Qualified Illegitimacy

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The qualified immunity doctrine allows courts to dismiss constitutional claims against government officials — before they are aired at trial and without adjudicating the constitutional claims at issue — if the law is not clearly established at the time of the officials' acts. This controversial doctrine has received increased public scrutiny amid a nationwide reckoning on race in the wake of several high-profile deaths stemming from citizen-police interactions in the summer of 2020. Despite growing public disapproval of the doctrine, little empirical work has investigated the extent to which members of the public are willing to legitimize or delegitimize it, and the circumstances under which they might do so.

This Article is the first to explore the qualified immunity doctrine from an institutional design perspective. Insights from social identity theory, relational psychology, and procedural and interactional justice suggest that the procedures through which legal doctrines are implemented have profound effects on the public's attitudes toward the judiciary. These procedures routinely convey relational signals with respect to the degree of voice, respect, and dignity that members of the public are afforded under the law. This Article is the first to present data — derived from four original psychology experiments — suggesting that courts and policymakers ignore procedural deficiencies in the qualified immunity doctrine to the detriment of its popular legitimacy.

The experiments suggest the current iteration of qualified immunity is the least legitimate version of the doctrine as it has evolved over decades of the Supreme Court's jurisprudence, in part because the public does not view the doctrine as procedurally just. The experiments also suggest a reason for this public disapproval: policymakers have failed to consider

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how the doctrine deprives plaintiffs of core tenets of procedural justice — for example, feeling meaningfully heard and respected — when the doctrine prevents plaintiffs from airing their claims in front of a jury and receiving a decision on the merits. This Article concludes by exploring recommendations for enhancing the popular legitimacy of the qualified immunity doctrine by improving the relational signals that it sends to the public.

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INTRODUCTION

Legitimate (adj.): Not spurious or unjustified.[1]

A pregnant Shaniz West and her two children returned to her house in Nampa, Idaho in August 2014 to find it in shambles.[2] Among the shattered glass and debris, she found nearly all her belongings, as well as her children's, destroyed or coated in a toxic film left over from tear gas canisters police had shot through the windows of her house during a ten-hour raid.[3]

On that day, West had been preparing to take her son to register for school when her ex-boyfriend, Fabian Salinas, unexpectedly arrived at the house to collect his belongings.[4] West allowed him to do so but demanded he leave before she returned.[5] Unbeknownst to West, her grandmother had called the police, as she was under the mistaken impression that Salinas — a gang member with an outstanding felony warrant — was armed with

[1] *Legitimate*, Dictionary.com, https://www.dictionary.com/browse/legitimate (last visited Jan. 27, 2023) [https://perma.cc/6QDP-XC9Z].

[2] Audrey Dutton, *Caldwell Police Damaged a House and the Only One Home Was a Dog, Suit Claims*, IDAHO STATESMAN, http://www.idahostatesman.com/news/local/community/canyon-county/article96434392.html (last updated Aug. 19, 2016, 5:55 AM) (reporting that West was unable to occupy her home for two months following the August 11, 2014 police raid and that she was pregnant at the time she returned).

[3] *Id.*

[4] West v. City of Caldwell, No. 16-cv-00359, 2018 WL 1526011, at *1 (D. Idaho Mar. 28, 2018).

[5] *Id.*

a BB gun, high on methamphetamine, and might be holding West and her children hostage in the house.[6]

Ms. West and her children arrived home that afternoon to find police officers milling about her yard.[7] When she momentarily hesitated to answer an officer's question regarding whether Salinas was in her house, the officer reminded West that if she did not answer truthfully, she could be arrested for knowingly harboring a fugitive.[8] Although West was unsure if Salinas was still present, she felt intimidated by the officer's statement and told him Salinas was in the house.[9] She provided the officers with a key to enter the premises and left the scene with her children.[10]

The police officers declined to use West's key and instead called in a Special Weapons and Tactics ("SWAT") team.[11] The SWAT team used 12-gauge shotguns to propel tear gas into the home through the windows and garage door, smashing windows, crashing though ceilings, and littering the house with debris.[12] After a ten-hour standoff, police entered

[6] West v. City of Caldwell, 931 F.3d 978, 980 (9th Cir. 2019); *see also* Ian Millhiser, *Qualified Immunity, Explained*, VOX (June 3, 2020, 8:00 AM EDT), https://www.vox.com/2020/6/3/21277104/end-qualified-immunity-police-definition-george-floyd [https://perma.cc/T7FF-XXX2]; Tommy Simmons, *U.S. Supreme Court Won't Hear Caldwell Woman's Case After SWAT Team Damaged Her Home*, IDAHO PRESS (June 15, 2020), https://www.idahopress.com/news/local/u-s-supreme-court-wont-hear-caldwell-womans-case-after-swat-team-damaged-her-home/article_d3e588bd-2369-50c3-8607-ae9c4b7226a4.html [https://perma.cc/MJ8F-VR8Z].

[7] *West*, 2018 WL 1526011, at *2.

[8] *Id.* at *3.

[9] *Id.*

[10] Ruth Brown, *Idaho Woman Who Says Police Destroyed Her Home Takes Case to U.S. Supreme Court*, IDAHO STATESMAN (Jan. 16, 2020), https://www.idahostatesman.com/article239358103.html; *West v. Winfield*, INST. FOR JUST., https://ij.org/case/west-v-city-of-caldwell/ (last visited Jan. 30, 2022) [https://perma.cc/7Z2D-F4N9]. Additionally, Ms. West told the officers that the front door may have been deadbolted, in which case the key could be used to open the door at the rear of the house. Nick Sibilla, *Legal Loophole Gives Police Immunity for Destroying Woman's Home*, FORBES (Apr. 21, 2020, 10:10 AM EDT), https://www.forbes.com/sites/nicksibilla/2020/04/21/legal-loophole-gives-police-immunity-for-destroying-womans-home/?sh=72fc6d3078d2 [https://perma.cc/4QQ9-6TXB].

[11] Petition for Writ of Certiorari at *4-5, West v. Winfield, No. 19-899 (U.S. Jan. 16, 2020), 2020 WL 529191 (stating that "officers on the scene did not use the keys. Instead, the sergeant in charge called the local SWAT unit," which "began bombarding the house with grenades"); *see also* Simmons, *supra* note 6 (quoting West as saying that "instead of trying to come in or use the keys like I had thought they would, they . . . just destroyed my house, destroyed my property").

[12] Although the SWAT team members had been in regular contact with Ms. West throughout the afternoon, they did not inform her that they intended to enter the house through non-peaceful means. Moreover, they waited several hours before attempting to use

the home to discover Salinas was not inside; the only inhabitant was West's dog, Blue, whom officers turned over to animal control.[13] Salinas was apprehended one week later in the town of Meridian, ten miles away.[14]

It took approximately eight weeks for the house to be made habitable again, and neither the police department nor the city of Nampa assisted West in cleaning up the debris.[15] The city did, however, pay for a three-week stay at a hotel and offered her $900 for her losses.[16] The damage to her home totaled roughly $20,000.[17]

West filed a constitutional tort suit against the police department for the warrantless destruction of her home.[18] The defendants claimed that by providing her key to the officers, West consented to their entrance into her house, and in any event, the officers were entitled to immunity from West's lawsuit altogether.[19] The district court denied many of the officers' requests for immunity,[20] but the district court's decision was overturned on an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit, where the panel majority (1) ruled that the officers' conduct was reasonable under the circumstances, because the law governing the way they entered the house was not clearly established when they acted; and (2) declined to decide whether entering the house in the manner in which the officers did was unconstitutional.[21] West appealed the decision to the United States Supreme Court, which denied certiorari in June 2020, ending the litigation.[22]

Ms. West's key to enter the empty house. Sibilla, *supra* note 10; *see also* Simmons, *supra* note 6 (quoting West as stating, "they didn't even give the chance or the opportunity to use the front door like I thought they would. It seems like they already had their plan and what they wanted to do").

[13] Dutton, *supra* note 2.

[14] Brown, *supra* note 10; Dutton, *supra* note 2.

[15] Dutton, *supra* note 2.

[16] West v. City of Caldwell, No. 16-cv-00359, 2018 WL 1526011, at *5 (D. Idaho Mar. 28, 2018).

[17] Simmons, *supra* note 6.

[18] Petition for Writ of Certiorari, *supra* note 11, at *6 ("West sued, alleging (as relevant here) that the officers involved in the siege had violated her Fourth Amendment rights by their warrantless bombardment of and violent entry into her home.").

[19] Appellants' Opening Brief at *11, *23-24, West v. City of Caldwell, No. 18-35300 (9th Cir. Aug. 27, 2017), 2017 WL 10188756.

[20] *West*, 2018 WL 1526011, at *15.

[21] *See* West v. City of Caldwell, 931 F.3d 978, 984-86 (9th Cir. 2019).

[22] West v. Winfield, 141 S. Ct. 111 (2020); *see also* Brown, *supra* note 10; John Kramer, *Supreme Court Refuses to Hear Cases Challenging Qualified Immunity*, INST. FOR JUST. (June 15, 2020), https://ij.org/press-release/supreme-court-refuses-to-hear-cases-

Qualified immunity for a government official's conduct is a judicially crafted doctrine. It purports to balance the competing interests of plaintiffs, who seek redress for constitutional violations perpetrated upon them by governmental actors, and government defendants, who seek not to be burdened with meritless, time- and resource-consuming litigation. The contours of the doctrine have changed substantially over time amid critiques from scholars, attorneys, judges, and at times, Supreme Court justices.[23] In its current form, the doctrine allows government officials to avoid liability, even for unconstitutional conduct, if the law governing their conduct was not clearly established at the time they acted.[24]

The qualified immunity doctrine is highly controversial and has attracted renewed academic interest.[25] There also is increasing public

challenging-qualified-immunity/ [https://perma.cc/W5EX-KXFJ]. Nonetheless, West's case has received nationwide attention amid a reckoning over the appropriateness of the qualified immunity doctrine. *See, e.g.*, Matthew Barakat, *Supreme Court Petitioned on Police Officers' Legal Immunity*, NBC 12, https://www.nbc12.com/2020/03/14/supreme-court-petitioned-police-officers-legal-immunity/ (last updated Mar. 14, 2020, 2:00 AM PDT) [https://perma.cc/WL2Q-K7ZK] (discussing *West v. Winfield* and qualified immunity); Robert Barnes, *Supreme Court Asked to Reconsider Immunity Available to Police Accused of Brutality*, WASH. POST (June 4, 2020, 5:25 PM EDT), https://www.washingtonpost.com/politics/courts_law/supreme-court-asked-to-reconsider-immunity-available-to-police-accused-of-brutality/2020/06/04/99266d2c-a5b0-11ea-b473-04905b1af82b_story.html [https://perma.cc/SBE6-42QU] (same); *Come on in, Officer — and Wreck the Place, While You're Here*, LAS VEGAS REV.-J. (Jan. 20, 2020, 9:06 PM), https://www.reviewjournal.com/opinion/editorials/editorial-come-on-in-officer-and-wreck-the-place-while-youre-here-1940033/ [https://perma.cc/JYL8-D8A3] (same); Orion Donovan-Smith, *A Once-Obscure Legal Doctrine, Qualified Immunity, Is Under Scrutiny in Spokane and Congress in Police Reform Debate*, SPOKESMAN-REV. (June 16, 2020, 10:08 AM), https://www.spokesman.com/stories/2020/jun/16/as-congress-weighs-police-reform-options-a-once-ob/ [https://perma.cc/2PWP-8VJZ] (same); Thomas L. Knapp, *A Loophole for the Lawless: 'Qualified Immunity' Must Go*, ELKO DAILY (Jan. 20, 2020), https://elkodaily.com/opinion/columnists/a-loophole-for-the-lawless-qualified-immunity-must-go/article_8ddd733b-8864-5758-ae30-75e0f46275b9.html [https://perma.cc/UEN3-MPQZ] (same); Jacob Sullum, *Does Letting Police Enter Your House Give Them Permission to Wreck It?*, REASON (Jan. 16, 2020, 4:25 PM), https://reason.com/2020/01/16/does-letting-police-enter-your-house-give-them-permission-to-wreck-it/ [https://perma.cc/Q88L-KE4Y] (same).

[23] *See infra* Part I.A.

[24] *See infra* Part I.A.

[25] Several scholarly articles analyzing the doctrine have been published just within this past year. *See, e.g.*, Jameson M. Fisher, Note, *Shoot at Me Once: Shame on You! Shoot at Me Twice: Qualified Immunity. Qualified Immunity Applies Where Police Target Innocent Bystanders*, 71 MERCER L. REV. 1171 (2020) (criticizing the doctrine); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229 (2020) (proposing legislative reforms); Lawrence Rosenthal, *Defending Qualified Immunity*, 72

interest in the doctrine, as evidenced by mainstream writings in venues including *Vox*, *Slate*, the *New York Times*, and the *Wall Street Journal*, among other outlets, after the death of George Floyd in the summer of 2020.[26]

The growing public scrutiny of qualified immunity is reflected in a recent Cato Institute-YouGov poll from July 2020, which found that nearly half of respondents had some familiarity with the doctrine.[27] Of those who had heard of it, sixty-nine percent were in favor of eliminating it entirely for police officers, and of those who learned about the doctrine from the survey, a smaller majority also was in favor of abandoning it.[28] In both groups, vast majorities stated that police should be held accountable for constitutional violations even if they were "unaware at the time that their actions were illegal," and that police officers should not be able "to avoid lawsuits . . . by arguing that they did not know they had acted illegally."[29]

S.C. L. REV. 547 (2020) (raising new arguments in support of the doctrine); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309 (2020) [hereinafter *After Qualified Immunity*] (discussing the implications of abolishing the doctrine); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L. REV. 305 (2020) (critiquing Professors Neilson and Walker).

[26] *See, e.g.*, Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html (last updated Oct. 18, 2021) [https://perma.cc/3J6K-8C3H] (discussing qualified immunity); Scott Michelman & David Cole, *A Step Toward Accountability in Policing*, WALL ST. J. (Sept. 10, 2020, 12:17 PM ET), https://www.wsj.com/articles/a-step-toward-accountability-in-policing-11599754650 [https://perma.cc/FH7T-4XER] (discussing qualified immunity); Millhiser, *supra* note 6; Mark Joseph Stern, *The Supreme Court Broke Police Accountability. Now It Has the Chance to Fix It.*, SLATE (May 27, 2020, 5:54 PM), https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html [https://perma.cc/KM59-82W4] (discussing qualified immunity).

[27] Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, CATO INST. (July 16, 2020), https://www.cato.org/publications/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police [https://perma.cc/9V7Y-Y6AE].

[28] *Id.* (reporting 69% in favor of abolition among respondents familiar with the doctrine and 58% in favor of abolition among respondents who learned about the doctrine from the survey organizers).

[29] *Id.* (reporting that 79% of respondents agreed with the former proposition and 77% agreed with the latter proposition). A Pew poll released the same month reported similar results and suggested that differing attitudes toward the doctrine may exist based on an individual's race, education level, and political orientation. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/G6SD-5RDU] [hereinafter *Majority of Public*].

