RESTORING *HOPE*

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This piece is a Response to Michael L. Wells's article, Qualified Immunity After Ziglar v. Abbasi: The Case for A Categorical Approach, *which appears in Volume 68 of the* American University Law Review.

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INTRODUCTION

Qualified immunity is under siege. As Judge Don Willett of the United States Court of Appeals for the Fifth Circuit recently put it: "Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence."[1] During an era in which text and original meaning increasingly dominate legal doctrine, qualified immunity has the misfortune of bearing little relationship to either text or history.[2]

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1. Zadeh v. Robinson, 928 F.3d 457, 480 (5th Cir. 2019) (Willet, J., concurring in part, dissenting in part).

2. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (discussing the legal justifications for qualified immunity and explaining why these justifications do not hold up to scrutiny). *But see* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018) (disputing Baude's argument that qualified immunity has no basis in positive law).

It is a judge-invented doctrine at a time when such doctrines are often purportedly disfavored.[3] Moreover, in an era in which legal and social movements are crying out for additional accountability, especially in the spheres of criminal justice and excessive force, qualified immunity has another feature that leaves it a target.[4] That is, it sometimes leaves victims of wrongdoing without a remedy.

The 2019 case of *Corbitt v. Vickers*[5] illustrates how qualified immunity can leave victims of wrongdoing without a remedy.[6] In that case, an officer searched for a suspect, and instead, encountered a man and six children standing in the front yard of a home,[7] none of whom had ever met the suspect.[8] The officer nonetheless drew a firearm and ordered the man and children to lay on the ground.[9] Then, "while the children were lying on the ground obeying [the officer's] orders . . . without necessity or any immediate threat or cause, [the officer] discharged his firearm at the family pet named 'Bruce' twice."[10] One of these shots struck a ten-year-old child, leading to a lawsuit.[11] The district court ruled that the case could survive the motion to dismiss stage, but the Eleventh Circuit disagreed.[12] That court, which commentators have called "the land of '*un*qualified immunity,'"[13] ruled that the officer was

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3. *See* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 406 (2018) ("Qualified immunity is a judge-made doctrine . . . .").

4. *See generally* S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 MO. L. REV. 943, 950 (2015) (discussing how the 2014 shooting of Michael Brown in Ferguson, Missouri led to protests across the country and criticism of the militarized police response to the protests); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 392–94 (2016) (examining the phenomenon of "copwatching" and what it means in the broader conversation surrounding police accountability and community policing); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2285 (2018) (discussing the legal challenges poor and indigent defendants have levied in response to perceived abuses by the criminal justice system and the abstention arguments that often arise).

5. 929 F.3d 1304 (11th Cir. 2019).

6. *See id.* at 1308, 1323 (holding that a police officer was entitled to qualified immunity in a case where he shot a minor child while attempting to shoot a dog).

7. *Id.* at 1308.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1308–09, 1323.

13. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 n.151 (2013); Elizabeth J. Norman & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002).

entitled to immunity.[14] The court determined that there was no prior "materially similar case" in that circuit and that the violation was not obvious.[15] Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[16]

One of the most recent scholarly works exploring this controversial doctrine is Michael L. Wells's recent article *Qualified Immunity After* Ziglar v. Abbasi*: The Case for A Categorical Approach*.[17] The article is a search for a nuanced middle ground. He seeks to protect the underlying aims of the doctrine without unduly trampling on accountability for government wrongdoing.[18] As his point of departure, Professor Wells engages the 2017 case of *Ziglar v. Abbasi*.[19] That case involved allegations that, in the aftermath of the September 11 attacks, high-ranking federal executive officials rounded up hundreds of men on account of their race and religion and then subjected them to violent, torturous conditions.[20] The Court dissolved the claims against the high-ranking officials.[21] "Special factors" counseled against implying a private cause of action in the Constitution against these acts.[22] The plaintiffs also brought claims under the express cause of action of 42 U.S.C. § 1985(3), which permits suits against those who conspire to violate federal rights.[23] And, importantly for Professor Wells's argument, the Court rejected those claims as well.[24] While there was no dispute that discriminating on the basis of race or gender violated the Constitution, it was less clear what types of conspiracies fell within the meaning of Section 1985.[25] At bottom, the Court ruled that officers are entitled to immunity

14. *Corbitt*, 929 F.3d. at 1323.

15. *Id.* at 1315, 1318–23.

16. *Id.* at 1311 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

17. Wells, *supra* note 3.

18. *See id.* at 383–84 (stating that while there are "defensible, *substantive* justifications for retaining some form of immunity defense," it would be better to frame the qualified immunity doctrine in the form of rules that limit it).

19. 137 S. Ct. 1843 (2017).

20. *Id.* at 1851–53; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 666–69 (2009) (describing the actions the FBI and other federal authorities took in response to the September 11, 2001 attacks).

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

22. *See id.* at 1859–60 (stating that this case presents a new *Bivens* context for which a "special factors" test is required and that a special factors analysis demonstrates that Congress, not the courts, should be the one to create a private cause of action in this kind of case).

23. *Id.* at 1865–66; *see also* 42 U.S.C. § 1985(3) (2012).

