justice of the individual case.

The second indirect cost is the deadweight loss[47] of nonmeritorious litigation, a problem exacerbated by the disproportionate number of nonmeritorious constitutional tort claims.[48] In the most comprehensive study of § 1983 litigation yet conducted, Professors Theodore Eisenberg and Stewart Schwab concluded that "constitu-

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[43] Anderson v. Creighton, 483 U.S. 635, 638 (1987) (citing *Harlow*, 457 U.S. at 814); *see also* Schuck, *Suing Our Servants*, *supra* note 37, at 305–15 (describing "decisional calculus" of street-level officers who face possibility of liability for damages).

[44] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[45] *Id.*

[46] *Id.* For two discussions of the problem in intervening years, see *Clinton v. Jones*, 520 U.S. 681, 693 (1997) ("In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability."), and *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979) ("The societal interest in providing [prosecutors and judges] with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.").

[47] A deadweight loss occurs when the equilibrium for a good or service is not Pareto optimal, that is, when there are other potential allocations under which one actor in the system would be better off and no one would be worse off. *See, e.g.*, R. PRESTON MCAFEE, INTRODUCTION TO ECONOMIC ANALYSIS 182–83 (2006), *available at* http://www.mcafee.cc/Introecon/IEA.pdf (defining Pareto optimality); *id.* at 198 (defining deadweight loss). In general, nonmeritorious litigation imposes such a cost because defendants and the public would be better off if the claims were never brought, and the plaintiff gains nothing (at least in economic terms) from the proceedings.

[48] Damages litigation against public officials is thought to be more likely nonmeritorious because of the incentives faced by civil rights plaintiffs. Particularly with regard to prisoners, the opportunity cost to a plaintiff of bringing a lawsuit is low, while its subjective value (a remote possibility of winning and a sure opportunity to harass the defendant) is high. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1598, 1607–08 (2003).

tional tort plaintiffs do significantly worse than non-civil rights litigants in every measurable way."[49] One article by a former Justice Department lawyer reported that of the more than 12,000 *Bivens* actions filed between 1971 and 1986, only thirty had resulted in judgments for plaintiffs, only four of those judgments had been paid, and settlements were rare.[50]

To be sure, there are meritorious damages claims against public officials, and they may have social benefits surpassing the value of individual claims. Yet the perception that constitutional tort cases "flood the federal courts with questionable claims that belong, if anywhere, in state court"[51] is supported at least by anecdotal evidence[52] and has undoubtedly affected the development of the modern qualified immunity doctrine.[53]

The third indirect cost is the potential that damages litigation will reveal information and decisionmaking processes that should remain private. While the most familiar example of this risk is claims by the President and his advisors to absolute immunity from the judicial process,[54] a more significant and workaday risk is that courts will uninten-

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[49] Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 677 (1987). Eisenberg and Schwab report that in a sample of 162 civil rights cases, 22 of 162 (13.6%) plaintiffs prevailed; in a comparable sample of non-civil rights cases, 1735 of 2195 (79%) prevailed. *Id.* at 679.

[50] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 821 (5th ed. 2003) (citing Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 343–44 (1989)). For a recent noteworthy counterexample, see *DeMayo v. Nugent*, 517 F.3d 11, 19 (1st Cir. 2008) (granting partial judgment on pleadings on *Bivens* claim to *pro se* homeowner whose house was illegally searched by DEA agents).

[51] Eisenberg & Schwab, *supra* note 49, at 645.

[52] One district judge observed in 2004: "The civil enforcement of constitutional remedies is by and large not a productive—and consequently in my nearly two decades of experience in dealing with such issues has been an infrequently used—manner of invoking judicial scrutiny . . . ." United States v. McKoy, 402 F. Supp. 2d 311, 315 n.5 (D. Mass. 2004).

[53] *See infra* Part I.C.2.

[54] The locus classicus is *United States v. Nixon*, 418 U.S. 683 (1974). There, the Court said:

> The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.

Id. at 708. The importance of confidentiality to executive decisionmaking was reiterated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the leading decision on qualified immunity. *See id.* at 817 & n.28 (observing that judicial inquiry into official's "subjective motivation" would implicate separation of powers concerns if it exposed privileged decisionmaking processes).

tionally force the federal bureaucracy to work in a "'fishbowl.'"[55] As the common law of evidence recognizes, the public good is served by "frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate."[56] The rationale, which traces its origins to the political philosophy of John Stuart Mill,[57] is that controversial opinions may ultimately prove to be wise policy: "To the extent that such communications may later be scrutinized by others, the communicative process itself becomes embarrassed."[58]

Most serious discussions of the issue recognize that protecting the integrity of governmental decisionmaking processes must be balanced against competing interests, particularly "the public concern in revelations facilitating the just resolution of legal disputes."[59] The interest in deliberative integrity must also be distinguished from more direct harms to the public interest, such as the risk that the judicial process will unintentionally reveal "military matters which, in the interest of national security, should not be divulged."[60] There, deliberative integrity presents a more straightforward balancing question: Assuming the challenged conduct is illegal—perhaps grossly so[61]—does the public interest nonetheless demand that the judicial process be short-circuited?

The fourth indirect cost involves fairness. In particular, such litigation threatens to hold the defendant-official liable for discretionary actions that she was required by law to perform.[62] A striking example is *Pierson v. Ray*,[63] a seminal § 1983 case that held that police officers were immune from damages for enforcing, in good faith, an unconsti-

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55 Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988)).

56 Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966).

57 *See* JOHN STUART MILL, ON LIBERTY 60 (Prometheus Books 1986) (1859) ("[I]f any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true.").

58 *Carl Zeiss*, 40 F.R.D. at 325.

59 *Id.* at 324. For a survey of the case law, see JOSEPH M. MCLAUGHLIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE §§ 509.22–24.

60 United States v. Reynolds, 345 U.S. 1, 10 (1953).

61 *See, e.g.*, El-Masri v. United States, 479 F.3d 296, 311 (2007) (holding that state-secrets privilege precluded prosecution of action by innocent victim of CIA's "extraordinary rendition" program). For a critical discussion of the privilege as applied to war-on-terror cases, see generally Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

62 The idea that a person is *required* to perform *discretionary* actions might seem paradoxical at first blush, but the law is full of examples of "mandatory discretion." *See, e.g.*, U.S. CONST. art. 2, § 3 (president "shall" take care that laws be faithfully executed).

63 386 U.S. 547 (1967).

tutional law.[64] There, Chief Justice Warren explained that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[65] *Pierson* thus recognized that officials are entitled to "fair warning" that their conduct is illegal before they may be punished for it, a principle central to later immunity doctrines.[66]

Of course, not all lawsuits against public officials implicate these risks to the same degree. As *Iqbal* illustrates, suits against high-level government officials have the greatest opportunity costs and the greatest potential to reveal privileged information and decisionmaking processes. Conversely, other risks—concerns about fairness and the potential that litigation will deter officials from exercising their discretion with zeal—are most salient in litigation against street-level officers.

C. Immunity Doctrines

These concerns highlight that damages litigation against public officials entails a basic trade-off. Such litigation imposes unique social costs, but may confer countervailing benefits on society, principally an expected increase in official compliance with the law. How to balance these costs and benefits is a serious problem to which many responses are possible.[67] The Supreme Court, however, has largely balanced these competing policies on its own.[68] And a single mechanism—official immunity—has dominated its response.

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[64] *Id.* at 556–57.

[65] *Id.* at 555. To "mulct" means to punish by a fine. 10 OXFORD ENGLISH DICTIONARY 69 (2d ed. 1989).

[66] *See* United States v. Lanier, 520 U.S. 259, 270–71 (1997) (describing relationship between modern qualified immunity doctrine and due process requirement of fair warning before criminal liability may be imposed).

[67] The literature on the costs and benefits of allowing citizens to sue the State—as an entity or public servants individually—is vast. For useful general discussions, see generally John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998) (arguing that benefit of Eleventh Amendment is to channel claims for constitutional violations to § 1983 and to create fault-based regime); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that immunity doctrines foster development of substantive constitutional law); Schuck, *Suing Our Servants*, *supra* note 37 (surveying immunity-liability regimes and advocating reforms based on established tort principles); James Samuel Sable, Comment, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 SW. U. L. REV. 457 (1981) (recommending abolition of state immunity doctrines).