Despite a wealth of critical academic scholarship examining the qualified immunity doctrine, little is known about the conditions under which the public is — or is not — willing to legitimize it. A small body of empirical research exists, but as I discuss in this Article, it lacks a psychological framework explaining why a sizeable cross-section of the public has become increasingly dissatisfied with the doctrine.

This Article begins to fill that gap. Although several psychological phenomena are relevant to understanding the public's attitudes toward qualified immunity, including academic work in the areas of moral psychology and attribution theory,[30] this Article focuses on the procedural antecedents that confer institutional legitimacy onto legal tribunals. Specifically, this Article focuses on the psychological principles of social identity theory, relationality, and procedural justice as a means by which policymakers might improve the qualified immunity doctrine — if it continues to survive — and construct it in a way that increases its legitimacy among the public.

Applied to legal institutional design, the tenets of social identity theory, relationality, and procedural justice involve the signals that legal institutions send to the public regarding the degree of respect, voice, control, and dignity that legal institutions afford litigants.[31] To the extent that features of legal doctrines like qualified immunity embody these tenets, they signal to the public that courts value the litigants who seek resolution before them, increasing the likelihood that the public will legitimize the legal institutions that employ those doctrines.

This Article is the first to report the results from four original studies designed to investigate, from an institutional design perspective, the conditions under which the public legitimizes — and delegitimizes — the qualified immunity doctrine. Based on the results from these studies, this Article argues that several facets of the qualified immunity doctrine send relational signals to the public that are anathema to core values of procedural justice and institutional legitimacy, which risks further alienating the public against the doctrine.

This Article describes the history of the qualified immunity doctrine and discusses the small body of empirical work conducted to date. It then

[30] Attribution theory is a body of work in social psychology that examines the process by which individuals explain the causes of behavior or events. *See, e.g.*, Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCH. 107, 107 (1973) (explaining the tenets of attribution theory).

[31] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (discussing in detail the psychological processes underlying the public's willingness to legitimize legal actors).

draws from social identity theory and relational psychology to provide a framework for understanding how the public legitimizes legal doctrines as a function of the procedures through which those doctrines are implemented. The Article then tests this framework in a series of four original experiments and discusses how the results can assist policymakers in crafting a qualified immunity doctrine that may enjoy greater popular legitimacy.

I. THE LAW AND SOCIAL SCIENCE OF QUALIFIED IMMUNITY

This Part provides a brief history of the qualified immunity doctrine. It then details the small body of empirical work on the doctrine to date. Other scholars have provided detailed accounts of the origin, historical context, and black-letter rules of qualified immunity.[32] Instead of reinventing the wheel, this Part highlights only the major shifts in the Supreme Court's qualified immunity jurisprudence that are directly relevant to the empirical studies reported in this Article.

A. The Evolving Qualified Immunity Doctrine

The Civil Rights Act of 1871 provides remedies to individuals whose federal statutory or constitutional rights have been violated by government officials "acting under color" of state law.[33] But legal scholars disagree with respect to whether, when Congress first passed the Act, governmental defendants were permitted to plead affirmative defenses to their alleged violation of a plaintiff's constitutional rights.[34] For example, in *Myers v. Anderson*, a poll tax case that the Supreme Court decided forty years after

[32] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45-46 (2018) (providing a detailed historical account of the development of the doctrine and arguing that qualified immunity "is unlawful and inconsistent with conventional principles of statutory interpretation"); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (discussing in detail the contours of the doctrine and arguing that the doctrine "has no basis in the common law").

[33] Section 1 of the Civil Rights Act of 1871 has been amended and codified at 42 U.S.C. § 1983 and provides for a statutory cause of action for violations of an individual's federal rights by state actors. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971), a judicial analogue to § 1983, provides a cause of action for the violation of federal rights by federal actors.

[34] *See, e.g.*, Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/M5WD-QW5E] (providing a detailed originalist account of the doctrine and concluding that it "has no valid legal basis").

the enactment of the Civil Rights Act of 1871, the Court appeared to hold that government officials are strictly liable for any such constitutional violations.[35] The Court reasoned that the language of the Act was unambiguous and excluded through its silence any defenses that may have existed under the common law.[36]

The Supreme Court reversed course fifty years later in *Pierson v. Ray*, where the Court planted the first seed for the qualified immunity doctrine.[37] The *Pierson* Court held that, when the Civil Rights Act of 1871 was enacted, the common law allowed for government officials to contest liability stemming from their unconstitutional conduct on the ground that they believed, in good faith and without malice, that they were following the law.[38] The *Pierson* Court reasoned that Congress's silence on the matter in the statute's text constituted not a rejection of the common law subjective good faith defense, but a tacit acceptance of it, absent clear statutory language to the contrary.[39]

Criticism mounted, however, with respect to the difficulty of defending claims of constitutional misconduct under *Pierson v. Ray*. Lower courts complained that inquiries into an official's subjective beliefs were so fact intensive that they could not be resolved before summary judgment and often would necessitate a trial.[40] Amid these growing concerns, the Supreme Court took up another immunity case fifteen years after *Pierson*. Noting the competing interests of plaintiffs, who have a right to redress wrongs stemming from constitutional violations perpetrated on them by government actors, and the interests of governmental defendants, who have a right not to be forced into meritless, resource-consuming litigation, the Court in *Harlow v. Fitzgerald* announced the first iteration of qualified

[35] Myers v. Anderson, 238 U.S. 368, 379 (1915) (deciding a civil action for damages against city officials who refused to register three Black voters pursuant to an unconstitutional grandfather clause statute under Maryland law and rejecting the defendants' arguments that they were immune from liability because their actions were non-malicious and made in good faith).

[36] Specifically, the Court stated that the defendants' arguments of their good faith application of Maryland law were meritless "when considered in the light of the inherently operative force of the Fifteenth Amendment." *Id.*

[37] *See* Pierson v. Ray, 386 U.S. 547, 555-58 (1967).

[38] *Id.*

[39] *Id.* at 554-55.

[40] Michael Silverstein, Note, *Rebalancing* Harlow*: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. RSRV. L. REV. 495, 503 (2017) (stating that "qualified immunity pre-*Harlow* asked courts to engage in an analysis that was properly left for the jury").

immunity that resembles the doctrine as it stands today.[41] The *Harlow* Court replaced the subjective good faith defense with an objective inquiry into the legal reasonableness of the official's actions.[42] The Court reasoned that such a showing can be made more easily before trial, avoiding excessive disruption of governmental functions by making it more difficult for "insubstantial" claims to advance beyond the early stages of litigation.[43]

The defendant-friendly *Harlow* test caused confusion in the lower courts. In light of the *Harlow* Court's holding that the defendant's conduct is subject to an objective reasonableness analysis, it was unclear if courts were required to determine whether a constitutional violation had actually occurred as a result of the governmental actor's conduct.[44] Lower courts had taken different approaches to this question when, nearly twenty years after *Harlow*, the Supreme Court granted certiorari to another important immunity case. In *Saucier v. Katz*, the Court held that the qualified immunity analysis must be conducted sequentially: courts must first determine if a constitutional violation has occurred, and only then may they determine whether the defendant's conduct was reasonable under the circumstances.[45] The Court explained that this analytical sequence promotes the development of constitutional law and places government actors "on notice" of what constitutes illegal conduct.[46]

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[41] Harlow v. Fitzgerald, 457 U.S. 800, 806-09, 814-16 (1982) (noting that damages actions are "an important means of vindicating constitutional guarantees" while also stating that government officials must be shielded "from undue interference with their duties and from potentially disabling threats of liability").

[42] *Id.* at 815-18 (noting that "[t]he subjective element of the good faith defense [to claims of government misconduct] frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial" and that "[r]eliance 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").

[43] Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 407 (2018); *see also Harlow*, 457 U.S. at 814-15 ("[P]etitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial — a factor presupposed in the balance of competing interests struck by our prior cases — requires an adjustment of the 'good faith' standard established by our [prior] decisions.").

[44] Silverstein, *supra* note 40, at 498-99, 508-11 (recounting this history of the *Harlow* decision while arguing that the Supreme Court has given the qualified immunity doctrine too much strength, presenting plaintiffs "who potentially have meritorious claims" with "too great an obstacle").

[45] Saucier v. Katz, 533 U.S. 194, 197 (2001).

[46] *Id.* at 202, 206.

The *Saucier* sequencing test, however, endured substantial criticism from lower courts, legal scholars, and dissenting members of the Supreme Court.[47] They argued that judges should have the freedom to avoid ruling on constitutional questions when possible, particularly if doing so would create inconsistent precedent among the circuits. Other commentators noted that most qualified immunity issues are decided early in the litigation, before the benefit of full discovery of the operative facts.[48] In light of those concerns, and just eight years after deciding *Saucier*, the Supreme Court in *Pearson v. Callahan* held that *Saucier*'s sequential analysis is optional; courts can avoid ruling on the constitutional merits of a plaintiff's claim and can focus instead on whether the law was clearly established when the defendants acted.[49]

Nonetheless, the current iteration of the qualified immunity doctrine continues to attract substantial criticism. Critics argue that the *Pearson* decision allows for constitutional stagnation, insofar as courts can strategically choose the cases in which to issue constitutional rulings and the cases in which to dodge them.[50] Other Supreme Court opinions examining the circumstances under which the law is "clearly established" — such that officials are "on notice" of what constitutes illegal conduct — also have received criticism. For example, although the Court held in *Hope v. Pelzer*[51] that the law is clearly established if it provides "fair and clear warning" to the official, more recent cases, such as *Ashcroft v. al-Kidd*,[52] have heightened that standard by requiring plaintiffs to identify precedent that places the legal question "beyond debate" to "every" reasonable officer.[53] This heightened standard results in less "clearly established" law that, in turn, increases the likelihood of a successful qualified immunity defense.

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[47] Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 476-77 (2011) (discussing the immediate ramifications of the *Pearson* decision).

[48] *Id.* at 482.

[49] Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[50] Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 33-38, 65 (2015) [hereinafter *New Qualified Immunity*] (suggesting that such a pattern of constitutional avoidance is evident empirically post-*Pearson v. Callahan*).

[51] Hope v. Pelzer, 536 U.S. 730, 739-41 (2002).

[52] Ashcroft v. al-Kidd, 563 U.S. 731 (2011).

[53] *Id.* at 741.

B. Empirical Investigations of Qualified Immunity

Theoretical critiques regarding the efficacy and fairness of the qualified immunity doctrine attracted the attention of empirical scholars. In the past decade, a small body of empirical work has emerged — composed of roughly a dozen studies — focusing largely on four issues: (1) the effects of these doctrinal shifts on subsequent judicial behavior; (2) the validity of the assumptions underlying the doctrine; (3) the doctrine's effects on attorney and litigant behavior; and (4) how the doctrine works at trial.

1. Judicial Behavior

Most of the empirical qualified immunity scholarship examines how changes in the doctrine have affected judicial behavior over time. This work almost exclusively focuses on shifts in lower court decisions after the Supreme Court's *Saucier v. Katz* opinion and its reversal in *Pearson v. Callahan*.

Research on shifts in judicial behavior after *Saucier*'s mandatory sequencing requirement was established converges on the same finding: courts made constitutional rulings significantly more often post-*Saucier* than they did pre-*Saucier*.[54] Although researchers agree that post-*Saucier* rates of constitutional adjudication jumped to a range of between 95 and 99 percent, they disagree regarding the magnitude of the increase from pre-*Saucier* decisions, in part due to differences regarding the appropriate time period to examine before *Saucier* was decided.[55]

Researchers also disagree about the effects of the *Saucier* decision on case outcomes. For example, Professor Nancy Leong has argued that lower courts decided more constitutional questions against plaintiffs after *Saucier* because of the psychological concept of cognitive dissonance: in an unconscious desire for consistency, and because judges were predisposed to find that the law was not clearly established, they were also

[54] *See, e.g.*, Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 688-89 (2009) (sampling federal district court cases in which qualified immunity was raised and analyzing the effects of the *Saucier* sequencing approach).

[55] *Compare id.* at 688-94 (summarizing Prof. Leong's empirical findings), *with* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 538-39, 545-51 (2010) (discussing the differences between their findings and Prof. Leong's).

more willing to view the defendant's conduct as constitutional.[56] Other researchers, however, did not find this effect.[57]

Other researchers have focused on judicial behavior after the *Pearson v. Callahan* decision reversed *Saucier*. Professors Aaron Nielson and Christopher Walker found that in many cases, appellate courts exercised their newfound freedom to strategically avoid ruling on the constitutionality of the defendant official's conduct, although courts still decided constitutional issues nearly two-thirds of the time.[58] These findings are in accord with earlier work by Colin Rolfs, who found a similar increase in appellate courts avoiding constitutional issues post-*Pearson*, although Rolfs found no such effect among district courts.[59]

When they examined their data at a more granular level, Nielson and Walker found that where appellate courts granted qualified immunity to the defendant but also ruled on the constitutionality of the defendant's conduct post-*Pearson*, the vast majority of those cases — ninety-two percent — resulted in a finding of no constitutional violation.[60] And in a follow-up study, Nielson and Walker found strategic political effects on post-*Pearson* judicial decision-making, such that panels in which all judges were appointed by republicans exercised *Pearson* discretion to find no constitutional violation more often than did panels composed of all judges appointed by democrats, who more frequently exercised *Pearson* discretion to find a constitutional violation.[61]

2. Litigants

A smaller body of research by Professor Joanna Schwartz has examined the validity of the Supreme Court's assumptions regarding the benefits that the qualified immunity doctrine confers upon government officials. In her

[56] Leong, *supra* note 54, at 670-71.

[57] *See* Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428-29, 428 n.122 (2009) (finding no difference in the proportion of claims decided against plaintiffs after the *Saucier* decision); Sobolski & Steinberg, *supra* note 55, at 545-46 (same).

[58] Nielson & Walker, *New Qualified Immunity*, *supra* note 50, at 34.

[59] Rolfs, *supra* note 47, at 493-95.

[60] Nielson & Walker, *New Qualified Immunity*, *supra* note 50, at 34-35, 35 fig.2; Leong, *supra* note 54, at 688-90.