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

25. *See id.* at 1868–69 (noting the confusion among courts regarding what constitutes conspiracy in this context).

when their conduct is clearly illegal, but there is doubt as to whether officers would know that they could be sued for that clearly illegal conduct.[26]

Professor Wells notes that the current doctrine of qualified immunity was invented by judges during the early 1980s as a means of balancing competing values.[27] On the one hand, lawless abdication and transgression of the nation's highest charter would seem to be deserving of a remedy.[28] Such remedies are thought to deter additional unconstitutional conduct.[29] Remedies for wrongdoing also serve a compensatory function, ensuring that victims can find themselves in the position they would be but for the lawless act.[30] Moreover, in more recent years, we have come to learn that remedies for constitutional wrongdoing serve to guard against the externalities that attend procedural injustice and legal estrangement. People are more likely to comply with the law when they perceive it to be fair.[31] And when marginalization and unaccountability become the norm, people start to feel that they are stateless, with no government for which they are a constitutive part.[32]

On the other hand, Professor Wells notes that there would be attendant societal costs to permitting suits against government officials without qualification.[33] Government officials might be afraid to conduct the affairs of the people, fearing resultant lawsuits for conduct that could well be constitutional, even if the conduct is close to the brink of unconstitutionality.[34] Others may find themselves distracted by the

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26. *Id.*

27. Wells, *supra* note 3, at 406–07 ("Qualified immunity is a judge-made doctrine . . . .").

28. *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777–86 (1991) (outlining how the Constitution does not provide a remedy for every violation by examining the history of immunity in American law).

29. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 281 (1988) (stating that remedies for Constitutional violations operate as deterrents).

30. *See* Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1011 (2012) (discussing compensation and deterrence).

31. *See* Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 517–19 (2003) ("[W]hen people believe the police or the courts are legitimate, they are more likely to comply with their directives.").

32. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066–67 (2017) (describing "legal estrangement," a theory to explain the view that police and courts are illegitimate and poorly structured to address community needs).

33. Wells, *supra* note 3, at 391–92.

34. *See id.* (explaining that hesitancy of government officials to act should qualified immunity be eliminated entirely and providing examples).

threat of litigation more generally.[35] Then there are concerns about fairness.[36] Should the law permit lawsuits against officials who lacked fair notice that their conduct violated the law?

The end result is a doctrine that—despite its unmooring from traditional legal principles like text or history—aims to balance these competing values.[37] The core of the qualified immunity doctrine is a prohibition on suing government officials in their individual capacities for money damages unless those officials violate clearly established rights that a reasonable person would have known at the time of the violation.[38] Layered on top of this basic formulation are a series of rhetorical glosses that often make the doctrine even stricter in practice. The Court has long said that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[39] As Professor Wells notes, recent doctrine in cases like *Ziglar* adds yet another gloss, to the extent that the violation of clearly established rights can avoid accountability when the underlying cause of action is less than certain.[40]

Ultimately, Professor Wells rejects calls for the absolute eradication of qualified immunity,[41] instead arguing for a more nuanced, fragmented doctrine. He identifies categories of cases in which qualified immunity should be significantly less robust, including Fourth Amendment excessive force cases;[42] cases that involve bad faith on the part of the

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35. *See id.* at 391 (reasoning that constitutional tort litigation has "social costs" that include the time and energy spent by public officials on litigation).

36. *See id.* at 392 (arguing that in *Ziglar*, "fairness" was not at risk by imposing liability on the officials, as the officials had fair warning that their actions were unconstitutional).

37. Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2107 (2018) (describing qualified immunity as "an avowedly judicially made rule that attempts to balance competing deterrence concerns").

38. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (explaining that the Supreme Court has generally determined when qualified immunity applies by "identifying the circumstances in which qualified immunity would *not* be available").

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

40. *See* Wells, *supra* note 3, at 419 (discussing how the issue in *Ziglar* was not whether a Constitutional violation occurred, but whether the officers knew they could be sued for their conduct).

41. *See generally* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. (forthcoming 2020) (manuscript at 3), http://ssrn.com/abstract_id=3330050 [https://perma.cc/P2V3-E935?type=image] ("[T]here are growing calls by courts, commentators, and advocacy organizations across the political spectrum to reconsider qualified immunity or do away with the defense altogether.").

42. *See* Wells, *supra* note 3, at 424–26 (explaining that in the Fourth Amendment context, a police officer can get two chances to escape liability by arguing that the

officer;[43] cases that involve clear Supreme Court rulings (contrary circuit precedent notwithstanding);[44] and cases in which violations are obvious, even without prior precedent with identical facts.[45] At the risk of obscuring the complexity of his argument in this introduction, his argument is, in part, a call for a doctrine that is closer to *Hope v. Pelzer*,[46] a 2002 case in which the Supreme Court expressly rejected the view that a plaintiff must identify a case with materially similar facts to defeat qualified immunity.[47] Some violations are "obvious."[48] Further, Professor Wells also identifies categories of cases in which qualified immunity should continue to be robust, including national security cases against federal officials[49] and cases in which prospective relief is available.[50]

Part I of this Response engages in a deeper dive into the state of qualified immunity, situating Professor Wells's article with the prior scholarly critiques of the doctrine. Part II explores the contours of Professor Wells's argument in more significant detail. Part II also outlines some of the conceptual similarities between Professor Wells's argument and the majority opinion in *Hope v. Pelzer*. Part III discusses some strengths and limitations of Professor Wells's argument.

I. BACKGROUND

Qualified immunity is best contextualized within a broader remedial architecture for constitutional wrongs. Sovereign immunity generally protects states from private damages actions, and even some suits for injunctive relief, absent a "byzantine" set of exceptions.[51] Suing local

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search was reasonable or that he made a "reasonable mistake as to the reasonableness of the search").