[68] As Schuck notes: "42 U.S.C. § 1983 was enacted 110 years ago. The Federal Tort Claims Act, 28 U.S.C. §§ 2671–80, was adopted thirty-five years ago and was amended in 1974 in the wake of *Bivens*. Neither has received a comprehensive congressional review, or even reexamination in light of the Court's recent decisions in this area." Schuck, *Suing Our Servants*, *supra* note 37, at 286 n.17. An exception to Congress's pattern of deferring

1. Absolute Immunity

The bluntest means of eliminating the risks of litigation against public officers is by granting them absolute immunity from civil liability. Thus, the official actions of a limited class of officers, including judges,[69] prosecutors,[70] and legislators,[71] cannot form the basis for a tort lawsuit. The basic rationale is twofold. First, a debilitating threat of civil liability would prevent such officials from performing their jobs if they were not protected by absolute immunity.[72] If deciding a case incorrectly meant exposing your personal bank account to a judgment, who would be a judge?[73] Second, other means of correcting illegal behavior make civil liability redundant.[74] If a judge cannot be sued for her wrong decision, at least she can be appealed.

2. Qualified Immunity

Absolute immunity, however, has its limits. Many official functions that also carry great power to do harm do not fully implicate the concerns that motivate absolute immunity. For example, extending absolute immunity to officials who arrest criminals or manage public employees would threaten deeply held rule-of-law values, as civil litigation may be the only practical means of deterring illegal conduct

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to the Supreme Court's resolution of immunity and liability issues is the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections (and titles 11, 18, 28, and 42) of U.S.C.), which imposes substantial new restrictions on prisoners' ability to litigate in the federal courts and on the federal courts' ability to mandate structural reform of prisons and jails.

[69] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 356–57 (1978) (holding judges absolutely immune except in cases of "clear absence of all jurisdiction").

[70] *See, e.g.*, Butz v. Economou, 438 U.S. 478, 515 (1978) (holding that agency officials who perform functions analogous to those of prosecutors should be absolutely immune from damages liability).

[71] *See, e.g.*, U.S. CONST. art. I, § 6, cl. 1 (granting senators and representatives immunity for any speech or debate in Congress); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (holding that legislators engaged in sphere of legitimate legislative activity are immune not only from consequences of results of litigation but also from burden of defending themselves).

[72] As Justice White observed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985):

> The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.

Id. at 521–22.

[73] *Id.* at 522 ("The mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process . . . .").

[74] *Id.* ("Most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed.").

and compensating the victims of official abuse.[75] At the same time, allowing tort lawsuits for these activities may implicate many—or all—of the costs surveyed in Part I.B. To take the simplest example, a police officer is less likely to arrest a suspected criminal if a suit for false arrest will follow as a matter of course.[76]

As a result of this jumble of considerations, the Court has attempted to craft a more limited or "qualified" immunity that applies to the vast body of public employees whose official acts are not categorically immune from civil liability. Under the doctrine, acts that otherwise would give rise to liability are immunized if they fall within a privileged category *and* are performed in a particular way. In contrast to absolute immunity, qualified immunity looks at *how* an allegedly unlawful act was performed, not just whether the act—viewed in isolation—falls within a privileged category.

Initially, the Supreme Court followed the intuitive rule that if an official performed an action in a good faith attempt to perform her official duties, she was immune from civil liability.[77] In *Gomez v. Toledo*, the Court held that the defendant must raise the defense, known then as "good faith" immunity.[78] Placing the pleading burden on the defendant made sense because § 1983's text is silent on the subject of governmental immunity,[79] and the existence of good faith ordinarily "depends on facts peculiarly within the knowledge and control of the defendant" such as "state or local law, advice of counsel, administrative practice, or some other factor of which the official

[75] Suits against public officials are necessary because sovereign immunity bars most direct claims against the government, *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (Congress may not abrogate State's Eleventh Amendment immunity under (Indian) Commerce Clause), and most civil rights causes of action do not allow the government to be held liable for the acts of its officers under ordinary principles of respondeat superior, Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (stating that language and legislative history of § 1983 suggest that Congress did not intend for local governments to be held liable under respondeat superior theory). Hence, officers who perform these activities are the only remaining potentially responsible party. A perhaps unintended consequence of these doctrines is that, in deciding damages claims against individual officers, the federal courts are interjected into the lowest levels of state decisionmaking. *See generally* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001) (arguing that Supreme Court's Eleventh Amendment jurisprudence imposes constraints on state action instead of enhancing federalism and state autonomy).

[76] *E.g.*, Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351, 1364 n.39 (1950) ("[A] policeman who has been sued for false arrest is likely to be more cautious in the future, perhaps to the point of failing to provide adequate protection.").

[77] Pierson v. Ray, 386 U.S. 547, 557 (1967); Wood v. Strickland, 420 U.S. 308, 321–22 (1975).

[78] 446 U.S. 635, 636 (1980).

[79] *Id.* at 639–40.

alone is aware."[80] The *Gomez* Court thus envisioned that the plaintiff would plead that her rights were violated, the defendant would then plead that she acted in good faith, and the issue of immunity would be resolved later in the suit.

Good faith, however, proved to be an unworkable rule in the context of the system created by the Rules, which allows for liberal discovery[81] and trial as to any claim which presents a genuine issue of material fact.[82] Because an official's state of mind cannot ordinarily be resolved on summary judgment,[83] a dispute about whether the defendant acted in good faith would lead inevitably to trial. Any routine official act that was unconstitutional if performed with an impermissible motive became pregnant with the potential for a civil trial to determine just what the government officer really thought about the legality of her behavior.[84]

In the 1982 case of *Harlow v. Fitzgerald*,[85] the Supreme Court responded by adopting the modern standard for qualified immunity. The standard provides that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[86] The Court further held that the test for immunity was to be an "objective" one: Courts were to review "the objective reasonableness of an official's conduct,"[87] not the defendant's actual state of mind, in determining immunity.

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[80] *Id.* at 641.

[81] *See* FED. R. CIV. P. 26(b) ("Unless otherwise limited by court order . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .").

[82] *See* FED. R. CIV. P. 56(c) (requiring summary judgment if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law").

[83] *See, e.g.*, Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970) ("The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.").

[84] *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982) (describing costs of good faith test's emphasis on subjective intent). For examples of summary judgment being denied based on a dispute over the defendant's subjective good faith, see *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979) (affirming denial of summary judgment where FBI agent's good faith presented genuine issue of material fact), *Shifrin v. Wilson*, 412 F. Supp. 1282, 1295, 1300 (D.D.C. 1976) (denying summary judgment where good faith of municipal police chief and captain was at issue), and *Safeguard Mutual Insurance Co. v. Miller*, 68 F.R.D. 239, 241 (E.D. Pa. 1975) (denying summary judgment where good faith of State Insurance Commissioners was at issue).

[85] 457 U.S. 800 (1982).

[86] *Id.* at 818.

[87] *Id.*

The Court offered two rationales for its new test. First, an objective standard would facilitate pretrial judgment. A claim could be dismissed before discovery if a plaintiff failed to plead the violation of a "clearly established" right.[88] To the extent that factual questions about the status of a right prevented a court from determining the issue on the pleadings, that issue could be resolved at summary judgment.[89] Second, "objective reasonableness"[90] would reduce burdensome discovery. "Judicial inquiry into subjective motivation," the Court noted, "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[91] Such discovery into the decisionmaking of high-level government officials is "peculiarly disruptive of effective government,"[92] producing many of the harms identified in Part I.B. It prevents the target of discovery from performing her primary official duties, it threatens her zeal by signaling that her actions will be subject to second-guessing, and by its very nature, it threatens to reveal hitherto unknown decisionmaking processes.[93]

Although the Court has tweaked the contours of the doctrine in subsequent years, the basic standard in *Harlow* has remained intact. Substantively, the most significant development involved the specificity with which a right must be "clearly established" to fall within the scope of qualified immunity. In a line of decisions beginning with *Davis v. Scherer*[94] and culminating in *Hope v. Pelzer*,[95] the Court held that a right is "clearly established" if a reasonable officer had "fair warning" or "fair notice" that her actions would violate the law.[96] Fair

[88] *See id.* at 819 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor . . . to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.").

[89] *See id.* ("Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.").

[90] Objective reasonableness, as the requirement has come to be known, would limit the need for discovery. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) (noting that objective reasonableness requirement was intended to facilitate summary judgment).

[91] *Harlow*, 457 U.S. at 817.