[61] Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 56 (2016) (reviewing over 800 published and unpublished circuit decisions and finding that "politically unified panels are more likely to exercise discretion either to find no constitutional violation, for 'all Republican' panels, or to recognize new constitutional rights, for 'all Democratic' panels").

first study, Professor Schwartz examined the assumption that government officials personally absorb the costs of liability judgments against them, insofar as the Supreme Court has expressed concern that large liability judgments will deter officials from performing important aspects of their discretionary duties.[62] Schwartz found, in sampling eighty-one representative jurisdictions across the country, that the Supreme Court's assumption about who actually pays these judgments is incorrect.[63] She found that officers contributed to settlements and adverse judgments in just 0.41 percent of 9,225 civil rights actions in which the plaintiff prevailed, and that their contributions collectively amounted to 0.02 percent of the roughly $730 million spent by the officials' employers in those cases.[64]

In a follow-up study, Schwartz examined the assumption that qualified immunity allows courts to screen out non-meritorious cases which, in turn, allows government officials to avoid having their time and financial resources taxed by participating in discovery and trial.[65] As in her earlier study, Schwartz found the assumption mistaken; in a representative sample of roughly one thousand Section 1983 actions against state officials, only 38 (3.90 percent) eligible cases were dismissed on the ground of qualified immunity.[66] Of those cases, only 7 (0.60 percent) were dismissed at the motion to dismiss stage, and 31 (2.60 percent) were dismissed on summary judgment, suggesting the qualified immunity doctrine does not provide to government defendants meaningful cost savings.[67]

3. Attorneys

Another small set of studies examines the practical effects of qualified immunity on attorneys' selection of cases. Professor Alex Reinert surveyed nearly 50 attorneys with significant experience in litigating *Bivens* actions against federal officials and sought to determine the extent to which a claim of qualified immunity factored into their decision to take

[62] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887-91 (2014) (raising and refuting these arguments).

[63] *Id.* at 961 (concluding that "[c]ourts should . . . adjust civil rights doctrines so that they no longer rely on counterfactual assumptions about officers' liability exposure").

[64] *Id.* at 890.

[65] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6-12 (2017) (discussing this assumption and previewing her findings).

[66] *Id.* at 26-27.

[67] *Id.* at 10.

a case.[68] While caveating several aspects of the qualitative interview technique that he employed, he found a substantial portion of his respondents viewed qualified immunity as the most important consideration in their decision, with only the less-experienced attorneys viewing the doctrine as significantly less important than other factors.[69]

Professor Schwartz also examined this issue but found more complex selection effects.[70] Schwartz analyzed survey data from 94 attorneys associated with cases that formed the basis of her prior empirical work[71] and conducted structured interviews with 35 of them.[72] Schwartz's findings generally support the results from Reinert's study, although her findings were more equivocal. The attorneys that Schwartz interviewed acknowledged that the presence of the doctrine increases the costs and risks of constitutional litigation, but they stated that they do not reliably decline to take such cases because of those increased risks.[73] Moreover, when they did decline to take those cases, it was not because they viewed them as insubstantial.[74]

4. Trial Mechanics

The final empirical study on qualified immunity focused on its use as an affirmative defense at trial.[75] The study also examined several key mechanistic questions, including the extent to which all aspects of the qualified immunity standard are given to the jury to decide and the identity

[68] Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

[69] *Id.* at 491-94. In reporting the results, Professor Reinert cautioned that (1) it is an open question whether participants are representative of qualified immunity litigators ("to the extent there is such an identifiable group") or civil rights litigators more broadly; (2) he did not employ a systematic, directed interview approach (in favor of a less-structured interview format) and he is not specifically trained in coding qualitative research; and (3) the data are soft by nature. *Id.* at 491.

[70] Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 N.Y.U. L. REV. 1101, 1152-53 (2020) (conducting structured interviews and partially supporting Professor Reinert's earlier findings).

[71] *Id.* at 1105. *See* Schwartz, *How Qualified Immunity Fails*, *supra* note 65 and accompanying text; Schwartz, *Police Indemnification*, *supra* note 62 and accompanying text.

[72] Schwartz, *Qualified Immunity's Selection Effects*, *supra* note 70, at 1115-16.

[73] *Id.* at 1131.

[74] *Id*.

[75] Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2068 (2018) (evaluating, with empirical evidence, the understudied question of the effects of raising the qualified immunity defense during a jury trial).

of the party that holds the burden of proof. The study found, perhaps surprisingly, that many courts seemed confused about how to implement qualified immunity as an affirmative defense at trial instead of as grounds for pre-trial immunity from suit.[76] Moreover, it found that courts disagreed regarding how to let juries evaluate questions of qualified immunity; although most courts let the jury resolve only the factual questions attendant to the reasonableness of the defendant official's conduct, a small minority of courts have allowed the jury to decide all aspects of the qualified immunity defense, including constitutional issues.[77]

Specifically, in the study's sample of 211 jury trials from 2013 to 2015 that involved a qualified immunity defense, most trials (74.50 percent) involved no special instruction to the jury with respect to the doctrine, although a minority of courts issued some combination of jury instructions and special interrogatories.[78] Many of those instructions or interrogatories, however, did not specify the party with the burden of proof (58.49 percent); when they did, courts placed it on the plaintiff roughly three quarters of the time.[79] Finally, in terms of outcomes, the study found that juries appear friendly to the doctrine. When qualified immunity was introduced as an affirmative defense, defendants won trial verdicts roughly seventy-five percent of the time, although that percentage was reduced substantially when the jury was provided special interrogatories instead of a general instruction on qualified immunity.[80]

This nascent empirical literature sheds light on the assumptions underlying the qualified immunity doctrine as well as its effects on appellate courts, jury trials, and attorney behavior. Based on this work, several innovations to the doctrine have been suggested. For example, Schwartz has suggested that in an era in which the doctrine is reformed, more qualified immunity cases would go to trial, which would offer more transparency and an opportunity for plaintiffs to have their day in court.[81]

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[76] *Id.* at 2077 (stating that "for the most part, lower courts have little guidance, outside of the Fifth Circuit, as to how to allocate burdens when instructing jurors on issues related to qualified immunity" and noting that "in some circuits, it remains an open question whether juries can be instructed at all on qualified immunity").

[77] *See id.* at 2088-91 (discussing the findings).

[78] *Id.* at 2084.

[79] *Id.* at 2086.

[80] *Id.* at 2087.

[81] Schwartz, *After Qualified Immunity*, *supra* note 25, at 362 (predicting more jury trials in a post-qualified-immunity era, but cautioning that attorneys appear to believe that juries are sympathetic toward governmental defendants, which might affect their willingness to litigate those cases).

Schwartz also notes that a reformed qualified immunity doctrine may lead to renewed focus on constitutional rulings vis-à-vis the defendant official's conduct, and notes the practical and expressive effects such rulings might have on how litigants perceive the doctrine and the courts that employ it.[82]

The innovations suggested by Professor Schwartz implicate several concepts in the social psychology literature. A litigant's desire to feel as if she has been "heard" by the legal tribunal implicates notions of voice and dignity, relational principles that play a role in constructing one's in-group social identity.[83] Moreover, to the extent that the process for adjudicating disputes allows litigants to feel as if they are in control of their fate, that the decisionmaker is transparent and respectful, and that the issues have been fully aired before a decision is rendered, it implicates the social psychological concept of procedural justice.[84] A core tenet of procedural justice is that people are more likely to comply with a tribunal's decision — and see it as legitimate even if the outcome is unfavorable — if the process is perceived as fair.[85]

None of the previous empirical work in this area has focused on the relevance of these social psychological concepts to the public's willingness to legitimize the qualified immunity doctrine. This Article next fleshes out these psychological concepts as a framework for understanding the public's growing dissatisfaction with the doctrine.

II. THE SOCIAL PSYCHOLOGY OF INSTITUTIONAL LEGITIMACY

This Part details the psychological principles that form the basis of the original experiments reported in this Article. The first Section discusses the concept of institutional legitimacy. The second Section details the psychology of relationality and procedural justice as a function of the group value model and as important components of the public's willingness to legitimize legal institutions.

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[82] *Id.* at 362-63 (stating that "[c]onstitutional rights are unlikely to change dramatically in their scope, but clarity about constitutional rights would benefit the public and assist local governments as they guide and train their officers").

[83] *See generally* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL'Y & L. 78 (2013) (discussing the psychological conditions precedent to individual compliance with legal authorities).

[84] *Id.* at 82.

[85] *Id.* at 83.

A. Institutional Legitimacy

Increasing the perceived legitimacy of social institutions is critical to a healthy and functioning society, given the reach of many sociolegal institutions into an individual's public and private life.[86] Institutional legitimacy often is understood as the acceptance people confer onto those who wield power, on the belief that those institutions wield power appropriately and justly.[87] Importantly, legitimacy is conferred through an alignment of values between institutional actors and the public, such that the public legitimizes and complies with institutional edicts not out of fear of punishment, but because they trust institutional actors to act in the public's interest and believe their acts to be an appropriate use of power.[88]

To the extent institutional legitimacy can be conveyed through a sociolegal institution's instructions, orders, and edicts, a misalignment of values conveyed through those orders and edicts threatens the legitimacy of the institution.[89] But how do these misalignments occur? Instrumentalists and social exchange theorists argue that institutional legitimacy is dependent on outcomes; to the extent a social institution predictably creates bad outcomes for its citizens, a misalignment will occur that threatens the institution's popular legitimacy.[90]

But especially in the legal context, many individuals who interact with the legal system experience bad outcomes, including criminal and civil defendants, civil plaintiffs, crime victims, and others. Nonetheless, compared to other sociopolitical bodies, American courts enjoy a significant degree of popular legitimacy. Legal psychologist Tom R. Tyler has posited persuasively that procedural elements of the adversary system — including a party's ability to call and cross-examine witnesses, submit

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[86] *See generally* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469 (1989) (examining the linkages among institutional legitimacy, perceptions of procedural justice, and voluntary compliance with unpopular institutional decisions).

[87] TYLER, *supra* note 31, at 29 (explaining the conditions under which citizens will voluntarily confer legitimacy onto legal institutions and the laws they enact).

[88] *See* Tyler & Jackson, *supra* note 83, at 79-81 (noting that "[t]he empirical study of legitimacy . . . [has demonstrated] that when authorities are viewed as legitimate they are better able to motivate people to comply with the law").

[89] *See* JOHN RAWLS, POLITICAL LIBERALISM 121 (1993) (suggesting that political institutions that lack legitimacy exercise their power unjustifiably and will not be obeyed).

[90] *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 7 (1975) (theorizing that people view governmental actions that are instrumental to the individual's attainment of social goods as legitimate).

its own evidence, and stand before a neutral judge and jury — convey relational signals that the public values.[91] As I have written elsewhere:[92]

> In contrast to the instrumental, goal-oriented model, this model posits a relational, equity-based manner in which governmental actors attain popular legitimacy.[93] The theory suggests that a government attains legitimacy through its *procedural* responsiveness to the concerns of its citizens by allowing them to meaningfully participate in the governmental process. Legal psychologist Tom R. Tyler's group value model provides empirical support for this theory of legitimacy . . .[:][94] [t]he relational [group value] model [of legitimacy] argues that people value the [governmental actor's] use of fair procedures because those procedures carry messages of status and inclusion which reinforce people's identification with legal institutions and authorities and support their feelings of inclusion and status in the community. This then leads to high self-worth and favorable self-esteem. When people can present their concerns to judicial

[91] *See* Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCH. 830, 836-38 (1989) [hereinafter *Psychology of Procedural Justice*] (conducting experiments and finding that the neutrality of the decision-making process, trust in the decisionmaker, and the information conveyed to an individual regarding her social standing influence perceptions of governmental legitimacy).

[92] Justin Sevier, *Evidentiary Trapdoors*, 103 IOWA L. REV. 1155, 1170-71 (2018).

[93] *See* Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCH. REV. 323, 325 (1997) (comparing resource-based and relation-based models of legitimacy); *see also* Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 138 (2008) (calling for a restructuring of the criminal justice system due to popular dissatisfaction in communities where poverty and crime intersect, in an attempt to restore legitimacy to the system in these areas).

[94] *See* Tyler, *Psychology of Procedural Justice*, *supra* note 91, at 836-38 (conducting experiments and finding that the neutrality of the decision-making process, trust in the decisionmaker, and the information conveyed to an individual regarding her social standing influence perceptions of governmental legitimacy). Other researchers have replicated these effects. *See, e.g.*, Heather J. Smith, Tom R. Tyler, Yuen J. Huo, Daniel J. Ortiz & E. Allan Lind, *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality*, 34 J. EXPERIMENTAL SOC. PSYCH. 470, 489-90 (1998) ("People care about treatment quality because fair and reasonable treatment by authorities communicates to them that they are respected and valued."); Fátima H. Sousa & Jorge Vala, *Relational Justice in Organizations: The Group-Value Model and Support for Change*, 15 SOC. JUST. RSCH. 99, 117-18 (2002) (finding respondents stressed "consistency" and "[the ability] to obtain a result according to the solution found for others in the same circumstances" as valuable aspects of justice).

> authorities and feel that those authorities consider and take account of their concerns, people's identification with law and legal authorities is strengthened.[95]

Because institutional legitimacy is dependent upon procedural mechanisms that, in turn, provide relational signals to the public, several bodies of social psychological research can aid policymakers in understanding how to enhance these relational signals to increase the perceived legitimacy of legal policies. In particular, research in relational psychology — specifically focused on social identity theory and procedural justice — is critical to undertaking that task.

B. Relational Psychology and Procedural Justice

Relationality and procedural justice are, in many ways, different instantiations of social identity theory and the group value model of compliance. I discuss these concepts in detail below and discuss the ways in which they might aid policymakers in designing a qualified immunity doctrine that enjoys increased popular legitimacy.

1. Relational Psychology

Humans are social beings with an interconnected web of social relationships, including family hierarchies, friendship networks, workplace power structures, professional interactions, and many others. Relational psychology focuses on the degree to which people evaluate their conduct, and the conduct of others, in the context of those social relationships.[96] Social interactions with others can occur "horizontally," insofar as an individual interacts with her social equals, and "vertically"

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[95] Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1097 (2014).

[96] Ian Tucker, *Psychology as Space: Embodied Relationality*, 5 SOC. & PERSONALITY PSYCH. COMPASS 231, 233-36 (2011) (borrowing from notions of biological "space" and conceptualizing areas of social psychology as instantiations of relational 'space' between individuals); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, *in* 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 138 (Mark P. Zanna ed., 1992) (categorizing relational models as those that "focus on relationship issues, especially perceptions of the relationship between the authority and those subject to his or her decision").

in a hierarchical structure, insofar as she interacts with people she views as socially superior and with people she deems socially inferior.[97]

Our appraisals of others during these interactions can be intentional or unconscious, and may be accurate or inaccurate, depending on a wealth of social-cognitive factors.[98] But a guiding principle that people employ — either intentionally or unconsciously — in evaluating their interactions with others involves the degree to which they believe they have been treated equitably or inequitably.[99] Relational psychology suggests this "equity heuristic" may exert its influence most strongly in situations where members of the public interact with authority figures in sociolegal institutions.[100] And perhaps most importantly, these equity judgments directly influence the public's willingness to legitimize those institutions.[101]

Several social science theories have attempted to understand and predict how notions of equity and fairness inform judgments about (1) others in one's social space and (2) institutional actors more generally.[102] Social

[97] *See, e.g.*, Sharon Shavitt, Timothy P. Johnson & Jing Zhang, *Horizontal and Vertical Cultural Differences in the Content of Advertising Appeals*, 23 J. INT'L CONSUMER MKTG. 297 (2011) (examining these concepts in the context of persuasive advertising appeals).