43. *Id.* at 421–22 (examining the Supreme Court's adoption of a standard that evaluates whether an official's action was objectively reasonable without any inquiry into whether the official actually knew he was violating the law).

44. *Id.* at 429–31 (arguing that the Court "gives too much deference to the circuits").

45. *Id.* at 436–37 (explaining that in some instances, officials' conduct is so egregious that they should be held liable even without precedent with near-identical facts).

46. 536 U.S. 730 (2002).

47. *See id.* at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

48. *See id.* at 738 (finding that handcuffing an already subdued inmate to a hitching post for seven hours in the sun without bathroom breaks was an "obvious" violation).

49. Wells, *supra* note 3, at 439–41.

50. *Id.* at 442–44.

51. Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 446 (2002) ("Although most sovereign immunity questions have tolerably clear answers, they often lie at the end of a maze of precedents

governments is often not an option either; cities are generally not legally responsible for the unconstitutional acts of their agents, even in the event of negligence or recklessness from supervisors.[52] And some actors receive absolute immunity, such as judges, prosecutors, and legislators.[53] In a single suit, these protections often work simultaneously to block constitutional remedies.[54] That is, if suits were allowed against states and cities for the unconstitutional acts of their agents, much less thought and ink would be dedicated to qualified immunity. But such a move would, as I have written elsewhere, invite its own social costs.[55] In the absence of these alternatives, qualified immunity has come to be, in the words of John Jeffries, "the most important doctrine in the law of constitutional torts."[56]

As Professor Wells notes, the story of qualified immunity as we know it begins in 1967 with the case of *Pierson v. Ray*.[57] There, "the Court recognized a defense of 'good faith and probable cause,' which meant that an officer would have a defense if he reasonably believed an arrest was proper, even if the arrest in fact violated the Fourth Amendment."[58] As Chief Justice Warren put it: "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."[59] The Court reaffirmed a concept of qualified immunity in *Scheuer*

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that only a specialist could navigate with confidence."); David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753, 758 (2000) ("[T]he total picture is a Byzantine aggregation of rules and doctrines."); *see also* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1995 (2012) (describing how the complex nature of sovereign immunity has rendered it difficult to administer).

52. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 413–14 (2016) (explaining how the municipal causation requirement makes it difficult to hold municipalities responsible for the unconstitutional acts of their agents).

53. *Id.* at 411.

54. *See id.* at 414–15 (stating that the burden of proving "a municipal policy caused a constitutional violation," when combined with other governmental immunities, may leave "survivors of governmental abuse . . . with no defendant to sue at all").

55. *See id.* at 485 (describing the costs, especially time and public money, that cities would face if their sovereign immunity or municipal cause requirements were weakened); *see also* Wells, *supra* note 3, at 391–92 (detailing how official immunity increases public officials' ability to act "without limitation toward the public good").

56. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010).

57. 386 U.S. 547 (1967); Wells, *supra* note 3, at 389.

58. Wells, *supra* note 3, at 389 (quoting Pierson v. Ray, 386 U.S. 547, 557 (1967)).

59. *Pierson*, 386 U.S. at 555.

v. Rhodes.[60] The Court emphasized "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion . . . ."[61]

In the years following *Scheuer*, however, the requirement of subjective "bad faith" proved unpopular. The requirement often meant that during discovery, civil defendants underwent substantial inquiries into their motives.[62] To the extent that qualified immunity is designed, in part, to protect governmental defendants from time-consuming, costly inquiries, the doctrine was arguably not living up to that goal.[63] Furthermore, from the plaintiff's perspective, subjective bad faith is difficult to prove.[64]

The Court retreated from the subjective aspects of qualified immunity in the seminal 1982 case of *Harlow v. Fitzgerald*.[65] The Court held that qualified immunity would instead be governed by an objective standard: "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."[66] The Court reasoned that this standard would avoid excessive disruption of governmental operations by resolving insubstantial claims in less onerous ways.[67] The Court described this new test as "an attempt to balance competing

60. 416 U.S. 232 (1974).

61. *Id.* at 240.

62. Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982) ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." (footnotes omitted)).

63. *See id.* (explaining how subjective inquiries into the decision-making of government officials carries "special costs" because it often entails "broad-ranging discovery" into an official's conduct).

64. *See generally* Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 437 (2017) (noting that "discriminatory intent is especially difficult to prove"); Sarah Carrington Walker Baker, Note, *A Choice of Rules in Title VII Retaliation Claims for Negative Employer References*, 55 DUKE L.J. 153, 168 (2005) ("The 'problem of proof' refers to the difficulty that [plaintiffs] have establishing or finding proof of discriminatory intent: providing compelling evidence of the mental state and intentions of another is a very difficult task."); David Chi-Ping Liu, Note, *Creation of Majority-Minority Districts: A Step Toward Voting Equality or Racial Segregation?*, 63 GEO. WASH. L. REV. 297, 325 (1995) ("In the context of race-neutral statutes or governmental actions, the element of discriminatory intent is often hard to prove.").

65. 457 U.S. 800, 815–18 (1982).

66. *Id.* at 818.