[92] *Id.*

[93] *See supra* Part I.B.

[94] 468 U.S. 183 (1984).

[95] 536 U.S. 730 (2002). *See also* Saucier v. Katz, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.").

[96] *Hope*, 536 U.S. at 739, 741.

notice does not mean that "the very action in question has previously been held unlawful," but rather that "in the light of pre-existing law the unlawfulness must be apparent."[97] Procedurally, the most significant change involved the availability of interlocutory appeal from the denial of qualified immunity. In *Mitchell v. Forsyth*,[98] the Court held that "to the extent that it turns on an issue of law," the denial of qualified immunity is a "final decision" that may be immediately appealed as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*[99]

D. The Procedural Dilemma

The *Harlow* Court's simple standard for when qualified immunity applies left a basic procedural question unresolved: When should qualified immunity be decided—and on what basis?[100] On one hand, *Harlow* made clear that an officer's actual, subjective state of mind is irrelevant to whether she is entitled to immunity,[101] and language in *Harlow* suggested that lower courts must determine early on whether qualified immunity is warranted.[102] Further, *Mitchell v. Forsyth* expressly rested on the premise that, like absolute immunity, qualified immunity is an entitlement "not to stand trial or face the other burdens of litigation."[103]

On the other hand, even under the *Harlow* Court's objective standard, determining before discovery whether immunity is warranted can be a difficult task. When a complaint is framed in general terms, identifying the specific right allegedly violated might be an impossible task.[104] Alternatively, even if the right is clear, the court

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

98 472 U.S. 511 (1985).

99 *Id.* at 528, 530 (applying *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546–47 (1949), which held that certain collateral orders, not part of principal cause of action, may be immediately appealed).

100 *See, e.g.*, FALLON ET AL., *supra* note 50, at 1132 ("It is clear that unless a claim of official immunity is made by the defendant, the issue is not in the case. But once such a claim has been asserted, it is not clear what burden, if any, is placed on the plaintiff in order to continue the litigation . . . .").

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

102 *See supra* notes 88–89 (quoting *Harlow*).

103 472 U.S. 511, 526 (1985) (explaining that qualified immunity functions as "an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial"). The Court has since frequently reiterated that conception. *E.g.*, Behrens v. Pelletier, 516 U.S. 299, 308 (1996); Hunter v. Bryant, 502 U.S. 224, 227 (1991); Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987); Malley v. Briggs, 475 U.S. 335, 341 (1986); Davis v. Scherer, 468 U.S. 183, 195 (1984).

104 *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 580–81 (1998) (seeking damages for violation of First Amendment and due process rights for misdelivery of prison mail); *see*

may lack facts essential to resolving whether a clearly established right has been violated.[105]

The nearest the Supreme Court has come to addressing the problem came in the 1998 case of *Crawford-El v. Britton*.[106] As discussed below, the *Crawford-El* Court established that a lower court may not impose a heightened burden of proof on a plaintiff's affirmative claim based on the policies underlying official immunity.[107] In influential dicta, however, the Court went on to describe the procedures a lower court should apply to claims where the defendant has invoked qualified immunity.

First, the Court observed that a court may demand additional information from the plaintiff at the pleadings stage consistent with Rules 7(a) and 12(e), which authorize the court to order a supplemental pleading from the plaintiff in certain circumstances.[108] Second, a court may dismiss a complaint for failure to state a claim if the plaintiff seeks damages for the violation of a right that was not clearly established when the defendant acted.[109] Finally, trial judges may actively manage discovery in unconstitutional motive cases pursuant to the wide discretionary authority of Rule 26.[110] Beyond this, summary judgment remained "the ultimate screen to weed out truly insubstantial lawsuits."[111]

In reciting that *all* the pretrial procedural mechanisms created by the Rules could potentially contribute to the resolution of qualified

also supra note 14 and accompanying text (discussing potential difficulty of discerning specific rights allegedly violated).

105 *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) (observing that qualified immunity "entail[s] nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context").

106 523 U.S. 574 (1998).

107 *Id.* at 592; *see infra* Part II.B–C.

108 *Crawford-El*, 523 U.S. at 598. Rule 7(a) allows the court to order "a reply to an answer," FED. R. CIV. P. 7(a); Rule 12(e) authorizes the court to order "a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response," FED. R. CIV. P. 12(e). The latter procedure is discussed at greater length in Part II.D, *infra*.

109 *See Crawford-El*, 523 U.S. at 598 (stating that district court should resolve threshold question of whether official's alleged conduct violated clearly established law before permitting discovery); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1981) (noting that threshold inquiry into whether right was clearly established "should avoid excessive disruption of government" by limiting discovery to violations that officials could fairly be said to "know" were forbidden).

110 *Crawford-El*, 523 U.S. at 598; *see* FED. R. CIV. P. 26(b)(2) ("By order, the court may alter the limits in [Rule 26] on the number of depositions and interrogations or on the length of depositions under Rule 30. . . . [And] the court may also limit the number of requests under Rule 36.").

111 *Crawford-El*, 523 U.S. at 601.

immunity, *Crawford-El* said little about which were optimal, to say nothing of legally required. Thus arose the procedural dilemma of qualified immunity: To the extent the court attempts to resolve the immunity question early, it risks making a judgment based on incomplete information. To the extent it allows the normal process of adversarial discovery, it disregards the policies underlying official immunity.

II
PROCEDURAL ALTERNATIVES

The preceding Part outlined how the Court's qualified immunity doctrine puts lower courts in the double-bind of choosing between applying a factual standard without the benefit of facts and disregarding the social policies underlying official immunity. The lower courts have responded with a variety of procedural mechanisms, intended both to uphold the policies at stake and to apply faithfully the standard announced in *Harlow*. This Part reviews and critiques these attempts.

A. Heightened Pleading Standards

A simple, traditional, and (since 1993)[112] unlawful way to reconcile the tension in the Court's qualified immunity doctrine is to require plaintiffs to put forth more detailed pleadings in damages suits against public officers than are normally required by the Rules. Ordinarily, the Rules require that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[113] The complaint need not contain a detailed description of the facts supporting the claim, just enough information to "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[114] Such a "'notice pleading'" system "'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'"[115]

A heightened pleading standard—one that departs from the usual notice pleading requirement and demands detailed factual allegations in the complaint—aims to give the trial court enough information to make a threshold determination about whether the claims are

[112] *See infra* notes 125–29 and accompanying text.

[113] FED. R. CIV. P. 8(a)(2).

[114] Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[115] *Id.*

sufficiently meritorious to warrant discovery.[116] If the facts pleaded show that the suit is barred by immunity, the case can be dismissed; if they show a plausible entitlement to relief, there is at least an assurance that discovery is worth the costs.[117]

The reasoning of *Bell Atlantic Corp. v. Twombly*,[118] the Court's watershed decision reinterpreting the pleading requirements of Rule 8(a), appears at first to support this approach. In *Twombly*, the Court held that to state a claim under section 1 of the Sherman Antitrust Act,[119] a complaint must include "enough factual matter (taken as true) to suggest that an [illegal] agreement was made."[120] According to the Court, "[a]sking for plausible grounds to infer an agreement . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[121] This standard superseded *Conley v. Gibson*'s famous formulation 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."[122] The Court justified this revision on two grounds: first, that "discovery can be expensive,"[123] and second, that given the expense of discovery, defendants might settle meritless claims for their *in terrorem* value.[124] By providing some guarantee that a plaintiff's claims are well founded, the plausibility standard thus seeks to control the costs of discovery and to provide a guarantee (albeit a modest one) that discovery will

116 *See, e.g.*, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1057–58 (5th Cir. 1992) (noting possibility of heightened pleading standard to serve as litigation screen), *rev'd*, 507 U.S. 163 (1993).

117 *E.g.*, Breidenbach v. Bolish, 126 F.3d 1288, 1293 (10th Cir. 1997) ("The heightened pleading standard requires that a plaintiff do more than assert bare allegations of a constitutional violation."), *abrogated by* Currier v. Doran, 242 F.3d 905 (10th Cir. 2001); Branch v. Tunnell, 14 F.3d 449, 452 (9th Cir. 1994) ("'[I]n order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent.'" (alteration in original) (quoting Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991))), *overruled by* Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002); Gooden v. Howard County, 954 F.2d 960, 969–70 (4th Cir. 1992) (en banc); Dominque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987).

118 127 S. Ct. 1955 (2007).