[98] *Compare* Bill D. Bell & Gary G. Stanfield, *An Interactionist Appraisal of Impression Formation: The 'Central Trait' Hypothesis Revisited*, 9 KAN. J. SOCIO. 55, 63 (1973) (stating the conditions under which people are more likely to take relational considerations into account when evaluating human behavior), *with* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (Leonard Berkowitz ed., 1977) (discussing the "fundamental attribution error" in which people insufficiently adjust for contextual factors that contribute to behavior).

[99] Kees van den Bos, E. Allan Lind & Henk A.M. Wilke, *The Psychology of Procedural and Distributive Justice Viewed from the Perspective of Fairness Heuristic Theory*, *in* JUSTICE IN THE WORKPLACE: FROM THEORY TO PRACTICE 49, 51-52 (R. Cropanzano ed., 2001) (arguing that "fairness heuristic theory proposes that people especially need fairness judgments when they are concerned about potential problems associated with social interdependence").

[100] *Id.* (stating that "[a]n important subgroup of social relations addressed by [fairness heuristic theory] are authority processes" and that "[f]airness information is used as a heuristic substitute to decide whether or not an authority can be trusted").

[101] Tyler & Sevier, *supra* note 95, at 1114-15 (testing two models of legitimacy and finding support for a model of legitimacy based on the social signals produced by a tribunal's procedures).

[102] For example, social exchange theory posits that people view their societal interactions as a means through which they can maximize socioeconomic benefits while minimizing losses. For a discussion of social exchange theory, see Edward J. Lawler, *An Affect Theory of Social Exchange*, 107 AM. J. SOCIO. 321, 323-26 (2001) (briefly summarizing the theory).

identity theory has been particularly influential in this respect. As I have written elsewhere:[103]

> Social identity theory posits that an individual's relevant social group has a direct, measurable impact on an individual's self-concept and her assessments of others in her social environment.[104] Social identity theorists hypothesize that social relationships primarily are governed not by what is the most economically beneficial outcome to the parties, but instead by what will lead to the best psychological self-concept for partners to the exchange.[105] This self-concept is often governed by the individual's group membership.[106] At the heart of social identity theory is the notion that people are intrinsically motivated, both consciously and non-consciously, to achieve a state of positive self-distinctiveness, or positive self-identity.[107] They typically judge themselves and others through a series of social comparisons between themselves and a target actor in their environment.[108] To the extent that a person's self-perception is linked to her social identity among others in her environment, one hypothesis for explaining how individuals achieve positive self-distinctiveness suggests that the nature of a person's group status in the relevant social hierarchy, as well as her status within that social group, can positively and negatively affect the polarity of her social identity.[109]

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[103] Justin Sevier, *A [Relational] Theory of Procedure*, 104 MINN. L. REV. 1987, 2008-09 (2020) [hereinafter *[Relational] Theory*].

[104] John C. Turner & Penelope J. Oakes, *The Significance of the Social Identity Concept for Social Psychology with Reference to Individualism, Interactionism and Social Influence*, 25 BRIT. J. SOC. PSYCH. 237, 240 (1986).

[105] Tyler & Lind, *supra* note 96, at 119-21.

[106] Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, *in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 34-38 (William G. Austin & Stephen Worchel eds., 1979).

[107] *See generally* S. ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH (2001) (discussing the components of social identity theory).

[108] *See* Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. RELS. 117, 118-20 (1954). Social comparison theory posits that social beings seek to gain information bearing on their self-valuations. Festinger hypothesized that individuals do so by explicitly or implicitly comparing themselves to others in their environment to reduce uncertainty about their own social standing and to receive information relevant to their self-concept.

[109] Tajfel & Turner, *supra* note 106, at 40-46.

To the extent that others in a person's social environment interact with them in ways that are inequitable or unfair, the person receives a relational signal that she is not valued and respected by that individual or institution. Thus, social identity theory ties an individual's willingness to legitimize her interactions with others, including social institutions, to notions of dignity, respect, and relationality.

2. Procedural Justice

Procedural justice, as the term is understood by psychologists, in many ways is an application of relationality principles and social identity theory to interactions with authority figures. In the context of legal dispute resolution, most early research on legal legitimacy focused on transactional outcomes: legal institutions would be "legitimate" to the extent that members of the public win their disputes or receive other substantive benefits.[110] But legal institutions enjoy a great deal of popular legitimacy, even though dispute resolution under the law is often a zero-sum game in which one party wins and the other loses. This is because the public's attitudes toward the courts are more complex than the sum of their legal wins and losses. Rather, the public is highly sensitive to the process by which legal disputes are decided independent of the identity of the winner.[111] Procedural justice theorists argue that the public's acceptance of the doctrines, edicts, and decisions rendered by legal tribunals is shaped substantially by their subjective evaluations of the procedures courts use to evaluate legal disputes.[112]

Legal psychologist Tom R. Tyler's influential group value model of intergroup compliance incorporates these insights. The model posits that the process through which a legal claim is evaluated is rife with meaning, including the ease or difficulty with which a claim can be filed, the degree

[110] For a review of distributive justice research, see generally J. Stacy Adams, *Inequity in Social Change*, *in* 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267 (Leonard Berkowitz ed., 5th ed. 1965); John T. Jost & Aaron C. Kay, *Social Justice: History, Theory, and Research*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 1122 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).

[111] THIBAUT & WALKER, *supra* note 90, at 118; Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 128 (1988).

[112] Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 541 (2010) (discussing this concept in the context of land use transactions); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCH. 72, 72 (1985).

to which a party can speak freely and present her case in court, and the degree to which she believes she is speaking to a neutral party that she can persuade, among others.[113] The model argues that the presence or absence of these components sends relational signals to people with respect to the degree to which they are valued by the legal institution.[114] As I have written elsewhere:[115]

> The group-value model predicts that specific factors will influence people's perceptions of their self-identity and self-distinctiveness as a result of their interaction with a legal tribunal: the amount of voice they have in the interaction, the amount of control they have over the procedure used to allocate resources, the level of respect they receive from the decision maker, and the degree of bias displayed by the resource allocator.[116] Perhaps because they are so important to an individual's social identity, the relational signals inherent in the process by which a legal decision is reached are often stronger than the outcome *itself* in determining the degree to which the public confers legitimacy onto a decision making tribunal.[117] To the extent that these relational signals are communicated by the procedure, people are significantly more willing to confer legitimacy onto the decision making body, are more willing to respect that body and abide by its decisions, and have more confidence in that body to make decisions that are both distributively and procedurally just.[118]

[113] *See* Sarah Sorial, *Legal Legitimacy and the Relevance of Participatory Procedures*, *in* PROCEDURAL JUSTICE AND RELATIONAL THEORY: EMPIRICAL, PHILOSOPHICAL, AND LEGAL PERSPECTIVES 141, 142-43 (D. Meyerson, C. Mackenzie & T. MacDermott eds., 2021) (discussing these factors and others).

[114] *See* Tyler, *Psychology of Procedural Justice*, *supra* note 91, at 831; *see also* TYLER, *supra* note 31, at 173-74 (discussing these concepts in detail).

[115] Sevier, *[Relational] Theory*, *supra* note 103, at 2014-15.

[116] Tyler & Lind, *supra* note 96, at 139-43.

[117] Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132-38 (2011) (noting that "[t]he findings from over three decades of research on the psychology of procedural justice research stand in sharp contrast to the continuing insistence of law and economics scholars that individuals are most interested, in any given setting, in maximizing their economic outcomes").

[118] *See generally* Tyler & Sevier, *supra* note 95 (discussing the extent to which procedural justice concerns underlie the public's willingness to legitimize American courts).

C. Study Design and Experimental Hypotheses

These psychological principles create a testable framework for examining the public's willingness to legitimize legal rules and institutions. In four studies, this Article explores the relationship among perceptions of voice and relationality, procedural justice, and legitimacy in the context of the qualified immunity doctrine. The studies aim to isolate and evaluate procedural features of the doctrine that inhibit or enhance its popular legitimacy.

Studies 1a and 1b examine the extent to which a grant of qualified immunity before a case is heard at trial diminishes popular perceptions of the tribunal's legitimacy. If perceptions of procedural justice are informed, in part, by the extent to which the public believes that the plaintiff has sufficient voice in proceedings, and if perceived procedural justice is a predicate to establishing popular legitimacy, then the qualified immunity doctrine — which avoids a full airing of the plaintiff's case at trial — may reduce the public's perceptions of the tribunal's legitimacy.

Study 2 focuses on the extent to which a constitutional ruling on the defendant official's conduct — which was required under *Saucier v. Katz* but is no longer required under *Pearson v. Callahan* — affects the public's attitudes toward the doctrine. If participants equate the court's willingness to engage with the constitutionality of the official's conduct with affording the plaintiff sufficient voice, dignity, and respect with respect to her claim — even if the court ultimately rules against her — a qualified immunity decision that declines to address the constitutional issue should reduce public perceptions of the tribunal's legitimacy.

Finally, Study 3 seeks to design a more legitimate form of the qualified immunity doctrine. It incorporates insights from Studies 1 and 2 by asking participants to choose between several iterations of the Supreme Court's qualified immunity doctrine, which are hypothesized to contain different degrees of perceived voice and procedural justice. In this study, participants directly compared five procedures for resolving conflicts between citizens and government officials. Four of those procedures tracked historical instantiations of the qualified immunity doctrine: the current approach in *Pearson*; the two-stage, constitutional approach in *Saucier*; the good-faith immunity in *Ray*; and the strict liability approach from *Myers*. In accordance with the results from Study 1, participants also were presented with a fifth procedure in which qualified immunity served as an affirmative defense at trial. Participants ranked the procedures and evaluated them with respect to their perceived voice afforded to litigants, procedural justice provided to the parties, and legitimacy.

If the legitimacy of qualified immunity is, in part, premised on principles of social identity theory, relationality, and procedural justice, three tiers should emerge with respect to participants' legitimacy perceptions. The procedure in which the defendants raise qualified immunity as an affirmative defense at trial should be perceived as the most legitimate. The *Saucier* and strict liability approaches — which require the court to rule on the constitutionality of the government official's behavior — should be perceived as the next-most legitimate procedures. The good faith immunity and the current qualified immunity doctrine should be perceived as low in voice, relationality, and procedural justice, and should be viewed as the least legitimate of the qualified immunity procedures.

III. STUDY 1A: THE JURY

The first study in this series examines the effects of distributive and procedural justice on the perceived legitimacy of legal tribunals that grant qualified immunity. Participants read a fictitious newspaper article reporting on a recent qualified immunity case. The study contained three experimental conditions: (1) a condition in which the plaintiff won her lawsuit after a jury trial; (2) a condition in which, on identical facts, the defendant government officials won the lawsuit after a jury trial; and (3) a condition in which the defendant officials won on a qualified immunity theory instead of at trial.

The study was designed to disentangle distributive and procedural justice effects on participants' perceptions of legitimacy. Any decreases in participants' legitimacy ratings between the "plaintiff trial win" and "defendant trial win" conditions would be attributable to distributive, outcome fairness. Decreased legitimacy ratings between the "defendant trial win" and "defendant qualified immunity win" conditions would be attributable to notions of voice and procedural justice beyond any outcome fairness effects. And in light of research suggesting perceptions of procedural justice are often as strong (or stronger) in predicting perceptions of institutional legitimacy as perceptions of distributive justice, [119] I predict the mean differences among these three conditions will form a negative, linear pattern with mean legitimacy ratings highest in the "plaintiff trial win" condition and lowest in the "defendant qualified immunity win" condition.

[119] Hollander-Blumoff, *supra* note 117.

A. Method

1. Participants

Five hundred and two American participants were recruited through Amazon Mechanical Turk, an online participation service, and paid $1.00 for their participation in this study.[120] Participants were 56 percent female, 75 percent white, averaged 42.28 years of age (with a *SD* of 12.48), and ranged from 21 to 79 years old. Sixty-nine percent of the sample had completed at least a college degree, and the median income of the sample was between $50,000 and $59,999. Sixty percent of participants identified as liberal-leaning and forty percent of participants identified as conservative-leaning. A summary of the sample characteristics for each study reported in this Article appears in Table 1 on page 1665.[121]

[120] mTurk is an inexpensive platform for collecting high-quality data from a representative sample of the population. *See, e.g.*, Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012) (discussing the benefits and drawbacks of mTurk and online human subjects research); Michael Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, yet High-Quality, Data?*, 6 PERSPS. ON PSYCH. SCI. 3, 5 (2011) (same); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RSCH. METHODS 1, 2-3 (2012) (same). The mTurk software contains several safeguards to ensure higher-quality data, including blocking IP addresses from taking the survey multiple times, allowing only well-established workers to take the survey, and screening for non-human "bot" accounts. Mason & Suri, *supra*, at 5-6, 14-15. We supplemented these safeguards by using the CloudResearch platform (formerly 'TurkPrime') to screen participants. *See* Leib Litman, Jonathan Robinson & Tzvi Abberbock, *TurkPrime.com: A Versatile Crowdsourcing Data Acquisition Platform for the Behavioral Science*s, 49 BEHAV. RSCH. METHODS 433, 437-40 (2017) (describing the benefits of using the TurkPrime platform).

[121] The composition of the participant sample in the studies reported in this Article adheres closely to general population statistics with caveats: overall, the population is slightly more educated and slightly less diverse than the general United States population, but far more representative than a typical sample of participants recruited at a University laboratory. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Feb. 11, 2022) [https://perma.cc/77QB-6WQM]; *see also* Joseph Henrich, Steven J. Heine & Ara Norenzayan, *Most People Are Not WEIRD*, 466 NATURE 29, 29 (2010) (arguing that Western, educated, industrialized, rich, and democratic ("WEIRD") populations are generally overrepresented in empirical research and proposing that researchers carefully evaluate how their findings generalize to non-"WEIRD" populations).

2. Procedures and Measures

Participants were told the researchers were interested in their opinions regarding different types of legal dispute resolution procedures. After providing their informed consent to participate in the study, they read a fictitious newspaper article about *West v. Winfield*, a recent case involving qualified immunity.[122]

The stimulus materials included a headline, byline, and several short paragraphs describing the facts underlying the case. The materials were structured to resemble the length and style of a typical online article from a local newspaper organization. We pretested our materials to ensure that the stories were balanced, such that participants felt that the reporting in the article was fair to both the plaintiff and the defendants.[123]

For example, in *West v. Winfield*, the newspaper report relayed to participants the facts of the case: (a) the defendant officers were attempting to apprehend a dangerous fugitive, (b) the plaintiff felt intimidated by the officers' threat to her, (c) she told the officers that the fugitive might be in her home, and (d) the officers shot canisters of tear gas into her house in a fruitless attempt to apprehend the suspect.

The stimulus materials then diverged, and participants were randomly assigned to one of three experimental conditions. In one condition, participants read that the case was taken to trial, and the jury had to determine the reasonableness of the defendant officers' actions. Participants learned that after evidence was presented and witnesses were called and examined, the jury found for the plaintiff. In a second condition, the case went to trial, but the jury instead found that the defendants had behaved reasonably under the circumstances.