67. *Id.*

values."[68] On the one hand, there is "the importance of a damages remedy to protect the rights of citizens."[69] On the other hand, there is "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[70]

This formulation has been met in recent years with considerable doubt from academic commentators.[71] One category of critiques, led by Professor Joanna Schwartz, is rooted in empirical studies that undermine qualified immunity's basic premises. In 2014, Professor Schwartz demonstrated that in light of indemnification, enforcement officers almost never contribute to judgments entered against them or related settlements.[72] If the fear related to qualified immunity is that officials will be afraid to do their jobs for fear of economically crippling lawsuits, this study deeply undermines that assumption. More recently, Professor Schwartz published the results of another study showing that qualified immunity is invoked and affirmed in far fewer cases than is often assumed, potentially undermining the idea that revisiting the doctrine would be particularly disruptive.[73]

Another influential set of recent critiques focuses on the ways that traditional tools of statutory interpretation or law, like text and history, cannot justify the doctrine. In the way of text, section 1983 applies to "[e]very person who," under the color of state law, violates federal rights.[74] Without more, there is little room in that language for qualified immunity, lest there be some confirmatory set of historical background principles at the time of the statute's adoption. Moreover, Professors William Baude and James Pfander have both cast considerable doubt over whether, in the way of federal common law, there are historical background principles that resemble today's qualified immunity doctrine.[75]

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68. *Id.* at 807.

69. *Id.* (citing Butz v. Economou, 438 U.S. 478, 504–05 (1978) (citation omitted)).

70. *Id.* (quoting *Butz*, 438 U.S. at 506).

71. The doctrine has also received considerable attention in the public sphere. A presidential candidate recently proposed its eradication. *See* Suzanne Gamboa, *Group Launches Ads Praising Julián Castro's Plan to Limit 'Immunity' for Police*, NBC NEWS (June 10, 2019), https://www.nbcnews.com/news/latino/group-launches-ads-praising-julian-castro-s-plan-limit-n1015156 [https://perma.cc/N3WW-KLF4].

72. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890, 912 (2014).

73. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9, 12 (2017).

74. 42 U.S.C. § 1983 (2012).

75. Baude, *supra* note 2, at 51 (identifying the Court's inconsistencies in adhering to Section 1983); *see also* JAMES PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 16 (2017) ("Quite in contrast to what we find in the modern-day handling of

Likewise, I have observed that in state courts, government officials faced varied levels of accountability at the time of Section 1983's adoption.[76] There were state cases embracing a strict liability approach, in which a government official executing a judgment was strictly liable for his or her own mistakes.[77] On this view, "[a]n officer seizes property at his peril, and if he errs he must take the consequences."[78] Other cases exempted officers from liability for unlawful or breached governmental contracts, but not for unlawful torts.[79] Further, other cases relied on standards that look much like negligence; officials who acted unlawfully and negligently were held liable.[80]

The net result is a legal moment in which scholars are exploring the "future of qualified immunity,"[81] or even the future "after qualified immunity."[82] Many are calling for its revision. Some have even called for its demise. Professor Wells's article is a thoughtful contribution to that discussion.

II. A CATEGORICAL APPROACH

Professor Wells acknowledges that qualified immunity unduly undermines accountability but argues against eradicating it entirely. He contends that there are significant social costs to the total elimination of the doctrine.[83] As noted, there are, for example, fairness concerns about personal liability for conduct an officer could not reasonably predict would become illegal. There is also the concern about whether officials would zealously do their jobs for fear of being sued. Professor Wells's article, then, is a search for a middle ground. According to Professor

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the war-on-terror cases, the courts of the nineteenth century took the view that the judicial duty was to focus quite specifically on the invasion of the legal right and ask only if it was justified by law.").

76. *See* Smith, *supra* note 37, at 2101–02 (discussing differences in state outcomes).

77. *Id.* at 2102.

78. Hibbard v. Thrasher, 65 Ill. 479, 480–81 (1872); *see also* Seip v. Tilghman, 23 Kan. 289, 291 (1880) (stating that an officer is liable to an action for replevin if he seizes exempt property); Ayer v. Bartlett, 26 Mass. (9 Pick.) 156, 164 (1829) ("The officer acts at his peril, and is answerable for any mistake.").

79. *See* Tutt v. Lewis's Ex'rs, 7 Va. (3 Call) 233, 233 (1802) ("[A] man, contracting on behalf of the State, is not liable in his individual capacity.").

80. *See* Blocker v. Clark, 54 S.E. 1022, 1024 (Ga. 1906) (shielding an officer who acted in good faith from liability).

81. Samuel L. Bray, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793, 1795–96 (2018).

82. Schwartz, *supra* note 41, (manuscript at 5–6).

83. Wells, *supra* note 3, at 391–92.

Wells, the way forward is to more carefully tune the doctrine to match its underlying goals. He identifies six categories in which qualified immunity should be significantly less protective of defendants and two settings in which a more protective form of qualified immunity is justified.

"Collateral issues" is the first category for which Professor Wells contends the case of qualified immunity is weak.[84] By this, he means situations where the law was clear about the existence of a constitutional right, but less clear about collateral issues such as the scope of liability under a statute or *Bivens*. If an official is on notice that rounding people up on account of their race or religion violates the Constitution, for example, there is little reason to shield that officer from liability, even if the reach of the underlying cause of action is less clear. It is difficult to argue that it would be "unfair" to hold a government official liable for conduct that they knew, or should have known, was illegal.