119 15 U.S.C. § 1 (2000 & Supp. V 2006).

120 *Twombly*, 127 S. Ct. at 1965.

121 *Id.*

122 355 U.S. 41, 45–46 (1957); *see also Twombly*, 127 S. Ct. at 1969.

123 *Twombly*, 127 S. Ct. at 1967.

124 *Id.* "In terrorem" is Latin for "in order to frighten." BLACK'S LAW DICTIONARY 839 (8th ed. 1999). The term is generally used to refer to suits where the plaintiff hopes for a settlement because the cost to the defendant of litigating is greater than the cost of settling. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (noting social costs of *in terrorem* suits).

be cost-justified. The Court's concerns in the antitrust context apply equally to damages claims against public officials.

If the logic of *Twombly* supports a heightened pleading standard for claims against public officers, the Court's opinion is nonetheless clear that, as a legal matter, any such change may not be adopted unilaterally by the lower courts.[125] After assaying why an incrementally more difficult pleading standard was required by Rule 8(a), the Court expressly reaffirmed the principle of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[126] and *Swierkiewicz v. Sorema, N.A.*[127] that federal courts may not change pleading standards through the process of judicial interpretation.[128] As *Leatherman* and *Swierkiewicz* established, broadening the scope of Rule 9 "can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'"[129]

The Court's reasoning in *Twombly* suggests that plaintiffs pressing damages claims against public officers should be subject to a higher pleading standard (perhaps one that, like Rule 9(b), requires them to plead the "'who, what, where, when, and how'" of the illegal conduct).[130] But as a question of doctrine, the most the case authorizes a lower court to do is to demand "enough fact" in the complaint to raise a reasonable expectation that discovery will reveal evidence of illegality.[131] This standard falls significantly short of the level of pleading that courts have required for suits against public officers. *Twombly* notwithstanding, lower courts remain prohibited from applying a heightened pleading standard "contrary to the Federal Rules' structure of liberal pleading requirements" absent a change effected through the rulemaking process or a reinterpretation by the Supreme Court.[132]

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[125] *Twombly*, 127 S. Ct. at 1973–74 & 1973 n.14 (noting that holding does not broaden scope of Rule 9).

[126] 507 U.S. 163 (1993).

[127] 534 U.S. 506 (2002).

[128] *Twombly*, 127 S. Ct. at 1973 n.14 (citing *Swierkiewicz*, 534 U.S. at 515).

[129] *Id.* These cases reasoned that otherwise, both the rulemaking process and the Rules' division of claims into those that require heightened pleading (Rule 9(b)) and those that do not (Rule 8(a)) would be pointless. *Swierkiewicz*, 534 U.S. at 512–13; *Leatherman*, 507 U.S. at 168.

[130] BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007) (quoting United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2003)); *accord* Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 507 (7th Cir. 2007); Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007); United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 731 (1st Cir. 2007).

[131] *Twombly*, 127 S. Ct. at 1965.

[132] *Id.* at 1973 (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003)). A decision issued hard and fast on the heels of *Twombly* confirms this interpretation. In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), the Court reversed a decision of the

B. Heightened Burdens of Proof

A second potential approach to reconciling the competing demands of the Supreme Court's qualified immunity doctrine is to impose a heightened burden of *proof* at summary judgment.[133] In *Crawford-El*, the D.C. Circuit held that a plaintiff was required to offer clear and convincing evidence of the defendant's state of mind to survive a motion for summary judgment in unconstitutional motive cases.[134] Otherwise, the "immunity from suit" that public officers enjoy could be defeated—to the point of a full civil trial—by an allegation that an official's action was motivated by an unconstitutional purpose.[135]

The Supreme Court reversed,[136] reasoning that whatever weight the policies underlying official immunity carried, they did not justify changing the standards governing the plaintiff's affirmative case.[137] The Court additionally held that as with a heightened pleading standard, a heightened burden of proof violates the *Leatherman-Swierkiewicz* principle that a lower court may not alter the procedural rules governing actions in federal court absent a change in the Rules.[138] As noted above, the Court also observed that a variety of procedural devices was available to lower courts to control the costs of litigation against public officials.[139]

Tenth Circuit Court of Appeals that affirmed the dismissal of a prisoner's civil rights complaint for failing to adequately plead "substantial harm." *Id.* at 2199–2200. The prisoner in *Erickson* alleged that by failing to treat him for hepatitis C, the prison officials had placed him "in imminent danger." *Id.* at 2199. The court of appeals rejected the complaint under Rule 8(a), finding that the plaintiff had made "only conclusory allegations to the effect that he had suffered a cognizable independent harm as a result of his removal from the [hepatitis C] treatment program." *Id.* (alteration in original) (quoting Erickson v. Pardus, 198 F. App'x 694, 698 (10th Cir. 2006)). Citing *Twombly*, the Supreme Court reiterated that a complaint "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" a requirement that the plaintiff in *Erickson* had discharged. *Id.* at 2200 (alteration in original) (quoting *Twombly*, 127 S. Ct. at 1964).

133 Most courts simply imposed a heightened pleading requirement. *See* Breidenbach v. Bolish, 126 F.3d 1288, 1293 (10th Cir. 1997) (collecting cases), *abrogated by* Currier v. Doran, 242 F.3d 905 (10th Cir. 2001).

134 Crawford-El v. Britton, 93 F.3d 813, 815 (D.C. Cir. 1996), *vacated*, 523 U.S. 574 (1998).

135 *Crawford-El*, 523 U.S. at 584–85.

136 *Id.* at 601.

137 *Id.* at 594.

138 *See id.* at 595 ("[Q]uestions regarding pleading, discovery, and summary judgment are more frequently and most effectively resolved either by the rulemaking process or the legislative process." (citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993))); *see also supra* notes 125–29 and accompanying text (describing *Leatherman-Swierkiewicz* principle).

139 *See supra* text accompanying notes 108–11.

C. The Rules as Usual

The Supreme Court's rejection of the D.C. Circuit's heightened burden of proof—and its broader command that procedural responses to the risks of public officer litigation must be authorized by the Rules—left lower courts with two options. First, courts can follow the ordinary procedures for pleading and proof in public officer cases, while expecting that trial courts display sensitivity to the policies underlying official immunity in managing discovery.[140] Under this method, when the usual procedural approach of the Rules conflicts with the policies underlying qualified immunity, the Rules trump. Especially significant is that the ordinary rules for the construction of pleadings apply when qualified immunity is asserted upon a motion to dismiss. Even in the post–*Twombly* era, "the allegations of the complaint are . . . taken as true,"[141] "all reasonable factual inferences [are] drawn to aid the pleader,"[142] and any "ambiguities [are] resolved in the pleader's favor."[143]

This approach has the virtue of simplicity, but it is unconvincing as both a matter of doctrine and of policy. At a doctrinal level, applying the rules as usual treats as precatory the Supreme Court's binding language regarding the kind of immunity that qualified immunity confers. The conception of qualified immunity as a true "immunity from suit" was integral to the Court's decisions in *Mitchell v. Forsyth* and *Behrens v. Pelletier* and is difficult to dismiss as dictum.[144] As a matter of policy, applying the rules as usual fails to take seriously the risks of litigation against public officers surveyed in Part I.B, *supra*.

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[140] *E.g.*, Baker v. Chisom, 501 F.3d 920, 924 (8th Cir. 2007); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125–26 (9th Cir. 2002); Goad v. Mitchell, 297 F.3d 497, 502–04 (6th Cir. 2002); Currier v. Doran, 242 F.3d 905, 916 (10th Cir. 2001); *see also* Fobbs v. Holy Cross Health Sys. Corp., 29 F.3d 1439, 1448–49 (9th Cir. 1994) (rejecting heightened pleading standard for § 1983 claims, outside of immunity context).

[141] United States v. Mississippi, 380 U.S. 128, 143 (1965); *accord* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

[142] 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1363, at 116 (3d ed. 2004) (citing cases from all courts of appeals); *cf. Twombly*, 127 S. Ct. at 1965 (demanding "plausible grounds to infer" illegality).

[143] 5C WRIGHT & MILLER, *supra* note 142, § 1363, at 116–19 (citing cases from all courts of appeals).

[144] *See* Behrens v. Pelletier, 516 U.S. 299, 308 (1996) ("The source of the First Circuit's confusion was its mistaken conception of the scope of protection afforded by qualified immunity. . . . [T]he defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . . .'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))); *Mitchell*, 472 U.S. at 526 ("*Harlow* . . . recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.").