In the third condition, the defendants moved for summary judgment before trial on a theory of qualified immunity. Participants learned that the defendants asked the court to dismiss the lawsuit before the trial, because the law was not sufficiently clear as to put them on notice that their conduct was potentially unlawful. The trial judge agreed and entered a judgment for the defendants.

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[122] West v. City of Caldwell, 931 F.3d 978, 980 (9th Cir. 2019), *cert. denied*, West v. Winfield, No. 19-899, 2020 U.S. LEXIS 3153 (June 15, 2020); *see also supra* notes 3–22 and accompanying text.

[123] Participants were asked, on a seven-point scale with a midpoint reading "about right," how fair they believed the reporting in the article had been to the parties. The results suggest that there was no perceived bias in the reporting: $M = 4.02$, $SD = 0.85$, $t(48) = 0.17$, $p = .87$ (suggesting that mean ratings did not differ meaningfully from 4.00, which is the scale midpoint).

Participants then completed the dependent measures of the study. They first answered several questions about the case, including which party they believed should win the case, their assessment of the reasonableness of the defendant officers' behavior, and how much they agreed with the outcome. All dependent measures required participants to respond on a seven-point Likert scale.[124]

Participants then answered a series of questions designed to assess their perceptions of the procedure by which the case was adjudicated and the perceived legitimacy of the procedure. Items included the extent to which the plaintiff and defendant were heard by the court, the extent to which the issues involved in the case were fully aired, the perceived fairness of the procedure, and the willingness of participants to legitimize disputes that are adjudicated in the manner about which they read.

Finally, participants answered a series of demographic and other relevant questions before being debriefed. Participants self-reported their age, gender, race, ethnicity, level of education, income level, and political orientation. They also answered whether they had previous experience with the courts (and, if so, in what capacity), the extent to which they were familiar with the qualified immunity doctrine, and the extent to which they had prior knowledge of the case.

[124] A Likert scale is a psychometric scale that is routinely used in psychological questionnaires and is analyzed as an ordinal variable (frequently a range from 1 to 7). *See* ROBERT M. LAWLESS, THOMAS ULEN & JENNIFER K. ROBBENNOLT, EMPIRICAL METHODS IN LAW 172-73 (2010).

Table 1. Sample Characteristics.

	Percentages *(N)*			
	Study 1(a)	Study 1(b)	Study 2	Study 3
Age				
< 30	15.00 (75)	14.40 (50)	11.60 (35)	15.90 (31)
30-39	32.40 (162)	33.30 (116)	25.60 (77)	36.40 (71)
40-49	26.00 (130)	23.60 (82)	18.30 (55)	23.10 (45)
50-59	14.60 (73)	19.00 (66)	22.90 (69)	17.40 (34)
60 and older	12.20 (61)	09.80 (34)	21.60 (65)	07.20 (14)
Gender				
Male	43.10 (216)	54.60 (190)	43.70 (131)	50.30 (98)
Female	56.10 (281)	44.50 (155)	55.30 (166)	48.70 (95)
Non-Binary	0.80 (04)	0.90 (03)	01.00 (03)	01.00 (02)
Race				
Caucasian	75.40 (377)	76.10 (265)	83.00 (249)	80.50 (157)
African-American	08.80 (44)	06.90 (24)	07.70 (23)	08.70 (17)
Hispanic	06.60 (33)	06.60 (23)	03.00 (09)	04.10 (08)
Asian/Pacific Islander	08.80 (40)	08.00 (28)	05.30 (16)	04.10 (08)
Other	01.20 (06)	02.30 (08)	01.00 (03)	02.60 (05)
Education				
High School	10.20 (51)	13.20 (46)	07.00 (21)	10.80 (21)
Some College	20.00 (100)	23.30 (81)	28.90 (87)	20.60 (40)
College	49.10 (245)	45.40 (158)	45.20 (136)	55.70 (108)
Master's	16.20 (81)	12.90 (45)	14.00 (42)	10.80 (21)
Ph.D. or Professional	04.40 (22)	05.20 (18)	05.00 (15)	02.10 (04)
Political Affiliation				
More Conservative	39.80 (196)	39.60 (137)	40.70 (122)	37.40 (73)
More Liberal	60.20 (296)	60.40 (209)	59.30 (178)	62.60 (122)
Income				
Less than $30,000	21.00 (105)	18.10 (63)	18.30 (55)	17.50 (34)
$30,000 - $49,999	18.40 (92)	24.10 (84)	20.60 (62)	24.20 (47)
$50,000 - $69,999	17.60 (88)	18.40 (64)	18.30 (55)	21.70 (42)
$70,000 or greater	43.20 (216)	39.30 (137)	42.80 (129)	36.60 (71)

B. Results

Results are presented in two parts. The preliminary analysis provides relevant descriptive statistics regarding our participants. The main analysis reports the results of a linear trend analysis designed to measure participants' attitudes regarding the legitimacy of the legal proceeding.

1. Preliminary Analyses

Eighteen percent of participants acknowledged some degree of familiarity with the concept of qualified immunity, and a smaller percentage (three percent) expressed familiarity with the facts of *West v. Winfield*. Half of our participants (fifty percent) reported having had some form of interaction with the legal system. To control for any potential effects of these participants' familiarity with the legal system or qualified immunity, the main analyses were performed with and without including these variables as covariates. The covariates did not affect the results and were dropped from the reported analysis.[125]

2. Main Analysis

To test whether a negative linear relationship exists among the means for the three experimental conditions in Study l, I first conducted a one-way analysis of variance ("ANOVA") on participants' perceptions of the trial court's legitimacy.[126] The effect of our experimental manipulation was statistically significant.[127] Thus, there were significant differences in perceptions of the trial court's legitimacy among participants in the three experimental conditions.

As predicted, follow-up polynomial contrasts[128] indicated that there was a significant linear relationship among the means, such that average

[125] These analyses are on file with the author.

[126] An analysis of variance ("ANOVA") is an application of the general linear model that provides a statistical test of whether the means of several groups are equal. ANOVA results are represented by an F-statistic, and the sizes of the effects are represented by η^2_p. Means are denoted by the letter "M" and standard deviations are denoted by the letters "SD." *See* LAWLESS ET AL., *supra* note 124, at 277-85 (explaining empirical research methodologies and statistical techniques).

Differences are denoted as "statistically significant" in this Article if the statistical tests indicate that the likelihood that the difference observed would occur by chance is 5% or less (as indicated by the p-value as $p < 0.05$). A difference is "marginally significant" if the likelihood of seeing such a difference by chance is greater than 5% but less than 10%. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485 n.117 (2003) (citing BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS (2d ed. 1989)).

[127] $F(2, 494) = 82.63$, $p < .001$, $\eta^2_p = .25$.

[128] Whereas an ANOVA allows researchers to determine whether any of the means for several different groups are different, a contrast analysis allows researchers to test more specific hypotheses, for example, whether the means show a specific polynomial pattern, such as a linear, cubic, or quadratic function. In sum, a contrast analysis tests a specific question about the pattern of results revealed in an ANOVA. *See* Hervé Abdi & Lynne J.

perceptions of the trial court's legitimacy decreased in the hypothesized direction.[129] Also as predicted, the contrast analysis revealed no significant quadratic relationship among the means in the experimental conditions, further suggesting that the pattern of results is linear.[130]

Planned comparisons, subjected to the Bonferroni error-correction procedure,[131] revealed that the tribunal was perceived as the most legitimate when the plaintiff won after a jury trial,[132] less legitimate when the defendant won but was subjected to a jury trial,[133] and least legitimate when the defendant won before trial on a qualified immunity theory.[134] The comparison of the difference in participants' legitimacy perceptions between the plaintiff's jury trial win and the defendant's jury trial win was statistically significant, as was the comparison between perceptions of the defendant's jury trial win and the defendant's pre-trial, qualified immunity victory.[135] A graph depicting these results appears as Figure 1 below.

Williams, *Contrast Analysis*, *in* 1 ENCYCLOPEDIA OF RESEARCH DESIGN 243, 243-44 (Neil J. Salkind ed., 2010).

[129] $F(1, 494) = 164.31$, $p < .001$.

[130] $F(1, 494) = 1.10$, $p = .30$.

[131] The Bonferroni procedure is a conservative statistical technique that corrects for the risk of false positive results when multiple hypotheses are tested simultaneously. The procedure raises the threshold by which differences detected between groups as a result of post-hoc testing are deemed statistically significant. *See* ANDY FIELD, DISCOVERING STATISTICS USING IBM STATISTICS 406-07 (5th ed. 2018). Although Bonferroni corrections are an overly cautious approach to our two planned comparisons in this study, statistically significant results after correcting for false positives support the robustness of our findings.

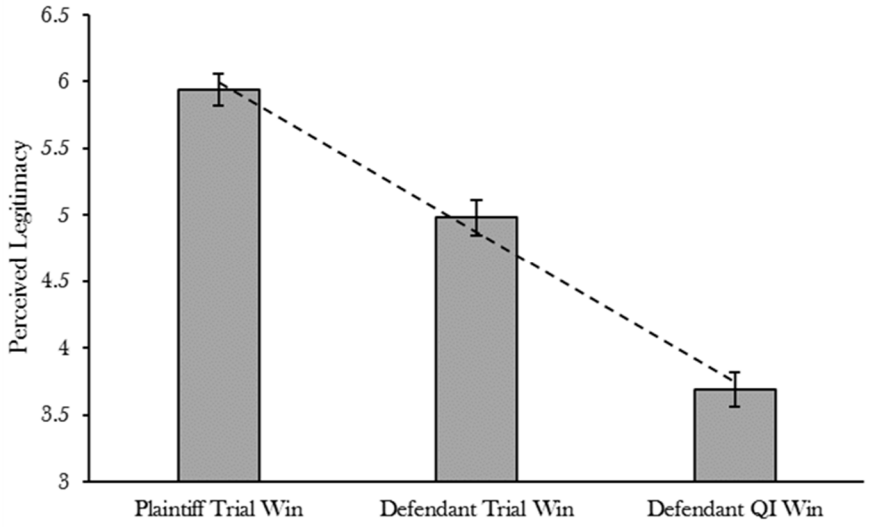
[132] $M = 5.94$, $SD = 1.12$.

[133] $M = 4.98$, $SD = 1.58$.

[134] $M = 3.69$, $SD = 1.99$.

[135] $p < .001$ for both comparisons.

Figure 1. Perceived Legitimacy by Substantive & Procedural Condition[136]



Study 1a yielded several findings. Importantly, participants' dissatisfaction with the qualified immunity doctrine implicates not just distributive justice concerns, but also concerns related to social identity theory and procedural justice. The analysis revealed a statistically significant decrease in participants' perceptions of the tribunal's legitimacy depending on the identity of the victor, which implicates outcome fairness concerns. The analysis also revealed a statistically significant decrease in perceptions of the tribunal's legitimacy depending on whether the defendant's victory was the result of a trial or the result of a pretrial qualified immunity determination. Thus, participants' dissatisfaction with the case implicates independent, procedural justice concerns as well. Indeed, the results are consistent with previous research suggesting that, with respect to people's willingness to legitimize legal institutions, procedural justice concerns are at least as important as perceptions of distributive justice.

[136] The y-axis of this graph does not begin at the lowest value on the legitimacy scale (1.0) so that the reader can clearly see the differences among the legitimacy ratings in the experimental conditions and the linear pattern that developed. The relevant means, standard deviations, test statistics, and measures of effect size have been reported in *supra* notes 127–10 and accompanying text. As in each figure reported in this Article, error bars represent one standard error above and below the mean.

Several questions flow from the results of Study 1a, however. For example, why are procedural justice concerns implicated when a defendant wins a case on qualified immunity grounds rather than at trial, and which features of the doctrine are implicated? Moreover, how generalizable are these findings to other types of qualified immunity cases? Study 1b addresses these questions.

IV. STUDY 1B: SUMMARY JUDGMENT

The results from Study 1a suggest that legal tribunals stand to lose popular legitimacy if they routinely deprive plaintiffs of their day in court through the qualified immunity doctrine. But these findings raise an important question: is the tribunal's decreased legitimacy attributable to the tribunal's decision to take the case away from the jury, or is it because the case was taken away from the jury without a *merits* decision?

To address this question, we supplemented the two trial conditions and the qualified immunity condition from Study 1a with two summary judgment conditions. In these conditions, either the plaintiff or the defendant successfully argued to the court that a trial was unnecessary because no reasonable juror could find for their adversary. Thus, although the case did not proceed to a jury trial, the parties did receive a decision on the merits from the court. Because a grant of qualified immunity often does not include a merits decision, we predicted that a decision for the defendants on qualified immunity grounds would be perceived as less legitimate than if the case had been resolved at trial or on summary judgment.

Additionally, we tested whether the decreased legitimacy effects we observed in Study 1a generalize to other qualified immunity cases. In Study 1b, half of our participants read the newspaper article about the *West v. Winfield* case from Study 1a. Other participants, however, read an article recounting the facts of *Jessop v. City of Fresno*, a qualified immunity case that, like *West*, was denied certiorari by the United States Supreme Court in its 2020 term.[137] The *Jessop* case involved allegations that city police officers had stolen substantial amounts of cash and rare coins while executing a search warrant during an investigation into a suspected illegal gambling ring.[138] An initial search of the property resulted in the confiscation of $50,000, which the officers noted in their logbooks.[139] The

[137] Jessop v. City of Fresno, 936 F.3d 937, 937 (9th Cir.), *cert. denied*, 140 S. Ct. 2793 (2019).

[138] *Id.* at 939-40.

[139] *Id.* at 939.

plaintiffs alleged, however, that one of the officers later returned to the property and conducted a second search in private.[140] The plaintiffs alleged the cash and coins — totaling $225,000 — went missing after the officer's second search and were not recorded on the official log.[141] The officers denied any wrongdoing.[142]

The *West* and *Jessop* cases differ with respect to their subject matter, the plaintiff's culpability, and the nature of the defendants' conduct, among other situational factors. Similar effects across cases therefore increase the generalizability of the results reported in this Article. They also would suggest our results stem from participants' attitudes toward the qualified immunity doctrine rather than the facts of any individual qualified immunity case.

Finally, Study 1b concludes with a serial mediation analysis, which will examine whether any hypothesized decreases in perceived legitimacy are attributable to decreased perceptions of (1) the litigants' voice in the proceedings; and (2) the perceived procedural justice afforded to the litigants.

A. Method

1. Participants

Three hundred and forty-eight American participants were recruited through Amazon Mechanical Turk and paid $2.00 for their participation.[143] Participants were 44.50 percent female, 76.10 percent white, averaged 42.47 years of age (with a *SD* of 12.34), and ranged from 19 to 78 years old. Sixty-three percent of the sample had completed at least a college degree, and the median income of the sample was between $50,000 and $59,999. Sixty percent of participants identified as liberal-leaning and forty percent of participants identified as conservative-leaning.

2. Procedures and Measures

As in Study 1a, participants read a fictitious newspaper article, this time depicting either the facts of *West v. Winfield* or *Jessop v. City of Fresno*.