The second weak category is bad faith.[85] That is, when an official intentionally flouts the law, inoculating that person from suit neither furthers fairness nor aids government officials in doing their jobs properly. Professor Wells notes that after *Harlow*, it became more difficult for plaintiffs to overcome summary judgment.[86] In addition, in light of stricter pleading standards that have emerged during this century, pleading bad faith in a plausible manner is more difficult than it used to be.[87] Qualified immunity has not been recalibrated in light of these developments in civil procedure.

The third weak category is what Professor Wells calls the "two bites at the apple" problem."[88] This problem is best demonstrated in the context of excessive force under the Fourth Amendment.[89] An officer only engages in unconstitutional excessive force under the Fourth Amendment when, during the course of a seizure, an officer's force is "unreasonable."[90] Under qualified immunity, this type of unreasonableness is not sufficient to hold an officer liable. An officer's actions can be unreasonable in light of the facts, but nonetheless reasonable in light of the law as it existed at the time of the violation. That is, prior cases may not have put an officer

84. *Id.* at 419.
85. *Id.* at 421.
86. *Id.* at 423–24.
87. *See id.* at 423 n.256 ("By enabling judges to reject a case deemed to be implausible on a motion to dismiss the complaint, [Ashcroft v. Iqbal] facilitates dismissals of cases in which the complaint asserts bad faith but provides no specifics.").
88. *Id.* at 424.
89. *Id.* at 426.
90. Graham v. Connor, 490 U.S. 386, 396–97 (1989).

on notice that his or her unreasonable actions were unlawful. Professor Wells questions the wisdom of this additional protection from liability when an officer's violence was, as some commentators put it, "reasonably unreasonable."[91] Indeed, Professor Wells is not alone in singling out this category. In an influential, highly-cited work, Professor John Jeffries powerfully contended that "[t]he unconstitutional use of excessive force presents the most glaring case of the inadequacy of current law."[92] He added:

> Civil liability serves an admirable function in recognizing that wrong was done and providing some measure of compensation to victims and their families. Excessive force is not the only context to which these arguments apply, but it is the most vivid example of the inadequacy of current law and of the need to do better.[93]

Fourth, Professor Wells points to circumstances in which Supreme Court precedent is clear, but there is a case in the relevant lower appellate circuit that contradicts the Supreme Court precedent.[94] This is one variation of what I have called "the conflicting notice problem"—when officers are asked to follow two conflicting declarations of what the law is.[95] Professor Wells points, for example, to a free speech case in which Eleventh Circuit precedent misapprehended the amount of protection properly afforded to public employees.[96] More specifically, in *Lane v. Franks*,[97] the defendant engaged in unconstitutional acts that were consistent with the Eleventh Circuit's precedents, but inconsistent with the Supreme Court's.[98] I am less persuaded than Professor Wells that it is fair to hold someone civilly liable under those circumstances. But the conflicting notice problem is a very real one, and, as I have

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91. Wells, *supra* note 3, at 424; *see also* Anderson v. Creighton, 483 U.S. 635, 659–67 (1987) (Stevens, J., dissenting) ("[T]his Court has decided to apply a double standard of reasonableness in damages actions against federal agents who are alleged to have violated an innocent citizen's Fourth Amendment rights."). *See generally* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 918 (1998) (discussing the difficulties of reconciling the doctrines in qualified immunity).

92. Jeffries, *supra* note 13, at 264.

93. *Id.* at 270.

94. Wells, *supra* note 3, at 427.

95. Smith, *supra* note 37, at 2105.

96. Wells, *supra* note 3, at 427–28.

97. 134 S. Ct. 2369 (2014).

98. *Id.* at 2383.

written elsewhere, "[a]ny future revision or restructuring of the doctrine of qualified immunity must confront and take this issue seriously."[99]

Fifth and sixth, Professor Wells contends that precedents should be read at a higher level of generality. Sometimes, even in the absence of a case with materially similar facts, officers should reasonably know that their conduct violates an articulated legal rule.[100] Likewise, Professor Wells argues that when there is a series of cases articulating a legal rule, officials should be held liable when they engage in conduct that transgresses the "ineluctable inference" that their conduct violates that legal rule.[101] The Supreme Court once warned about these concerns in *Hope v. Pelzer*.[102] There, prison officials punished inmates by strapping them onto "hitching posts" on hot summer days, sometimes refusing to give them food or drink.[103] While the Supreme Court had ruled that unreasonable and wanton infliction of pain violates the Eighth Amendment, there were no precedents specifically about hitching posts.[104] The Eleventh Circuit granted qualified immunity, citing the absence of cases with materially similar facts.[105] The Supreme Court reversed, finding that it was "obvious" the officials' conduct violated the prohibition against unreasonable and wanton infliction of pain.[106]

Indeed, it can be said that at least three of the categories Professor Wells identifies would bring us closer to the promise of *Hope*. First, *Hope* involved allegations of bad faith; namely, the Court found that prison guards engaged in "unnecessary and wanton infliction of pain."[107] The court inferred "this subjective state of mind" in part based on "the fact that the risk of harm is obvious."[108] Second, *Hope* cautioned against demanding that a plaintiff produce cases with "fundamentally similar" or "materially similar" facts when a violation, based on prior rulings, is obvious.[109] Third, rather than relying on a single case, the *Hope* Court carefully catalogued prior cases from its own jurisprudence and from