The Rules are simply not designed to minimize the costs of public-officer suits.[145] Rule 8—the rule that governs pleadings—requires that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[146] Rule 26(b)—the rule that governs the scope of discovery—allows discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense."[147] Because a typical civil rights claim will plead a variety of legal theories with a high degree of generality (for example, violations of "due process," "cruel and unusual punishment," or "free speech"),[148] a standard application of the Rules results in a system with virtually no principled limits on discovery. The complaint (Rule 8) defines the general field of inquiry; the discovery rules (Rule 26 particularly) expand it.[149]

An ordinary application of the Rules—even a "'firm application'"[150] of the Rules such as called for by *Harlow*[151]—is thus an unsatisfying response to the risks created by damages litigation against public officials. Intrusive discovery pursuant to the Rules is the mischief that qualified immunity aimed to remedy; and it is a cold comfort to say that the Rules that spawned the problem, solve it too.

D. Specific Allegations Before Discovery

The second option left open by *Crawford-El*—one arguably endorsed by its statement that a "court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' . . . in order to

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145 Indeed, given that the modern civil rights causes of action are creations of the Warren and Burger Courts, *see generally* Monroe v. Pape, 365 U.S. 167 (1961), it is impossible that the Rules, which were designed in the 1930s, *see generally* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935), could have accommodated these objectives.

146 FED. R. CIV. P. 8(a)(2). Rule 8 governs the complaint (8(a) and (d)), the answer (8(b), (c), and (d)), and the construction of pleadings (8(e)).

147 FED. R. CIV. P. 26(b)(1).

148 *See supra* notes 14–16 (citing examples of generalized pleadings); *cf.* 2 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04[7a] (2007) (discussing practical reasons for pleading more information).

149 This observation is not novel. Judge Easterbrook has concluded, for example, that "excessive discovery is only a symptom of larger problems," including "the inability of our legal system to define what is relevant to a legal conflict . . . ." Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 643 (1989). As he explains, litigation follows a common pattern: "The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched." *Id.* at 638. Because "[a] judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details," well-structured discovery is exceedingly difficult to accomplish. *Id.*

150 Harlow v. Fitzgerald, 457 U.S. 800, 820 & n.35 (1982) (quoting Butz v. Economou, 438 U.S. 478, 508 (1978)).

151 *Harlow*, 457 U.S. at 807–08 (1982).

survive a prediscovery motion for dismissal or summary judgment"[152]—is to demand more specific allegations from the plaintiff as a condition of allowing discovery.[153] In *Thomas v. Independence Township*,[154] for instance, the Third Circuit held that when a plaintiff files a shotgun complaint,[155] the district court must order the plaintiff to produce specific allegations of unconstitutional or illegal conduct to survive a motion to dismiss "[i]n order to provide government officials the protections afforded by qualified immunity."[156]

In contrast to a classic heightened pleading requirement, this procedure demands additional information from the plaintiff *after* the complaint is filed. When the defendant receives the complaint, she suggests (perhaps before filing an answer) that immunity may be warranted.[157] The court then orders the plaintiff to produce more facts, on pain of having her case dismissed for failure to state a claim.[158]

By demanding facts before discovery, the *Thomas* decision responds to one of the risks identified in Part I.B: the deadweight costs of frivolous suits.[159] But the procedure is less useful as a response to more general social costs of damages litigation against public officials, particularly in cases where the plaintiff is represented by skilled counsel and can easily meet the demand for more information. In such cases, the qualified immunity doctrine must deal with two specific risks: first, the potential that a culture of litigation will unduly inhibit officials in the discharge of their duties, and second, the

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[152] Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

[153] The Second Circuit made tentative moves in this direction in *Iqbal*, stating that "in order to survive a motion to dismiss under the plausibility standard of *Twombly*, a conclusory allegation concerning some elements of a plaintiff's claims *might* need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement." Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007) (emphasis added); *see also* Conrod v. Davis, 120 F.3d 92, 95 (8th Cir. 1997) ("Once a defense of qualified immunity is raised, a plaintiff must offer 'particularized' allegations of unconstitutional or illegal conduct." (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))); Schultea v. Wood, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (holding that in qualified immunity cases, trial court may require that plaintiff produce reply to answer under Rule 7 before proceeding to discovery).

[154] 463 F.3d 285 (3d Cir. 2006).

[155] That is, one that "encompasses a wide range of contentions, usu[ally] supported by vague factual allegations." BLACK'S LAW DICTIONARY 1191 (8th ed. 2004) (defining "shotgun pleading").

[156] 463 F.3d at 300. "When presented with an appropriate Rule 12(e) motion for a more definite statement, the district court shall grant the motion and demand more specific factual allegations from the plaintiff concerning the conduct underlying the claims for relief." *Id.* at 301.

[157] *Id.*

[158] *Id.* at 302.

[159] *See supra* text accompanying notes 116–17 (noting that principal goal of demanding additional facts from plaintiff at pleadings stage is to enable early analysis of merits).

risk that civil discovery will intrude upon privileged decisionmaking processes.[160] Nowhere are these concerns more apparent than in *Harlow*. The lynchpin of that decision was the possibility that prolonged judicial inquiry into the motivations of high-ranking executive officials would be "peculiarly disruptive of effective government."[161]

Demanding more specific allegations as a condition of obtaining discovery does not respond to these risks. Rather, it responds only to the risk presented by a plaintiff like the one in *Crawford-El*—the risk that a vexatious litigant pressing a claim of questionable merit will consume too much of the court's and the defendant's time. The *Thomas* Rule 12(e) procedure will resolve a case prior to discovery only if the plaintiff pleads facts that trigger immunity. Such a resolution is not impossible,[162] but in general, a plaintiff with competent counsel will be able to satisfy a Rule 12(e) order demanding more facts. Once that hurdle is cleared, Rule 12(e)'s capacity to minimize the costs of public officer litigation is exhausted.

In addition, the *Thomas* rule is an uncomfortable fit with the procedural vehicle through which it operates, Rule 12(e).[163] In the early years of the Rules, district courts frequently demanded specific allegations as a condition of allowing a claim to proceed past the pleadings, via either Rule 12(e) or a bill of particulars.[164] The 1948 amendments to the Rules, however, struck the motion for a bill of particulars, and changed the language of Rule 12(e) to its current form, under which the motion is proper only if the complaint "is so vague or ambiguous that the party cannot reasonably prepare a response."[165] The proce-

160 *See supra* text accompanying notes 54–58. For example, *Scheuer v. Rhodes*, which established that the same qualified immunity standard applies to all executive branch officials regardless of rank, concerned the actions of Ohio's governor. 416 U.S. 232, 234, 247 (1974). *Mitchell v. Forsyth* concerned liability for the Attorney General's policy decisions. 472 U.S. 511, 513 (1985).

161 Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982).

162 In *Mitchell v. Forsyth*, for example, it may have been possible to determine whether Attorney General Mitchell's warrantless wiretapping violated a clearly established right on the basis of amended pleadings. The main issue the case presented was the effect of qualified immunity on the Attorney General's reasonable, but mistaken, belief that warrantless wiretapping did not violate the Fourth Amendment. *Mitchell*, 472 U.S. at 531–32.

163 *Cf.* Federal Deposit Ins. Corp. v. Wise, 758 F. Supp. 1414, 1418 (D. Colo. 1991) ("A [12(e)] motion should only be granted if the complaint is so vague or ambiguous that defendants cannot reasonably be required to frame an answer. 12(e) motions are discouraged unless the complaint is so unintelligible that defendants cannot understand the allegations and are unable to respond." (citing Colo. Springs Cablevision, Inc. v. Lively, 579 F. Supp. 252, 255 (D. Colo. 1984)).

164 *See* Fleming James, Jr., Comment, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1476–78 (1958) (describing history of Rule 12(e)); 5C WRIGHT & MILLER, *supra* note 142, § 1375 (same).

165 FED. R. CIV. P. 12(e).

dure described in *Thomas*—which demands facts not because the opposing party cannot reasonably respond to the complaint, but to prevent possibly unnecessary discovery—is difficult to square with this language and history.