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[140] *Id.* at 940.

[141] *Id.* at 942.

[142] *Id.* at 940.

[143] We initially recruited 505 participants; 348 participants remained in the study as a result of attention and comprehension checks embedded in our study materials. For details, see *infra* Section IV.B.1.

The materials again included a headline, byline, and several short paragraphs describing the case, and they averaged 471 words in length across all experimental conditions.

The article covering *West v. Winfield* was left unchanged from how it was presented to participants in Study 1a. The newspaper report covering *Jessop v. City of Fresno* relayed to participants the facts of the case: (1) the defendant officers were investigating an alleged illegal gambling ring; (2) they executed a valid search warrant on the premises of the accused's various properties; (3) one officer returned to one of the properties to execute a second search in private; (4) the plaintiffs alleged that the officer stole cash and rare coins while executing that second search; and (5) the officers denied that they had acted improperly.

As in Study 1a, the resolution of the *West* and *Jessop* cases varied in accordance with our experimental manipulation. This time, however, participants read about one of *five* different case resolutions. In two trial conditions, participants were told that the case went to a trial by jury, where evidence was submitted, witnesses were called, direct and cross-examination occurred, and each party made arguments. Participants were further told that after deliberations, the jury had found either for the plaintiff (condition 1) or for the defendants (condition 2).

In two summary judgment conditions, participants were told either that the plaintiff or the defendants had filed a motion with the court at the end of the discovery phase. The motion argued that the evidence collected so far was clear and that any reasonable juror would conclude that the moving party should win the case on the merits. The judge asked the parties to submit their evidence and prepare for oral argument. At the conclusion of the arguments, the judge agreed that no reasonable jury could find for anyone other than the plaintiff (condition 3) or the defendants (condition 4) on the facts presented. The judge then granted summary judgment for the moving party and ended the case before trial.

In the final experimental condition, the defendants filed a motion with the court to dismiss the case on qualified immunity grounds. Instead of arguing that the undisputed facts would lead all reasonable jurors to side with the defendants, they argued that the right that the plaintiff was asserting was not clearly established, regardless of how the court would resolve any factual disputes at trial. After receiving each party's legal brief and holding oral arguments on the matter, the judge agreed that the law was ambiguous regarding whether the conduct alleged by the plaintiff would amount to a violation of the Fourth Amendment. The judge therefore held that the defendants were immune from the plaintiff's lawsuit and ended the case.

Participants then completed comprehension checks, where they were asked who won the case, whether a jury trial had been held, and whether the defendants had been declared immune from the plaintiffs' lawsuit. Participants also completed an attention check — asking them to choose a specific answer — that was embedded within other questions posed to participants later in the study. Participants who failed the attention check or any of the comprehension checks were excluded from the study results.

As in Study 1a, we asked participants a series of questions designed to assess their perceptions of the legitimacy of the proceedings as well as their perceptions of the legal procedures that resolved the dispute. This included their satisfaction with the proceedings, their willingness to legitimize the proceedings, their perceptions of the fairness of proceedings, and the extent to which the plaintiffs and the defendants were heard by the court. After answering standard demographic questions, participants were debriefed, and the study was concluded.

B. Results

The results of Study 1b are presented in three parts. The preliminary analysis provides relevant descriptive statistics, analyzes the results of the attention and comprehension checks, and tests for any meaningful differences between the two qualified immunity cases that participants read. The main analysis reports the results of a linear trend analysis that tests our experimental predictions regarding our participants' perceptions of the legitimacy of the proceedings. Finally, a serial mediation analysis examines the psychological antecedents of any effects of the experimental manipulation on participants' legitimacy perceptions.

1. Preliminary Analyses

Eighteen percent of participants acknowledged some familiarity with the concept of qualified immunity, and a smaller percentage (2.60 percent) expressed familiarity with the facts of either *West v. Winfield* or *Jessop v. City of Fresno*. Forty percent of participants reported having interacted with the legal system in some way in the past, but participants' familiarity with the legal system had no effect on the results.

Five participants were excluded from the analysis because they failed the attention check. A larger number of participants — 152 in total — were excluded because they failed at least one of the comprehension checks. This was expected, however, and we recruited substantially more participants than we needed. Most of the participants who failed one of the comprehension checks incorrectly answered the third question — whether

the court had determined the defendant was immune from the plaintiffs' lawsuit. The difference between a merits-based summary judgment determination and a qualified immunity determination is a subtle one that even attorneys might confuse; it was therefore unsurprising to us that a portion of our non-lawyer sample also missed this nuance. But because we intentionally oversampled, we were left with a robust sample of participants who understood the distinction when evaluating the legitimacy of the proceedings.

Before turning to our main analyses, we examined two aspects of the newspaper articles that our participants read. First, we examined whether participants perceived the newspaper reports as biased toward either the plaintiff or defendants. We asked participants to rate, on a seven-point Likert scale with "about right" at the midpoint, how fairly they believe the facts had been reported. Our analysis suggests that our participants viewed the reporting as neutral.[144]

Next, we examined whether any material differences existed regarding how our participants responded to the facts of *West v. Winfield* and *Jessop v. City of Fresno*. Specifically, we examined whether the content of the story that our participants read (1) affected their perceptions of the legitimacy of the tribunal; and (2) interacted with any of our five experimental manipulations. We found no statistically meaningful main effect of the stories on our participants' perceptions of the tribunal's legitimacy[145] and no interaction effect between the story that each participant read and our experimental manipulations.[146] We therefore pooled the results from participants who read about the *West* case with the results from those who read about the *Jessop* case and analyzed them together.

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[144] As in Study 1a, we conducted a one-sample t-test with the scale midpoint (4.00) set as the test value for the *Jessop* case: $M = 4.10$, $SD = 0.64$, $t(50) = 1.09$, $p = .28$ (suggesting that mean ratings did not differ from 4.00, which is the scale midpoint). For a review of similar results with respect to the *West* case, see *supra* note 123.

We also compared the results from the *West* and *Jessop* cases to determine if they differed from each other with respect to the neutrality of the reporting. The result from an independent samples t-test suggests that they did not: *M-difference* = -0.08, $t(98) = -0.52$, $p = .61$.

[145] $F(1, 337) = 0.03$, $p = .874$, $\eta^2_p = .00$.

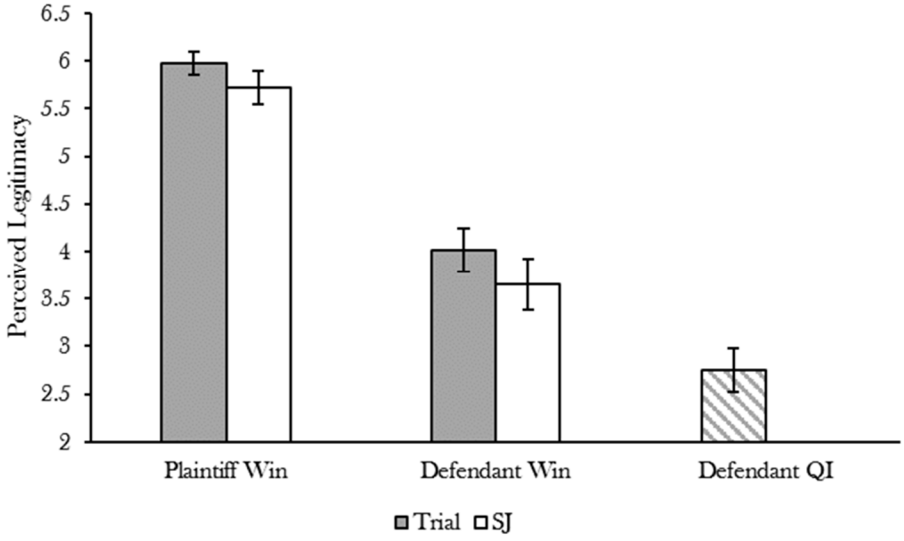
[146] $F(4, 337) = 0.82$, $p = .516$, $\eta^2_p = .01$. These results come from a two-way analysis of variance in which our experimental manipulation, the story participants read, and the interaction between the story and the manipulations served as the independent variables and the participants' perceptions of the legitimacy of the proceedings served as the dependent variable.

2. Main Analysis

To test the hypothesis of a negative linear relationship among the five experimental conditions in Study 1b, as well as whether a meaningful difference exists between the (non-trial) summary judgment conditions and the (non-trial) qualified immunity condition, I conducted a one-way analysis of variance on participants' perceptions of the trial's legitimacy. As in Study 1a, the main effect of the case's procedural resolution was statistically significant.[147] Thus, averaging across experimental conditions, there were differences in how our participants perceived the trial court's legitimacy.

Also as predicted, follow-up polynomial contrasts indicated that a significant linear relationship exists among the means from the five experimental conditions, such that average perceptions of the trial court's legitimacy steadily decreased from the condition in which the plaintiff won at trial through the condition in which the defendants won on qualified immunity grounds.[148] A graph depicting these results appears as Figure 2 below.

Figure 2. Legitimacy Perceptions as a Function of Case Resolution

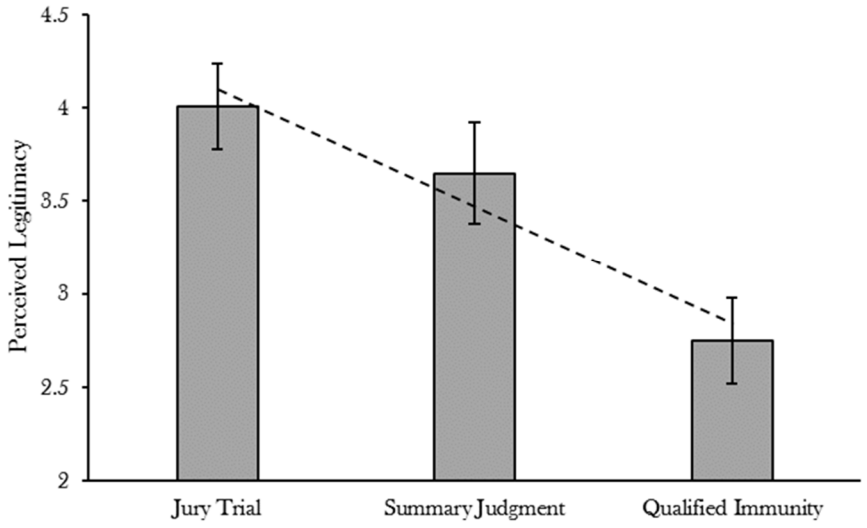


[147] $F(4, 342) = 47.22$, $p < .001$, $\eta^2 = .36$.

[148] $F(1, 342) = 178.68$, $p < .001$. As in Study 1a, the contrast analysis revealed no significant quadratic relationship among the means, further supporting the conclusion that the pattern is linear. $F(1, 342) = 0.00$, $p = .94$.

Further, and most importantly, the analysis revealed that perceptions of the tribunal's legitimacy in the qualified immunity condition were significantly lower than perceptions of the tribunal's legitimacy in both the trial conditions *and* the summary judgment conditions (regardless of who won).[149] This suggests that participants find cases resolved on qualified immunity grounds less legitimate in part, but not *only* because, qualified immunity determinations deprive the parties of a trial; they also find them less legitimate because they often do not reach a decision on the *merits*. To illustrate this point more clearly, Figure 3 below isolates the results from the experimental conditions in which only the defendants won: at trial, on summary judgment, or on qualified immunity grounds.

Figure 3. Legitimacy Perceptions by Mode of Defendants' Victory



[149] *M*-difference (between D-summary judgment and D-qualified immunity) = -0.90, *SE* = 0.31, *p* = .004 (uncorrected), *p* = .03 (Tukey post-hoc correction). The comparison between the condition in which the defendants won on summary judgment and the condition in which the defendants won on qualified immunity grounds was a planned comparison, so I have reported the uncorrected p-value associated with the comparison. To be cautious with respect to false positive results, I also have reported the p-value associated with a post-hoc correction for multiple comparisons. The mean difference between the two conditions remained statistically significant.

3. Serial Mediation Analysis

To investigate the psychological determinants of participants' decreased willingness to legitimize qualified immunity rulings, I conducted a serial mediation analysis focusing on the difference in legitimacy perceptions between (1) the experimental condition in which the defendants won on summary judgment, and (2) the condition in which they won on qualified immunity grounds.[150] Specifically, I hypothesized that participants' willingness to legitimize legal decision-making depends, in part, on principles of relationality: specifically, (a) the degree to which participants perceived the issues in the case were fully aired and "heard," and (b) the degree to which they perceived the decision-making process was just.

I therefore constructed a serial mediation model using Model 80 from Hayes's PROCESS macroinstruction.[151] The model included (a) the experimental condition as the predictor variable (defendant summary judgment win vs. qualified immunity win), (b) perceptions of legitimacy as the outcome variable, (c) participants' perceptions of the plaintiffs' voice in the proceedings, the defendants' voice in the proceedings, and (d) the perceived extent to which the legal procedure was fair as mediator variables. Specifically, Model 80 tests the extent to which the plaintiff was heard and the defendants were heard as separate, earlier-in-time mediators of the legitimizing effect of procedural justice on perceptions of legitimacy.[152] I hypothesized that both variables would mediate the experimental effect, but that the extent to which the plaintiff was perceived to be heard by the court would be the stronger mediator.

[150] A mediation analysis detects "when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator." Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RSCH. METHODS 879, 879 (2008). The mediation analysis reported in this Article is performed using a linear regression analysis and reports unstandardized coefficients, "B," and standard errors, "SE." It also reports a "t" statistic, which determines whether the coefficients are statistically significant. A linear regression is a statistical test that estimates the independent effects of several predictor variables on a continuous dependent variable. *See* LAWLESS ET AL., *supra* note 124, at 300-31.

[151] *See* ANDREW F. HAYES, INTRODUCTION TO MEDIATION, MODERATION, AND CONDITIONAL PROCESS ANALYSIS: A REGRESSION-BASED APPROACH 551-606 (2d ed. 2017) (including an appendix with myriad theoretical models from which to conduct a mediation or moderation analysis). The PROCESS macroinstruction can be downloaded from Professor Hayes's website. *See The PROCESS Macro for SPSS, SAS, and R*, PROCESS MACRO, http://www.processmacro.org/faq.html (last visited Feb. 11, 2022) [https://perma.cc/83FE-4CAG].

[152] *See* HAYES, *supra* note 151, at 606.

The change from a summary judgment verdict for the defendant to a win on a qualified immunity theory decreased participants' perceptions of the court's legitimacy.[153] As theorized, the effect of the experimental condition (specifically, the change from a defense summary judgment victory to a defense victory based on qualified immunity) on perceptions of the court's legitimacy was fully mediated by the extent to which participants perceived that the plaintiff was heard, the extent to which they perceived that the defendant was heard, and their perceptions of the fairness of the proceedings.[154]

Specifically, the defendant's win on a qualified immunity theory decreased perceptions of the plaintiff's voice in the proceedings,[155] and perceptions of the plaintiff's voice were positively associated with perceptions of procedural justice.[156] Increased perceptions of procedural justice were, in turn, associated with increased perceptions of the court's legitimacy.[157]

A similar pattern emerged with respect to perceptions of the defendant's voice in the proceedings.[158] This suggests that perceptions of the plaintiffs' voice, defendants' voice, and the procedural justice afforded by legal procedures fully mediated the effect of our experimental manipulation on participants' legitimacy perceptions.[159] A graph depicting the serial mediation appears as Figure 4 below.