99. Smith, *supra* note 37, at 2105.
100. Wells, *supra* note 3, at 431.
101. *Id.* at 436.
102. 536 U.S. 730, 742–43 (2002).
103. *Id.* at 733. In outlining the facts, the Court relied, in part, on the robust record about a hitching post compiled by Judge Myron H. Thompson in an earlier case. *Id.* at 744 (citing Austin v. Hopper, 15 F. Supp. 2d 1210, 1244–46 (M.D. Ala. 1998)).
104. *Id.* at 737 (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)).
105. Hope v. Pelzer, 240 F.3d 975, 982 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).
106. *Hope*, 536 U.S. at 737–38.
107. *Id.* at 737 (quoting *Whitley*, 475 U.S. at 319).
108. *Id.* at 738.
109. *Id.* at 741.

the governing court of appeals. The Court held that, together, these cases created an ineluctable inference that the hitching post violated the Eighth Amendment.[110]

But as Professor Wells notes, the continuing power of *Hope* has, perhaps, waned in some quarters over time.[111] Indeed, Professor Schwartz has noted: "Since 2005, when John Roberts became Chief Justice, the Court has granted certiorari to consider twenty qualified immunity denials, and ruled in the government's favor every time."[112] Indeed, in the words of Professor Baude, reversals of lower courts' denial of qualified immunity have a prized place on the Supreme Court docket.[113] And the vitality of *Hope* sometimes seems elusive in these cases. Two years after *Hope*, in *Brousseau v. Haugen*,[114] the Court emphasized that in Fourth Amendment excessive force cases, it is important to identify prior cases that state a rule "particularized" to the factual setting the parties confronted.[115] The Court was unimpressed with the prior "handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[116] At some point, demanding prior cases with a high level of contextual specificity starts to look like the "materially similar" requirement rejected in *Hope*.

But, as noted, Professor Wells identifies not only weak cases for qualified immunity; he also identifies two strong ones. First, he adduces cases against high-ranking federal officials that implicate national

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110. *Id.* at 745–46. As the Court explained:

> Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The "fair and clear warning" that these cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage.

Id. (internal citation omitted).

111. Wells, *supra* note 3, at 434 ("But the Court soon turned away from the plaintiff-friendly approach it had taken in *Hope*. Its 'subsequent decisions veered back toward requiring precedential specificity.'" (quoting Jeffries, *supra* note 13, at 257)).

112. Schwartz, *supra* note 41, (manuscript at 2).

113. Baude, *supra* note 2, at 82 ("Setting aside formal and informal tinkering with the doctrinal formula of qualified immunity, there is another important aspect of qualified immunity that might call for reconsideration: the Supreme Court's special treatment of qualified immunity issues on its certiorari docket." (footnote omitted)).

114. 543 U.S. 194 (2004) (per curiam).

115. *Id.* at 199 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

116. *Id.* at 200 (quoting *Saucier*, 533 U.S. at 202).

security.[117] This observation is at peace with a range of other scholarly observations and doctrines. Professor Stephen Vladek has written about a "national security canon," where the Court seems to increase the governing standards in cases that implicate national security.[118] One prominent example of this might be the seminal case of *Ashcroft v. Iqbal*[119] where the Supreme Court announced a rigorous new pleading standard in a case against federal officials for their decisions about matters of national security.[120] Likewise, Professor Richard Fallon has written that this national security variable might help explain Article III standing cases that seem to invoke a more stringent legal standard than other cases.[121] Second, Professor Wells notes that in at least some cases, courts can enter prospective relief to stop unconstitutional conduct, even in the absence of damages.[122] In those cases, he contends, it is less troubling when there are no damages available.[123] The unconstitutional actors are still held accountable and the unlawful conduct is thereby deterred.

III. ASSESSING THE CATEGORICAL APPROACH

A. Advantages

Professor Wells's proposal has at least four advantages. First, it would promote greater transparency, which could reduce the risk of raising the remedial bar in cases where that outcome is not warranted. Second, the proposal would increase accountability and the related "declaratory function" of law. Third, it is a compromise proposal of sorts for a middle ground at a moment in which individuals with different normative priors are reevaluating the doctrine. Fourth, he shines attention on ways that *Ziglar* could represent a significant extension of qualified immunity if it is applied in other contexts.

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117. Wells, *supra* note 3, at 439–42.

118. Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1329 (2012) (concluding that victims of government overreaching in the national security context will have to rely on the political branches rather than the courts for a remedy).

119. 556 U.S. 662 (2009).

120. *Id.* at 682 (setting stronger complaint pleading standards by stating that the complaint must connect unconstitutional discrimination to the policy the plaintiff actually challenged).

121. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1077–78 (2015).

122. Wells, *supra* note 3, at 442.

123. *Id.* at 442–43.

The transparency encouraged by Professor Wells' approach is commendable for many reasons. As I have previously asked: "If courts are going to weigh considerations beyond what a strict unyielding test technically permits, isn't it at least sometimes better for them to be open about it?"[124] After all, when the Supreme Court articulates a heightened legal standard because of concerns in a specific case about national security, and they fail to say that they are creating a special rule for a specific context, this can create confusion. The rule may start to creep into settings that have nothing to do with national security. Professor Vladeck has powerfully written about this, writing in 2012 that

> we must confront a[n] . . . alarming possibility: that as these 'national security'-based exceptions increasingly become the rule in contemporary civil litigation against government officers . . . the line between the unique national security justifications giving rise to these cases and ordinary civil litigation will increasingly blur.[125]

When the Court fails to expressly acknowledge that it is applying a special standard in a distinct setting, this risk presumably increases. By calling on courts to identify strong and weak settings for qualified immunity, Professor Wells's proposal encourages that kind of transparency, thereby reducing the risk of a mass standard creep in settings where it does not belong.