III
An Assessment and Suggestions for Reform

As this Note has shown until now, the *Harlow* Court's seemingly straightforward standard for protecting government officials from the burdens of litigation gives rise to a procedural dilemma. While the standard is meant to minimize the social costs of litigation against public officers, it demands an application of law to facts requiring substantial pretrial discovery.[166] As Part II demonstrated, the existing procedural responses to this problem are inadequate. Particularly in cases brought by sophisticated plaintiffs against high-ranking officials (exemplified by *Iqbal*), the current procedural devices fail to regulate costly discovery that has the potential to impose substantial opportunity costs and reveal privileged decisionmaking structures.

This Part argues for a revised conception of the judicial role in claims where a defendant is potentially immune. In these circumstances, the court's primary task should be to narrow the universe of the plaintiff's claims and thus to promote a rational discovery process—one that is sufficient, but no more expansive than necessary, to determine if the factual predicates for immunity are present. After briefly revisiting why the procedures discussed in Part II cannot, in principle, control the social costs of litigation against public officers, I suggest two means of narrowing the universe of the plaintiff's legal claims. The first, which would require action from the Supreme Court, collapses the standards for liability and immunity in damages claims against public officers. To survive a motion to dismiss, a plaintiff would be required to plead the violation of a specific, clearly established right. Absent such a far-reaching change, lower courts can achieve similar results using a second means—by allowing a motion for summary judgment immediately after the pleadings are complete.

A. The Limits of Prescreening

Leaving to the side the rules as usual,[167] each of the mechanisms discussed in Part II takes a similar approach to limiting the social costs of public-officer litigation: Each uses a threshold procedural device, before the plaintiff is allowed discovery, to control the social costs of

166 *See supra* Part I.D.

167 The problems of using the rules as usual were canvassed in Part II.C, *supra*.

litigation against defendant-officials. Once discovery is underway, however, the procedures offer no means to control the costs that flow from it. Instead, the Rules operate on the assumption that there is "good discovery" and "bad discovery" and that demanding extra information from the plaintiff at the pleadings will distinguish the two.

Ex ante regulation, however, can accomplish only so much.[168] In particular, a threshold procedural hurdle does not respond to the principal harm that justifies modern qualified immunity doctrine—prolonged, uncontrolled, and disruptive discovery into the policymaking departments of government, and the resulting unwillingness of officials to discharge their duties with aplomb. In other words, if the goal of a procedural rule is to limit the scope of discovery, the rule should offer some ex post means to do that; it is not enough to regulate through an on-off switch.

If this is correct, a better response to the risks identified in Part I would be to regulate and restructure the discovery process. In principle, a reformed process is easy to imagine: A court would identify dispositive factual issues early on, target fact-finding at them, then reassess the plaintiff's claims in light of the newly discovered information.[169] To be sure, that model is idealized. Facts do not arrive in the world labeled "dispositive" or not and in simple cases, it may be more efficient to find out everything from a single source of information than to proceed piecemeal through legal issues. At the same time, the model is far from an impossibility. In a well-managed Fourth Amendment case, for example, discovery will almost always first be targeted at the existence of probable cause to search or to arrest,[170] as the issue is dispositive of claims of unreasonable search and seizure.[171] Or, as

168 Though the context is different, this is a principal insight of William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991). Stuntz notes:

> Mandatory prescreening of regulated conduct is very unusual in our legal system. Most regulatory regimes, whether governed by statute or common law, follow a two-step pattern: [S]ubstantive conduct standards define regulated actors' obligations, and violations of those standards (typically, though not always, violations that cause some injury) are subject to after-the-fact legal sanctions, such as damages, fines, or equitable relief.

Id. at 885.

For other useful discussions, see Steven Shavell, Economic Analysis of Accident Law 277–90 (1987), Donald Wittman, Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring, 6 J. Legal Stud. 193 (1977).

169 *See* Easterbrook, *supra* note 149, at 644 ("If pleadings were used to focus legal and factual disputes before discovery began, or if discovery alternated with legal resolution, constantly paring away issues, the process would be more tolerable.").

170 *See, e.g.*, Criss v. City of Kent, 867 F.2d 259, 261–62 (6th Cir. 1988) (approving of discovery process restricted to probable cause).

171 *See, e.g.*, Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996) (holding that probable cause is complete defense to Fourth Amendment damages action).

the Second Circuit recognized in *Iqbal*, if a plaintiff alleges that decisionmakers at all levels of the government are culpable for implementing an unconstitutional policy, the rational starting point is to identify who knew what when, working up from the bottom of the chain of command.[172] Discovery can thus be limited to this issue, with the need for further discovery reevaluated once the issue has been settled.

For these reasons, I suggest that a court confronted with an immunity claim should view its principal task as narrowing the universe of the plaintiff's claims in order to facilitate a rational discovery process. The question is how that can be accomplished—a question that the next two Sections attempt to answer.

B. Controlling the Universe of Claims—Revised Pleading Standards

Conceptually, the cleanest way to narrow the universe of the plaintiff's claims would be to collapse the pleading standards for liability and immunity and to require a plaintiff to plead the violation of a specific, clearly established right when stating a claim for damages against a public officer.[173] Without the violation of a specific, clearly established right, the plaintiff cannot prevail.[174] By "focusing up front on whether there is an effective remedy for the claimed injury,"[175] a revised pleading standard would promote the efficient resolution of public-officer claims without distorting the purposes of the underlying causes of action.[176]

The Supreme Court's case law provides many examples of the kinds of allegations that would be sufficient: A police officer "[shot] a disturbed felon, set on avoiding capture through vehicular flight";[177] a court officer "use[d] a search warrant" to "violate[ ] an attorney's

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172 Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007). If no policymaker authorized, knew of, or reasonably should have known of the tortious conduct, liability for damages is foregone. *E.g.*, Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986) ("'[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" (quoting McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977))).

173 The proposal would require action from the Supreme Court. *See supra* note 32 and accompanying text. Additionally, the proposal would be limited to damages claims.

174 *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 209 (2001) (finding military officer immune from excessive force claim where "neither respondent nor the Court of Appeals had identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did"); Wilson v. Layne, 526 U.S. 603, 605–06, 616 (1999) (finding police officers immune where not clearly established that allowing media to document search violated Fourth Amendment).

175 McNeil v. Springfield Park Dist., 851 F.2d 937, 942 (7th Cir. 1998).

176 *Id.* (endorsing restructuring of cause of action under Voting Rights Act of 1965 § 2, currently codified in 42 U.S.C. § 1973 (2000)).

177 Brosseau v. Haugen, 543 U.S. 194, 200 (2004).

right to practice his profession";[178] police officers "[brought] members of the media into a home during the execution of an arrest warrant";[179] a warden "deliberately misdirected . . . boxes to punish [the plaintiff] for exercising his First Amendment rights and to deter similar conduct in the future," causing him to incur "the costs of having the boxes shipped and purchasing new clothes and other items in the interim, as well as mental and emotional distress."[180]

A pleading standard collapsed in this way responds to many of the risks associated with damages litigation against public officials. By narrowing the field of relevant facts, the standard reduces the complexity, and thus the costs, of litigation. By requiring greater specificity in the complaint, the procedure effectively identifies dispositive factual issues (e.g., whether there was probable cause, or whether the defendant was personally involved in tortious conduct) and allows for narrow discovery with the potential to end litigation early. Requiring specificity in the complaint—less than required by a heightened pleading standard, but more than a conclusory allegation that the defendant violated due process or the like—deters *in terrorem* litigation. If a plaintiff's allegation that the defendant violated a specific right proves false, she exposes herself to sanction under Rule 11.[181]

Note how this revised pleading standard differs both from a traditional heightened pleading standard (which requires detailed factual allegations),[182] and from a requirement that the plaintiff produce specific factual allegations during the pleadings as a condition of advancing to discovery.[183] The standard is squarely focused on the plaintiff's legal theory, rather than the factual information that tends to prove or disprove it. Admittedly, the line between a legal claim and its supporting facts can be blurry in the qualified immunity context.[184] A focus on the plaintiff's legal theory is nevertheless critical, for ultimately it is the legal theory, not the factual background, that specifies the elements necessary to prove the claim (and so allows discovery to be structured around potentially dispositive factual issues).

A requirement of legal specificity is less likely to operate as a rule requiring plaintiffs to plead facts that may hurt their claims. As Charles E. Clark, the chief architect of the Rules, once noted, "[y]ou

178 Conn v. Gabbert, 526 U.S. 286, 291 (1999).

179 *Wilson*, 526 U.S. at 615 (1999).