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[153] $\beta = -0.47$, $p = .009$.

[154] $b = -0.78$, $SE = 0.31$, CI [-1.41, -0.16] (total indirect effect); $b = -0.17$, $SE = 0.18$, $p = .36$, CI [-0.55, 0.20] (total direct effect); $b = -0.95$, $SE = 0.36$, CI [-1.65, -0.25] (total overall effect).

[155] $\beta = -0.44$, $p = .015$.

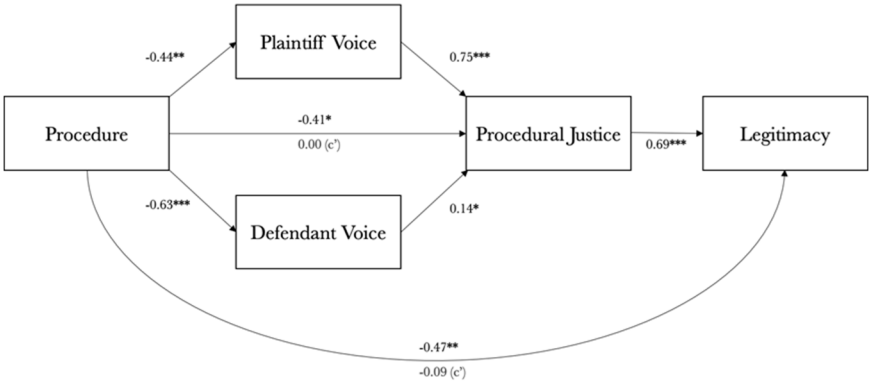
[156] $\beta = 0.75$, $p < .001$.

[157] $\beta = 0.69$, $p < .001$.

[158] $\beta = -0.63$, $p < .001$ (defendant's voice), $\beta = 0.14$, $p = .02$ (procedural justice).

[159] Specifically, the direct effect of our experimental manipulation on participants' perceptions of legitimacy was reduced to non-significant — from $\beta = -0.47$ ($p = .009$) to $\beta = -0.09$ ($p = .36$) — when the mediator variables were included in the model. The mediating effect of the plaintiff's voice was stronger than the mediating effect of the defendants' voice: $b = -0.46$, $SE = 0.22$, CI [-0.95, -0.08] (plaintiff's voice pathway); $b = -0.12$, $SE = 0.07$, CI [-0.28, -0.02] (defendants' voice pathway).

Figure 4. Serial Mediation Analysis



Study 1b provides additional information regarding the perceived legitimacy of the qualified immunity doctrine. First, Study 1b replicates the linear pattern of results that we observed in Study 1a with respect to the perceived legitimacy of the qualified immunity doctrine. The linear pattern we observed again suggests that both distributive justice and procedural justice affect the public's willingness to legitimize tribunals that grant qualified immunity to government defendants.

Study 1b adds to that understanding by examining the procedural elements of the qualified immunity doctrine more deeply. By including in our experimental design two summary judgment conditions in which the parties are deprived of a jury trial but receive a merits decision, we were able to compare two different procedures by which a dispute is resolved by the court before trial. The results indicate that the public legitimizes legal tribunals even less when the defendant wins on qualified immunity grounds than when the defendant wins on merit-based grounds before trial. Moreover, we observed the same effects across two different qualified immunity cases.

Finally, the mediation analysis also suggests that procedural justice concerns create challenges to popular acceptance of the qualified immunity doctrine. The analysis revealed the doctrine's unpopularity is fully attributable to perceptions that the plaintiffs and the defendants lack sufficient voice in the legal proceedings when those proceedings are resolved before trial without a decision on the merits.

V. STUDY 2: CONSTITUTIONAL RULINGS

Study 1 examined the effect that the removal of trial by jury in qualified-immunity-eligible cases has on perceptions of the tribunal's legitimacy.

Study 2 examines voice effects on perceptions of legitimacy in a different context: the extent to which an appellate court decides to address the constitutionality of the defendant's conduct in its qualified immunity ruling.

In this study, participants again read a fictional news article detailing the facts of a recent qualified immunity case. This time, however, participants learned about an appeals court ruling in which the government officials won, but the procedural posture of the case differed, as did the substance of the court's opinion with respect to the constitutionality of the defendants' conduct. Study 2 tests (a) whether a constitutional ruling against the defendant (but where the defendant nonetheless prevails) causes participants to perceive the tribunal as more legitimate; and (b) whether any effect of the constitutional ruling depends on the procedural posture of the case.

A. Method: Participants, Procedures, and Measures

Three hundred and two American participants were recruited through Amazon Mechanical Turk and paid $1.00 for their participation in this study. Participants were 55 percent female, 83 percent white, averaged 46.94 years of age (with a *SD* of 14.40), and ranged from 21 to 96 years old. Sixty-four percent of the sample had completed at least a college degree, and the median income of the sample was between $50,000 and $59,999. Fifty-nine percent of participants identified as liberal-leaning and forty-one percent of participants identified as conservative-leaning.

After providing their consent, participants read about the facts of *West v. Winfield* in a fictitious newspaper article. This time, however, participants read about the case in the context of an appellate decision, with a focus on whether the appellate court confronted or avoided the constitutionality of the defendant officers' conduct.

The fictitious newspaper article recounted the facts that appeared in the article from Study 1a. This time, however, the defendant officers always won on appeal on a qualified immunity theory, although the procedural posture of the case varied as did the substance of the appellate court's ruling. Specifically, participants were randomly assigned to one of four experimental conditions in a 2 (posture: reversal of judgment for plaintiff vs. affirmance of defendant's qualified immunity) x 2 (constitutional ruling: ruled vs. declined to rule) factorial design.[160] Participants therefore

[160] A factorial design consists of two or more variables, or "factors," each with discrete values or "levels," and whose experimental units take on all possible combinations of these levels across all factors. In a "between subjects" design, each participant is randomly

read about an appellate decision that (a) either reversed a judgment in the plaintiff's favor or affirmed a qualified immunity judgment for the defense, and (b) either found the officers' conduct unconstitutional but reasonable (because of the lack of clarity in the law) or found the officers' conduct reasonable while declining to rule on the constitutionality of their conduct.[161] A table summarizing the experimental manipulations within the newspaper article appears as Table 2 below.

Table 2. Summary of Experimental Manipulations.

	Constitutional Ruling	No Ruling
Reverse Plaintiff Judgment	"An appellate court has reversed a judgment . . . for [plaintiff]."	"An appellate court has reversed a judgment . . . for [plaintiff]."
	"The defendants' conduct was a constitutional violation, but the law was not clearly decided at the time."	"We decline to decide whether the [defendants'] conduct was constitutional, because the law was not clearly decided at the time."
Affirm Defense Judgment	"An appellate court has affirmed a judgment . . . for [defendants]."	"An appellate court has affirmed a judgment . . . for [defendants]."
	"The defendants' conduct was a constitutional violation, but the law was not clearly decided at the time."	"We decline to decide whether the [defendants'] conduct was constitutional, because the law was not clearly decided at the time."

exposed to one level of each variable and is not exposed to the other levels. *See* FIELD, *supra* note 131, at 608-09.

[161] The plaintiff always lost on appeal, even if the court affirmatively ruled that the officers' conduct was unconstitutional, because the court held in all experimental conditions that the law was not clearly defined. Thus, a finding that the defendant's conduct was unconstitutional had no positive bearing on the substantive outcome of the case for the plaintiff. Study 2 is meant to replicate previous research on procedural justice, which found that giving individuals an opportunity to be "heard," even if it was clear that being heard would not affect the substantive outcome of the dispute, increases the decisionmaker's perceived legitimacy. *See, e.g.*, E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952, 957-58 (describing the results of an experiment in which 'postdecision voice' opportunities nonetheless increased participants' perceptions of the fairness of the proceedings compared to participants who were not afforded an opportunity to communicate with the experimenter).

It is possible, however, that some participants may not have understood that the constitutional ruling had no effect on the outcome of the case. To account for that possibility, an updated experimental condition could look as follows: the court states (1) that the law was not clearly established, so the defendants were not liable, and (2) that, in any event, the officers' conduct did not amount to a constitutional violation. I thank the students in the University of Virginia Law School's Colloquium on Law and Social Science for their insight on this aspect of the experimental design.

After completing attention and comprehension checks, participants completed several dependent measures. As in Study 1, participants were asked to respond to dichotomous and Likert-scale items measuring the extent to which: (1) they perceived the court's ruling to be legitimate, (2) it was important to them that the court issue a constitutional ruling, (3) they respect courts that rule the way this court did, and (4) they have confidence that such courts will decide these cases fairly. Participants also answered standard demographic items and items gauging their familiarity with the doctrine of qualified immunity. After completing these measures, participants were debriefed.

B. Results

Results are presented in two Subsections. The preliminary analysis provides relevant descriptive statistics regarding participants' perceptions of the trial outcome and their understanding of qualified immunity. The next Subsection reports the results of an analysis of variance examining the effects of procedural posture and constitutional ruling on participants' perceptions of the legitimacy of the tribunal.

1. Preliminary Analyses

Fourteen percent of participants acknowledged some degree of familiarity with qualified immunity, and a smaller percentage (one percent) expressed familiarity with the facts of the case. Also as in Study 1, slightly over half of participants (fifty-three percent) reported having had some form of interaction with the legal system.[162]

Overall, about two-thirds of participants (sixty-six percent) thought the plaintiff should have won the case, but across all experimental conditions, most participants (seventy-one percent) believed the court's decision was legitimate. Across all conditions, average perceptions of the reasonableness of the defendants' conduct fell below the midpoint of the scale, suggesting that participants found the officials' conduct somewhat unreasonable.[163]

[162] To control for any potential effects of these participants' familiarity with the legal system or qualified immunity, the main analyses were performed with and without these variables as covariates. The covariates did not affect the results and were dropped from the reported analysis.

[163] $M = 3.37$, $SD = 1.98$, $t(300) = -5.58$, $p < .001$, Cohen's $d = 1.98$ (measure of effect size).

2. Main Analysis

To test the hypothesis that the procedural posture of the case and the court's willingness to make a constitutional ruling would affect the tribunal's perceived legitimacy, a 2 (posture: reversal of plaintiff judgment vs. affirmance of defendant's qualified immunity) x 2 (constitutional holding: no vs. yes) analysis of variance ("ANOVA") was conducted on participants' legitimacy perceptions. As predicted, the analysis revealed no main effect of procedural posture,[164] such that there was no statistically significant difference in participants' perceptions of the tribunal's legitimacy as a function of whether the appellate court reversed a judgment for the plaintiff[165] or affirmed a qualified immunity judgment for the defendants.[166]

Also as predicted, the ANOVA revealed a significant main effect of the court's willingness to issue a constitutional ruling,[167] such that participants were more willing to legitimize appellate court decisions that reached the constitutional issue[168] than decisions that declined to reach the constitutional issue.[169]

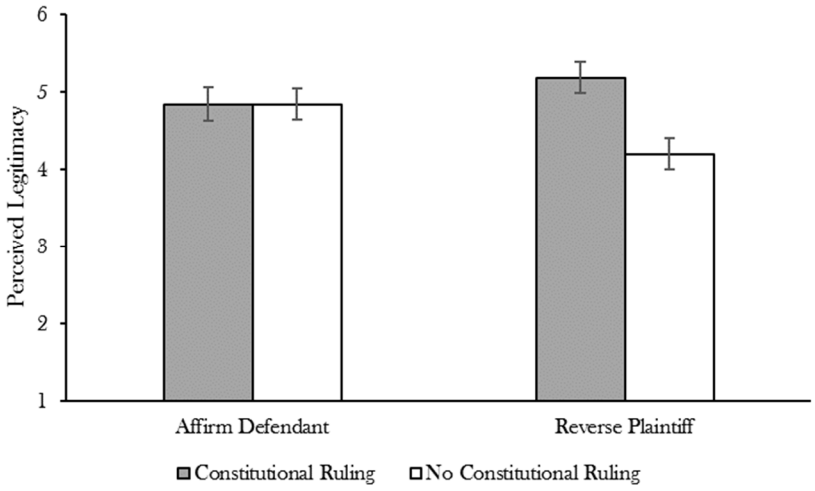
Importantly, these main effects on participants' perceptions of the court's legitimacy were qualified by a significant interaction between the procedural posture of the case and the court's willingness to rule on the constitutionality of the defendants' actions.[170] I investigated the nature of this interaction by examining the effect of the court issuing a constitutional ruling when that ruling reverses a judgment for the plaintiff and when it affirms a qualified immunity judgment for the defendants.

When the appellate court affirmed a qualified immunity judgment for the defense, the presence[171] or absence[172] of a constitutional ruling had no effect on participants' perceptions of the court's legitimacy.[173] In contrast, participants perceived an appellate court that reversed a judgment for the plaintiff as more legitimate when it issued a constitutional ruling against

[164] $F(1, 294) = 0.55$, $p = .46$, $\eta^2_p = .00$.
[165] $M = 4.70$, $SD = 1.79$.
[166] $M = 4.84$, $SD = 1.79$.
[167] $F(1, 294) = 5.62$, $p = .018$, $\eta^2_p = .02$.
[168] $M = 5.02$, $SD = 1.74$.
[169] $M = 4.53$, $SD = 1.81$.
[170] $F(1, 294) = 5.82$, $p = .016$, $\eta^2_p = .02$.
[171] $M = 4.84$, $SD = 1.94$.
[172] $M = 4.84$, $SD = 1.66$.
[173] $F(1, 142) = 0.00$, $p = .98$, $\eta^2_p = .00$.

the defendant[174] than when it declined to do so.[175] A graph depicting these results appears as Figure 5 below.

Figure 5. Legitimacy Perceptions by Constitutional Ruling and Procedural Posture



These results provide insight into the role that perceptions of voice have on participants' perceptions of the legitimacy of qualified immunity. The mere presence of a constitutional ruling by the appellate court increased participants' perceptions of the tribunal's legitimacy. But more interestingly, the effect of a constitutional ruling on participants' perceptions of legitimacy also depended on the procedural posture of the case. Participants were less sensitive to the presence or absence of a constitutional ruling when the court was simply affirming a qualified immunity judgment already reached by a lower court. But participants were far more sensitive to the absence of a constitutional ruling by the appellate court when the court reversed a jury award for the plaintiff, suggesting the willingness of the court to address the defendants' conduct had an ameliorative effect on participants' perceptions of the tribunal's legitimacy.

[174] $M = 5.18$, $SD = 1.54$.

[175] $M = 4.20$, $SD = 1.90$, $F(1, 152) = 12.37$, $p = .001$, $\eta^2_p = .08$.