Professor Wells's proposal has the additional advantage of increasing accountability. This is especially true of excessive force cases, which have demanded special attention over the last decade.[126] Moreover, it is hard to see what is gained by according immunity when officials demonstrably act with bad faith. His approach reduces at least some of the circumstances in which officers are immune from conduct that commentators have sometimes labeled "outrageous."[127] Even without advocating for unqualified liability, Professor Wells's proposal means that the law will serve a compensatory and declaratory function[128] for lawless acts more often than the law currently does.

Moreover, a strength of Professor Wells's proposal is its spirit of compromise. Simmering just beneath the proposal is the belief that the outright elimination of qualified immunity may not be realistic or consistent with America's incrementalist common law tradition.

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124. Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 909 (2017).

125. Vladeck, *supra* note 118, at 1330.

126. *See* Wells, *supra* note 3, at 411–12 (discussing a hypothetical excessive force claim).

127. Jeffries, *supra* note 13, at 263.

128. *See generally* James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153 (2016) (arguing states should allow claimants to pursue claims through state law processes).

Acknowledging that "[q]ualified immunity is a judge-made doctrine," he expresses concern that "[i]ts abrupt termination would threaten the process values that inhere in the common law tradition, which favors incremental rather than abrupt change in judge-made law."[129] He contends that "the more realistic, and prudent, goal is not to eliminate qualified immunity," but to revise it in a way that "modifies rather than uproots the current doctrine."[130] Indeed, as he notes, the last rewrite of the qualified immunity standard happened in a nuanced, rather than wholesale, way. Finding a realistic alternative—one that appeals to different factions and values—is a worthy goal.

Finally, much of the attention that *Ziglar* has received has been focused on dimensions of the opinion other than the majority's qualified immunity holding. Some of this attention has been devoted to the Court's holding that the plaintiffs lacked an implied constitutional cause of action against the defendants.[131] Others have written about the question of whether 42 U.S.C. § 1985 does or should apply to inter-entity conspiracies.[132] Still others have often cited Justice Thomas's concurrence because of what it might portend about qualified immunity's future.[133]

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129. Wells, *supra* note 3, at 406–07.

130. *Id.* at 407.

131. *See, e.g.*, Jules Lobel, Ziglar v. Abbasi *and the Demise of Accountability*, 86 FORDHAM L. REV. 2149, 2166 (2018) (arguing that the change in judicial decision-making weakens deterrence for officials from committing acts of torture); Aaron Tang & Fred O. Smith, Jr., *Constitutional Remedies*-Bivens *Actions*-Ziglar v. Abbasi, 131 HARV. L. REV. 313, 316 (2017) (noting the new context of *Ziglar* prompted the Court to conclude that "special factors" weighed against creating a cause of action under *Bivens*); Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2171 (2018) (highlighting that the Court's restrictiveness has increased as the Court narrowly reads *Bivens*); Julio Pereyra, Comment, Ziglar v. Abbasi *and Its Effect on the Constitutional Rights of Federal Prisoners*, 109 J. CRIM. L. & CRIMINOLOGY 395, 421 (2019) (concluding that the Court's deviation from *Bivens* left federal prisoners without a remedy to protect their Eighth Amendment rights).

132. *See* Allen Page, Comment, *The Problems with Alleging Federal Government Conspiracies Under 42 U.S.C. S 1985(3)*, 68 EMORY L.J. 563, 567–69 (2019) (arguing plaintiffs should be able to allege conspiracy under § 1985(3)).

133. *See* Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 WASH. L. REV. 645, 677 (2019) (citing Justice Thomas's stated concerns); Christopher Landau & Sopan Joshi, *Looking Ahead: October Term 2017*, CATO SUP. CT. REV., 2016-2017, at 253, 271 (2017) (noting Justice Thomas's concern for immunity being granted to any officer whose violation is not clearly violating a reasonably known right); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2020 n.38 (2018) (quoting Justice Thomas's position that "[u]ntil we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress");

Professor Wells provides an important service in focusing our attention on the aggressive nature of the majority's qualified immunity argument. It is one thing to say that an official should not be held responsible for violating rights that are not clearly established, but it is another to say that an official should face no responsibility when violating clearly established rights simply because the related liability rules have not been worked out. This is all the more true in an opinion that does not clarify those liability rules. The troubling nature of this move ought to be critiqued at the outset and cabined to the unique context of national security in which it arises, lest it creep into other factual settings.

B. Challenges

Professor Wells's article nonetheless leaves at least three questions less resolved. First, given that much of the criticism of qualified immunity is rooted in formalism and empirics, how does his account appeal to legal formalists and empiricists? Second, how administrable is a proposed test that requires litigants and courts to divvy up cases into eight different categories? Third, is the article proposing "categories" of immunity? Or is it better to think about his categories as "factors?" Surely, there are cases in which the categories themselves overlap.