180 Crawford-El v. Britton, 523 U.S. 574, 578–79 (1998).

181 *See* FED. R. CIV. P. 11(b)(3), (c) (providing that sanction may be imposed if filing, *inter alia*, does not have "evidentiary support").

182 *See supra* Part II.A.

183 *See supra* Part II.D.

184 *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 242–43 (1974) ("If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts.").

don't get people to throw away their case on these paper documents, or, if occasionally they do so, the judges are not going to be sufficiently hardboiled to throw the case out for that reason."[185] A requirement of legal specificity, designed to facilitate a well-structured discovery process, is fundamentally different from procedures like the *Thomas* Rule 12(e) procedure,[186] which are expressly designed to "forc[e] a claimant to disclose damaging facts pertinent to threshold defenses."[187]

It may be objected that a requirement of legal particularity in the complaint disadvantages plaintiffs with legitimate claims who fail to plead them under the proper legal standard. The problem with the Federal Rules of Civil Procedure prior to their landmark revision in 1938, after all, was that a plaintiff who failed to plead her claim in the correct legal pigeonhole was barred from recovery, even if the claim had merit.[188] Demanding particularity in the complaint may be subject to the same objection, as it is a move toward delineating the action's scope at the pleadings.

But the objection has limited force, as the proposal does not alter the routine operation of the Rules, which provide claimants with opportunities to fix pleadings based on later-acquired information. The Rules require that courts liberally grant leave to amend pleadings.[189] If new information surfaces during discovery, supporting recovery under a different clearly established right, the court generally must allow the plaintiff to replead.[190] Further, "[a] document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than

185 Charles E. Clark, Reporter to the Advisory Committee on Rules of Civil Procedure, Address on Rules 2–25 at the New York Symposium (Oct. 17, 1938), *in* FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938, AND OF THE SYMPOSIUM AT NEW YORK CITY, OCTOBER 17, 18, 19, 1938, at 235, 242–43 (Edward H. Hammond ed., 1939).

186 *See supra* Part II.D.

187 5C WRIGHT & MILLER, *supra* note 142, § 1376.

188 For a standard account of the pre-1938 Rules and the traditional English "forms of action," see 1 MOORE, *supra* note 148, § 1.02.

189 Rule 15(a)(1) allows a party who has not been served with a "responsive pleading" (that is, a response to the original pleading or complaint) to amend the original pleading without permission from the court. FED. R. CIV. P. 15(a)(1)(A). Rule 15(a)(2) provides that in all other cases "[t]he court should freely give leave [to amend the pleadings] when justice so requires." FED. R. CIV. P. 15(a)(2).

190 *See* FED. R. CIV. P. 15(b) (establishing liberal amendment rules during and after trial); *see also* 6 WRIGHT & MILLER, *supra* note 142, § 1471 ("[T]he rule's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.").

formal pleadings drafted by lawyers.'"[191] Thus a court faced with a *pro se* complaint averring only generalized constitutional violations would be required to narrow the focus of the claims, not dismiss the action altogether.

Demanding legal particularity in the complaint may also appear at odds with the logic of *Gomez v. Toledo*, which held that official immunity is an affirmative defense the defendant must raise.[192] The practical effect of demanding legal particularity from the plaintiff would be to shift the burden of pleading the issue of immunity to the plaintiff.[193] A close reading of the case, however, demonstrates that its reasoning is consistent with requiring the plaintiff to plead the violation of a clearly established right. The *Gomez* Court offered two reasons for why the defendant must raise the defense himself. The first was that as a matter of statutory construction, § 1983 did not support requiring the plaintiff to plead bad faith.[194] But as suggested above,[195] incorporating the clearly established law requirement into the plaintiff's complaint merely focuses on whether a remedy is possible. Requiring the plaintiff to plead the existence of a remedy is entirely consistent with Rule 8(a), since the Rule specifically requires the plaintiff to state the relief she requests.[196]

The Court's second reason for requiring the defendant to raise good faith was that "whether . . . immunity has been established depends on facts peculiarly within the knowledge and control of the defendant."[197] But the *Gomez* decision, which predated *Harlow* by two years, did not (because it could not) contemplate that such "facts" would include the legal status of the right allegedly violated, something that only assumed importance after *Harlow*. Case law establishing a right as such is not peculiarly within the control of the defendant—it is available to all. What *is* peculiarly within the defendant's control, under *Harlow*, is information relating to whether the defendant's acts were justified: what the defendant knew before she acted, what official policies supported the allegedly tortious action, whether extraordinary circumstances necessitated official action, and so on.

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191 Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

192 446 U.S. 635, 640 (1980).

193 *Cf.* Siegert v. Gilley, 500 U.S. 226, 231 (1991) ("Qualified immunity is a defense that must be pleaded by a defendant official."); *Gomez*, 446 U.S. at 640.

194 *Gomez*, 446 U.S. at 640.

195 *See supra* text accompanying notes 182–84.

196 FED. R. CIV. P. 8(a)(3) ("A pleading . . . must contain . . . a demand for the relief sought . . . .").

197 *Gomez*, 446 U.S. at 641.

C. Controlling the Universe of Claims—Creative Summary Judgment Practice

A revised pleading standard is not, however, the only way to control the universe of claims; such control may be achieved without action by the Supreme Court.[198] A second alternative for reform, which theoretically offers similar potential for controlling the discovery process, is for lower courts to consider a motion for summary judgment served with or before the answer (what I will call an "out-of-the-box" motion) and to structure discovery in light of the information revealed in adjudicating the motion.

To illustrate how the process would operate, suppose in a case like *Iqbal* that a high-level policymaker made an out-of-the-box motion for summary judgment on the ground that qualified immunity barred all damages claims against her. The plaintiff, unable to rebut the motion before discovery, would object to summary judgment on that ground and demand discovery. In these circumstances, the court has substantial authority under the Rules to optimize the discovery process so that it may rule on the summary judgment motion.

Under Rule 56—the Rule governing summary judgment—a party opposing the motion must file an affidavit containing "the facts the moving party expects to discover and how those facts would create a genuine issue of material fact precluding summary judgment."[199] A court may then "(1) deny the motion; (2) order a continuance to enable . . . discovery to be undertaken; or (3) issue any other just order."[200] In deciding how to proceed, the court must "balance the movant's demonstrated need for discovery against the burden such discovery will place on the opposing party."[201] In addition, the court may order the parties to appear and present arguments about whether summary judgment is appropriate and how to proceed if it is not.[202]

Taken together, these Rules authorize the court to identify the specific claims on which the plaintiff is most likely to prevail and to structure discovery around them. The affidavit requirement and the authority to order oral argument provide informal means of determining which of the plaintiff's claims are most meritorious and their

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198 *See supra* note 173 (noting revised pleading standard proposal would require Supreme Court's action).

199 Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1280 (11th Cir. 1998). *See* FED. R. CIV. P. 56(e)(2) (detailing affidavit requirement for opposing party).

200 FED. R. CIV. P. 56(f).

201 *Harbert*, 157 F.3d at 1280.

202 FED. R. CIV. P. 43(c); *see, e.g.*, Houston v. Bryan, 725 F.2d 516, 518 (9th Cir. 1984) ("[W]e admonish trial courts to grant oral argument on nonfrivolous summary judgment motions . . . .").

precise legal bases. The power to make "any other just order"[203] authorizes narrower discovery than would be allowable absent a summary judgment motion.[204] And the balancing standard on which the motion is ultimately decided provides a legal mechanism by which a court may properly consider the social costs of litigation against public officials—a proposition sporadically recognized by the courts of appeals.[205]

An early motion for summary judgment thus achieves the principal desiderata of pretrial procedure in litigation against public officers: discovery sufficient, but not greater than necessary, to determine whether the defendant's conduct infringed a specific, clearly identified right. Like a requirement of legal specificity in the complaint, the proceeding on an early motion for summary judgment helps narrow the field of relevant facts, reducing the cost and complexity of the subsequent litigation. Proceeding this way does not guarantee that discovery will never intrude on privileged decisionmaking processes. It does reduce the likelihood of such intrusion, however, by enabling a process through which, if certain facts are discovered (lack of personal involvement, for example), discovery, and possibly the whole litigation, can end much sooner than it otherwise would. At the same time, an early summary judgment motion does explicitly what many of the procedures reviewed in Part II appear designed to do: It creates a new way for information about a plaintiff's claims to reach a court, allowing the court to design an appropriate strategy for managing the litigation.

To be sure, early summary judgment is a departure from ordinary civil practice. In general, discovery runs for a set time period, after which the parties must produce motions for summary judgment by a deadline identified in a master scheduling order.[206] This procedure

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203 FED. R. CIV. P. 56(f).

204 Ordinarily, discovery is appropriate as to "any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). A Rule 56(f) order, by contrast, may restrict the scope of discovery, provided that the order is "just." FED. R. CIV. P. 56(f).

205 *See, e.g.*, *Harbert*, 157 F.3d at 1280 ("In qualified immunity cases, the Rule 56(f) balancing is done with a thumb on the side of the scale weighing against discovery."); Lewis v. City of Fort Collins, 903 F.2d 752, 758 (10th Cir. 1990) ("[T]he district court's discretion is not without bounds, particularly when the summary judgment motion is grounded on a claim of qualified immunity . . . .").

206 Rule 16(b) requires that unless local rules provide otherwise, a scheduling order be issued within 120 days after the complaint is served on the defendant. FED. R. CIV. P. 16(b)(2). The Rule also provides that "[t]he scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." FED. R. CIV. P. 16(b)(3)(A). As Wright and Miller note, "[t]he scope of the scheduling order is rather broad," and "the timetable it establishes will be binding." 6A WRIGHT & MILLER, *supra* note 142, § 1522.1.

follows not only from Rule 16(b)'s requirement that the court file a scheduling order soon after the complaint is filed[207] but also from a defendant's litigation incentives. As Professors Samuel Issacharoff and George Loewenstein have noted "the major benefit of summary judgment to the defendant is the possibility that she will prevail on the motion."[208] A rational defendant will thus wait until there is a possibility of success before moving for summary judgment.[209]

In principle, a court's power to manage its docket[210] provides a means of overcoming the defendant's natural tendency to delay moving for summary judgment. In practice, however, minimizing the social costs of litigation against public officials via early summary judgment proceedings may require the buy-in of defendants and their counsel. American civil procedure remains a deeply party-driven system, and little would be gained by a pro-forma summary judgment motion made only to comply with a scheduling order.[211] In most cases, buy-in should be easy to obtain. The defendant in a § 1983 or *Bivens* claim is necessarily an agent of the government,[212] so she should share the court's interest in minimizing the social costs of litigation against her. There remains, however, the possibility of an agency cost if the defendant stands to gain a private advantage by delaying the point at which she moves for summary judgment.[213] The force of this point should not be, however, overstated; like all attempts to control the social costs of public officer litigation, early summary judgment proceedings are an optimizing, not an absolute, reform.

Narrowing the universe of claims, particularly through out-of-the-box summary judgment proceedings, might also be criticized as another form of heightened pleading. Both mechanisms share the goal of preventing discovery run amok, and in practice, both place

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207 FED. R. CIV. P. 16(b).

208 Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 107 (1990).

209 *Id.* at 108 ("[A] defendant with a weak case does not benefit from the promiscuous filing of a summary judgment motion.").

210 *See supra* note 206.

211 For a general description of the relative roles of judges and litigants in the American system, see Part II.B of Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 383–86 (1982).

212 *See, e.g.*, United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

213 This might occur, for instance, if the defendant hopes to bring about a default by dragging out pretrial as long as possible. Here, the defendant would gain a personal benefit (dismissal of suit), at significant social costs (for example, her time spent defending the litigation and the court's time supervising the case).

additional burdens on the plaintiff at the beginning of litigation. But there are important practical and conceptual differences between the two procedures. A heightened pleading standard requires the plaintiff to allege the "'who, what, where, when, and how'" of the illegal conduct she suffered.[214] Attempts to narrow the universe of claims, by contrast, require only that the plaintiff cooperate with the court to identify the specific right allegedly infringed.

This contrast highlights a second important difference between prescreening devices and the summary judgment procedure: the latter's firmer doctrinal footing. Clear legal authority exists for a summary judgment procedure designed to identify the specific legal basis of the plaintiff's claim. The defendant's right to bring the motion, the court's authority in response, and the court's remedial powers are all defined in Rule 56.[215] For prescreening devices to be legally justified, by contrast, they must exist in the grey area between a conclusory pleading and a pleading that satisfies *Twombly*'s pleading standard.[216]

Perhaps the strongest objection to the early summary judgment approach is that it unrealistically assumes courts will take an active interest in managing the social costs of litigation against public officers.[217] Nevertheless, as the Third Circuit recognized in *Thomas*, a court of appeals may effectively require that trial courts minimize social costs by recasting their precatory obligations as mandatory modes of exercising their discretion.[218] Indeed, what the Third Circuit said about its newly minted Rule 12(e) procedure might apply equally to a summary judgment procedure designed to minimize the social

214 *E.g.*, BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007) (quoting United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 888 (8th Cir. 2003)).

215 *See* FED. R. CIV. P. 56(b) (identifying defendant's right to bring summary judgment motion); FED. R. CIV. P. 56(f) (identifying court's powers to respond).

216 As discussed in Part II.A, *Twombly* authorized lower courts to demand "enough fact to raise a reasonable expectation that discovery will reveal evidence of [illegality]," Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007), while reaffirming that the "'use of a heightened pleading standard . . . [is] contrary to the Federal Rules' structure of liberal pleading requirements,'" *id.* at 1973 (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003)).

217 In an early study of the discovery system, a majority of lawyers surveyed "emphasized the [courts'] inhospitability to hearing discovery disputes, the poor quality of decisions about discovery matters by trial judges and magistrates, and the underuse and ineffectiveness of sanctions." Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 825 (1980). If, as a general proposition, courts do not actively manage their day-to-day dockets, why should claims against public officials be treated any differently?

218 *See* Thomas v. Independence Twp., 463 F.3d 285, 302 (3d Cir. 2006) (reversing denial of motion to dismiss and remanding with instructions to hold motion to dismiss in abeyance during resolution of motion for more definite statement, in order to allow further development of immunity issue at pleadings stage).

costs of litigation against public officers: "In order to provide government officials the protections afforded by qualified immunity, a district court must avail itself of the procedures available under the Federal Rules to facilitate an early resolution of the qualified immunity issue."[219]

Finally, it must be noted that the procedure outlined here falls short of the strong version of qualified immunity endorsed by cases like *Mitchell v. Forsyth*, which posits complete "*immunity from suit* rather than a mere defense to liability."[220] In cases implicating state secrets or first-order separation of powers concerns, for example, the claim advanced by the government is that *any* discovery presents unacceptable social costs.[221] Such cases, however, are likely beyond the scope of generally applicable, trans-substantive procedural rules. Claims of absolute immunity from all judicial process ought to be rare in a "government of laws, and not of men."[222] They deserve to be addressed on their merits, not through the twice-removed lens of procedural mechanisms intended to optimize more run-of-the-mill litigation.[223] For the mine run of cases, creative summary judgment practice has the potential to reduce many of the unique risks associated with damages claims against public officers.

CONCLUSION

Contrary to received wisdom, the time-honored methods of weeding out insubstantial claims—heightened fact pleading and its variants—are actually poor means of controlling the social costs of damages litigation against public officers.[224] A more effective approach is to change discovery practice, principally by limiting the legal universe of the plaintiff's claims and thus limiting the scope of discovery.

If this reform is overdue, it is no panacea. Mechanisms for deciding qualified immunity are necessarily optimizing rules, which assume both that some social costs are justified by the benefits of

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219 *Id.* at 300.

220 472 U.S. 511, 526 (1985).

221 *See supra* notes 54–61 and accompanying text (describing cost of potentially revealing private information and decisionmaking processes).

222 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). On the general presumption in favor of judicial review of administrative action, see for example, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

223 As Chief Justice Marshall expressed the idea: "If this obloquy is to be cast on the jurisprudence of our country, it must arise from the *peculiar character of the case*." *Marbury*, 5 U.S. (1 Cranch) at 163 (emphasis added).

224 *See supra* Parts II.A, II.D (discussing heightened pleading standards and specific allegation requirements under Rule 12(e), respectively).

damages litigation against public officials and that there is a strong public interest in minimizing those costs. Getting all the benefits from damages litigation against public officials without incurring social costs is impossible; so is eliminating the social costs of public-officer litigation without getting rid of such litigation entirely. But the existing procedures leave room for improvement. Supreme Court precedent, and the intuitions on which it is built, suggest that lower courts should take advantage of this opportunity.