On the first point, Professor Wells's article is markedly non-formalist. It is not, for example, a claim about a statute's text or its original public meaning, nor is it a claim about the state of the common law as of 1871, when section 1983 was enacted. Instead, like *Harlow* itself, it is a policy-driven proposal about how courts can apply qualified immunity in ways that yield better results. The difficulty here is that, as Professor Wells acknowledges,[134] the perceived opening for reevaluating qualified immunity comes, in part, from Justice Thomas's expressed willingness to re-evaluate the doctrine. In doing so, Justice Thomas did not cite to policy arguments, but rather to the possibility that qualified immunity is so disconnected from text and history that it may, in fact, be unlawful.[135] More broadly, formalist legal rules have come to characterize much of

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Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) (discussing the weakening of qualified immunity through Justice Thomas's recommendation to reconsider the doctrine in *Ziglar*); Aaron Tang & Fred O. Smith, Jr., *Can Unions Be Sued for Following the Law?*, 132 HARV. L. REV. F. 24, 27 n.24 (2018) (identifying Justice Thomas's concern with qualified immunity jurisprudence).

134. Wells, *supra* note 3, at 384 n.24.

135. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Court has diverged from the common law and redefined qualified immunity).

American law in the decades after *Harlow*. Judge-made causes of action, and judge-made limits on causes of action, have both been met with considerable skepticism in this era.[136] None of the Justices who signed on to *Harlow* are alive today. While Professor Wells argues that his proposal's incrementalistic policy-driven argument is "realistic" in light of the approach taken in *Harlow*, is his proposal adequately responsive to this legal moment?

Second, are eight categories of qualified immunity too many? Other than, perhaps, the political question doctrine[137] and Justice Brandeis's announced categories for constitutional avoidance,[138] few doctrines involve this many legal categories. When voluminous factors are announced, courts and commentators sometimes comment on their limited usefulness.[139] Moreover, consider the case of *Pearson v. Callahan*,[140] a qualified immunity case that gives discretion to lower courts to answer whether a constitutional violation has been properly alleged or whether, instead, to simply answer if the conduct violated clearly established law.[141] To help guide this discretion, the Supreme Court offered fifteen factors to consider.[142] The net result is a doctrine that the lower courts apply in an

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136. *See generally* Smith, *supra* note 37, at 2099 (raising concerns about the legitimacy of judge-made components to complaints); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 909, 914 (2017) (emphasizing that "democratic concerns" arise when a "constitutional label is placed on a self-imposed judge-made doctrine").

137. Zivotofsky v. Clinton, 566 U.S. 189, 202–03 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (listing the factors).

138. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–38 (1936) (Brandeis, J., concurring) (cataloging factors the Court considers).

139. *See, e.g.*, Doe v. Bush, 323 F.3d 133, 140 (1st Cir. 2003) ("The political question doctrine—that courts should not intervene in questions that are the province of the legislative and executive branches—is a famously murky one."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (per curiam) ("That the contours of the [political question] doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court . . . ."); Elizabeth Earle Beske, *Political Question Disconnects*, 67 AM. U. L. REV. F. 35, 39 (2018) (describing the "murky and contested underpinnings of the doctrine").

140. 555 U.S. 223 (2009).

141. Beske, *supra* note 139, at 36–37.

142. Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 71 n.96–97 (2016). Nielson and Walker succinctly categorize the factors the Court identified:

> The factors in favor of deciding a constitutional question include whether: (1) "there would be little if any conservation of judicial resources" in not deciding it; (2) it would "be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be"; (3) the "two-step procedure" would "promote[] the development of

exceptionally uneven manner,[143] perhaps speaking to the difficulty in administering a test so laden with categories.

Third, is Professor Wells really advancing a "categorical" approach, or is he instead offering factors for courts to consider when determining whether to deploy qualified immunity? After all, a single case may be in multiple categories. Take for example the case of *Ziglar* itself. On the one hand, the case involved plausible allegations of bad faith. On the other hand, the case implicated national security officials at the highest federal levels. It is unclear how a court is to reconcile these conflicts under the categorical approach Professor Wells proposes. Were his proposal to be adopted, some refinement would be necessary.

CONCLUSION

In sum, Professor Wells's article represents a thoughtful contribution to this important moment with respect to qualified immunity. When legal doctrine asserts a set of aspirations and fails to live up to them, it is up to legal scholars to say so and offer alternative ways forward. This work does precisely that. To be sure, it is unclear whether his proposal would appeal to the formalists and empiricists who have successfully shaken the foundation of qualified immunity. And his approach invites important unresolved questions in the way of administrability. Nonetheless, Professor Wells pragmatically helps demonstrate that there may be ways to improve qualified immunity that do not involve destroying it root and branch.

> constitutional precedent"; and (4) the question is not one that "frequently arise[s] in cases in which a qualified immunity defense is unavailable."

Id. at 71 n.96. Nielson and Walker further note:

> The factors against deciding a constitutional question include whether: (1) doing so would result in "substantial expenditure of scarce judicial resources"; (2) "it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right"; (3) the court has a "heavy caseload[]"; (4) additional "litigation of constitutional issues [would] waste[] the parties' resources"; (5) the "question is so factbound that the decision provides little guidance for future cases"; (6) "the question will soon be decided by a higher court"; (7) "an uncertain interpretation of state law" is involved; (8) "'the parties have provided very few facts to define and limit any holding' on the constitutional question"; (9) "the briefing of constitutional questions is woefully inadequate"; (10) it would be "hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations"; and (11) in a particular case, "constitutional avoidance" is unusually important.

Id. at 71 n.97.

143. *Id.* at 71.