VI. STUDY 3: PROCEDURAL PREFERENCES

Studies 1 and 2 were designed to identify and isolate aspects of social identity theory and procedural justice theory that bear on the public's willingness to legitimize legal tribunals that apply the qualified immunity rule. Although other psychological determinants undoubtedly also predict public attitudes toward qualified immunity, Studies 1 and 2 suggest that the absence of a trial and the absence of a ruling on the constitutionality of a government official's conduct may serve as barriers to the doctrine's popular legitimacy.

Study 3 incorporates these insights in an attempt to construct a qualified immunity procedure that the public is more likely to accept. This study provided participants with five different iterations of the Supreme Court's qualified immunity jurisprudence — in addition to another procedure that incorporates the findings from Study 1 — to determine which procedural variation receives the greatest popular legitimacy.

A. Method: Participants, Procedures, and Measures

One hundred ninety-five American participants were recruited through Amazon Mechanical Turk and paid $1.00 for their participation in this study. Participants were 49 percent female, 81 percent white, averaged 40.86 years of age (with a *SD* of 11.82), and ranged from 18 to 83 years old. Sixty-nine percent of the sample had completed at least a college degree, and the median income of the sample was between $50,000 and $59,999. Sixty-three percent of participants identified as liberal-leaning and thirty-seven percent of participants identified as conservative-leaning.

After providing their informed consent, participants were told legal policymakers are currently evaluating different ways of resolving disputes between ordinary citizens and government officials. They were further told policymakers are attempting to balance the plaintiff's right to fair compensation for injuries stemming from wrongful governmental conduct with concerns about governmental officials being subjected to meritless, time-consuming, expensive litigation.

Participants were then presented with short summaries of five different legal procedures for resolving disputes between citizens and government officials. Four of these procedures mirrored an iteration of the Supreme Court's qualified immunity jurisprudence. Specifically, one was modeled after the current qualified immunity doctrine as expressed in *Pearson v. Callahan*; another was modeled after the good faith immunity expressed in *Pierson v. Ray*; a third was modeled after the sequential, constitutional analysis in *Saucier v. Katz*; and a fourth was modeled on the strict liability

standard expressed in *Myers v. Anderson*.[176] Based on the results of Study 1, I constructed a fifth procedure in which a pre-trial motion alleging qualified immunity is unavailable to government defendants, who may instead raise the reasonableness of their actions as an affirmative defense at trial.[177]

The five procedures were presented side by side and consisted of short, bulleted descriptions. The descriptions included the process for resolving each dispute, along with a brief description of the potential drawbacks and benefits associated with each procedure, to provide a neutral a description of each procedure. A summary of the information presented to participants appears in Table 3 on page 1686.

After completing attention and comprehension checks, participants were asked to rank the procedures against each other in terms of their willingness to legitimize the tribunals that employ them. Participants then viewed each procedure in isolation in random order. They were asked to respond to Likert-scale items measuring the extent to which, for example, (1) they saw the procedure as a legitimate means of resolving these disputes; (2) the dispute resolution procedure is procedurally fair (both overall and to each party); and (3) a plaintiff using the procedure would feel heard by the court. Afterward, participants were asked the extent to which it is important to them that the court deliver a constitutional ruling and to resolve these cases at trial. After completing several demographic items, participants were debriefed.

[176] For a discussion of these cases, *see supra* notes 33–53 and accompanying text.

[177] To maintain a high degree of internal validity, experimental designs attempt to hold all elements of the different experimental conditions constant except for the independent variable to be manipulated; however, maintaining a high degree of internal validity routinely involves a tradeoff with ecological validity — the degree to which the experiment is generalizable to a real-world setting. In Study 3, some iterations of qualified immunity occur before trial (for example, at the summary judgment stage), while others occur at trial. This is because the objective of Study 3 is to determine the public's attitudes toward qualified immunity as the doctrine existed — whether as an affirmative defense to be used at trial or as a shield from trial altogether — to understand which variations of the doctrine enjoy greater popular legitimacy. An intriguing follow-up experiment could involve standardizing the time-period in which the different iterations of qualified immunity are employed. I thank students in the University of Virginia Law School's Colloquium on Law and Social Science for their discussion of this point.

Table 3. Abbreviated Procedure Descriptions.

Procedure	Benefits	Drawbacks
Qualified Immunity ▪ The case will proceed to trial unless the court finds that the defendant's act was reasonable because the law was not clearly established at the time that the official acted. ▪ The court has the option of deciding if defendant's conduct was unconstitutional.	▪ Efficiency ▪ Cost savings (gov't)	▪ No jury ▪ May not provide notice to other officials
Good Faith Immunity ▪ The case will proceed to trial unless the court finds that, regardless of whether the defendant's conduct was reasonable or constitutional, she believed in good faith that she was following the law.	▪ Efficiency ▪ Cost savings (gov't) ▪ Well-meaning officials not liable	▪ No jury ▪ Defendant's conduct might be unreasonable or unconstitutional
Saucier Sequencing ▪ The case will proceed to trial unless the court finds: (1) that the defendant's acts were constitutional; and (2) even if they were unconstitutional, that the defendants acted reasonably because the law wasn't clear at the time they acted.	▪ Efficiency ▪ Cost savings (gov't) ▪ Notice to other officials	▪ No jury ▪ Constitutional rulings at this stage may be unclear or confusing
Strict Liability ▪ The case proceeds to trial unless court finds that the defendant committed a constitutional violation. If so, the defendant is strictly liable for that harm.	▪ Efficiency ▪ Cost savings (gov't) ▪ Notice to other officials	▪ No jury ▪ Reasonable defendants under the circumstances still liable
Trial Defense ▪ The case proceeds to trial. At the trial, the defendants can argue that their actions were reasonable, even if they were unconstitutional, in part because the law wasn't clear when the defendants acted.	▪ Jury decides ▪ Notice to other officials	▪ Time- and resource-consuming ▪ Unpredictable juries

B. Results

The results proceed in three parts. First, I report the results of the preliminary analyses. Second, I examine whether a statistically significant difference exists with respect to participants' procedural rankings. Third,

I separately compare participants' perceptions of each procedure's voice afforded, procedural justice produced, and legitimacy obtained.

1. Preliminary Analyses

Nineteen percent of participants acknowledged some degree of familiarity with the concept of qualified immunity, and forty-one percent reported having had some form of interaction with the legal system. Across all experimental conditions, participants preferred that courts adjudicate the constitutionality of the defendant's conduct[178] and preferred that these cases be resolved after a trial.[179] Both means were significantly above the midpoint of the scale.[180] The means also were statistically different from one another.[181]

2. Main Analysis I: Rankings

To test the hypothesis that participants will rank procedures that prioritize the airing of claims to a jury and the issuing of constitutional rulings over procedures that take claims away from juries or allow for courts to avoid constitutional rulings, I conducted a repeated-measures, non-parametric Friedman ANOVA for examining differences in ranks.[182] As predicted, the analysis revealed significant differences among participants' rankings.[183]

To determine the nature of the differences in the distributions of participants' rankings, Dunn-Bonferroni post hoc tests were performed.[184]

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[178] $M = 5.66$, $SD = 1.30$.

[179] $M = 4.84$, $SD = 1.68$.

[180] $t(191) = 17.65$, $p < .001$, $d = 1.27$ (constitutional issue), $t(194) = 6.97$, $p < .001$, $d = 0.50$ (trial).

[181] $t(191) = 6.16$, $p < .001$, $d = 0.44$.

[182] The Friedman test is a non-parametric statistical test, like a repeated measures ANOVA, that is used to detect differences in treatments across multiple responses from the same participant. *Friedman Test in SPSS Statistics*, LAERD STAT., https://statistics.laerd.com/spss-tutorials/friedman-test-using-spss-statistics.php (last visited Feb. 11, 2022) [https://perma.cc/JKX3-CHG9]; *see also* Milton Friedman, *A Correction: The Use of Ranks to Avoid the Assumption of Normality Implicit in the Analysis of Variance*, 34 J. AM. STAT. ASS'N 109, 109 (1939).

[183] χ^2 (4, N = 194) = 92.28, $p < .001$, $W = .12$.

[184] The Dunn-Bonferroni test is a conservative post-hoc procedure appropriate for examining differences involving nonparametric data; unlike parametric tests, it does not assume that the data fits any particular distribution. *What Is Dunn's Test*, STAT. HOW TO, https://www.statisticshowto.com/dunns-test/ (last visited Feb. 4, 2022) [https://perma.cc/8DDT-D5ZM].

The tests confirmed the experimental hypotheses and revealed three tiers of participant preferences. Participants perceived the qualified immunity procedure as the least legitimate along with the good faith defense procedure, and the procedures were not significantly different from one another.[185] Participants viewed the good faith procedure as less legitimate than the two-phase *Saucier* procedure and the strict liability procedure.[186] The *Saucier* procedure and the strict liability procedure, in turn, were not significantly different from each other.[187] Finally, the strict liability procedure was deemed less legitimate than the trial procedure, which participants viewed as the most legitimate of the five procedures.[188]

A box and whisker plot of participants' procedure rankings appears below.[189] The whiskers represent the upper and lower bounds of their rankings from one to five, and the two boxes represent the 25th and 75th percentiles (with the line separating them representing the median rank for each procedure). The mean rank for each procedure also appears as a rectangular bullet within each box. For easier interpretation, scores were reverse-coded, such that higher rankings indicate greater participant preference. A graph depicting these results appears as Figure 6 below.

[185] $M = 2.42$, $SD = 1.22$, median = 2.00 (qualified immunity procedure); $M = 2.62$, $SD = 1.33$, median = 3.00 (good faith defense); $p = .20$.

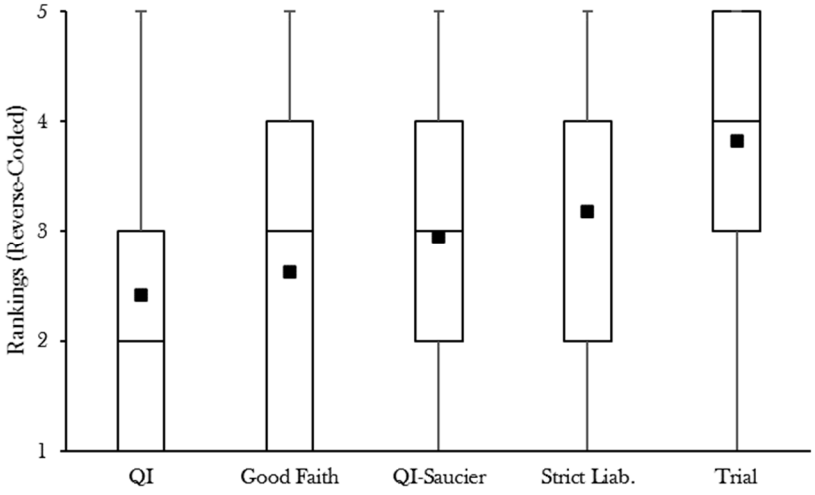
[186] $M = 3.19$, $SD = 1.46$, median = 4.00 (*Saucier*), $p < .001$.

[187] $p = .15$.

[188] $M = 3.82$, $SD = 1.38$, median = 4.00 (trial procedure), $p < .001$.

[189] Also called a box plot, a box and whisker plot is a method of data visualization that reports measures of spread in a dataset — including the interquartile range, the minimum, and maximum values — and measures of central tendency — including the mean and the median. *Box Plot (Box and Whiskers): How to Read One & How to Make One in Excel, TI-83, SPSS*, STAT. HOW TO, https://www.statisticshowto.com/probability-and-statistics/descriptive-statistics/box-plot/ (last visited Feb. 4, 2022) [https://perma.cc/G7S3-G45B].

Figure 6. Box and Whisker Plot of Participants' Procedural Rankings



3. Main Analysis II: Attitudes

To test the hypothesis that participants' perceptions of the (a) voice afforded by, (b) procedural justice obtained by, and (c) legitimacy produced by each procedure differed as a function of jury accessibility and constitutional avoidance, I conducted a repeated-measures, multivariate analysis of variance ("MANOVA") on participants' responses.[190] The overall MANOVA was statistically significant,[191] so I explored the nature of this overall effect with respect to each dependent variable separately.

A repeated-measures ANOVA with a Huynh-Feldt correction[192] revealed that participants perceived the five procedures as differentially

[190] A Multivariate Analysis of Variance ("MANOVA") controls for Type I error. Both an ANOVA and a MANOVA are statistical tests, which produce Fisher's F-statistics, that examine whether the means of different groups are statistically different or statistically equal. A MANOVA is a special type of analysis of variance where multiple dependent variables — which are at least moderately correlated with each other — are analyzed in tandem to reduce the likelihood of false positives ("type I error"). *See, e.g.*, Russell Warne, *A Primer on Multivariate Analysis of Variance (MANOVA) for Behavioral Scientists*, 19 PRAC. ASSESSMENT, RSCH., & EVALUATION 1, 2 (2014) (explaining MANOVA). A repeated measures factor compares multiple responses by the same participant to the experimental stimuli. *See* FIELD, *supra* note 131, at 651.

[191] $F(3, 12) = 36.96$, $p < .001$, Wilks' $\Lambda = 0.27$, $\eta^2_p = .73$.

[192] The Huynh-Feldt procedure is used in the common scenario in which the distribution of the underlying data violates the sphericity assumption of the repeated-measures analysis

legitimate.[193] Post hoc testing with a Šidák adjustment for multiple comparisons[194] revealed a pattern of results that mirrored participants' procedural rankings. Participants perceived the jury procedure as the most legitimate and as significantly more legitimate than all other procedures.[195] The strict liability procedure and the *Saucier* procedure, which both require a constitutional ruling, were perceived as the next-most legitimate procedures (and were perceived as similarly legitimate).[196] The good faith procedure and the current qualified immunity procedure were perceived as the least legitimate procedures (and were perceived as similarly legitimate).[197]

Participants also viewed the five procedures as producing different levels of justice to the litigants,[198] and affording the plaintiff differing levels of voice in the proceedings.[199] Error-corrected post hoc comparisons revealed that participants' perceptions of procedural justice and voice were highly similar to their perceptions of the legitimacy of the procedures. A graph depicting these results appears as Figure 7 below.

of variance. The Huynh-Feldt procedure corrects for the violation by adjusting the degrees of freedom accordingly, which may result in degrees of freedom that are not integers. *See* FIELD, *supra* note 131, at 654-58 (reviewing the concept of sphericity and the statistical techniques associated with it).

193 $F(3.51, 617.88) = 107.06$, $p < .001$, $\eta^2_p = .38$.

194 Like the Bonferroni method, the Šidák procedure controls the familywise error rate when multiple post-hoc hypotheses tests are performed. *See* Zbyněk Šidák, *Rectangular Confidence Regions for the Means of Multivariate Normal Distributions*, 62 J. AM. STAT. ASS'N 626, 626 (1967).

195 $M = 5.89$, $SD = 1.40$; all p's $< .001$.

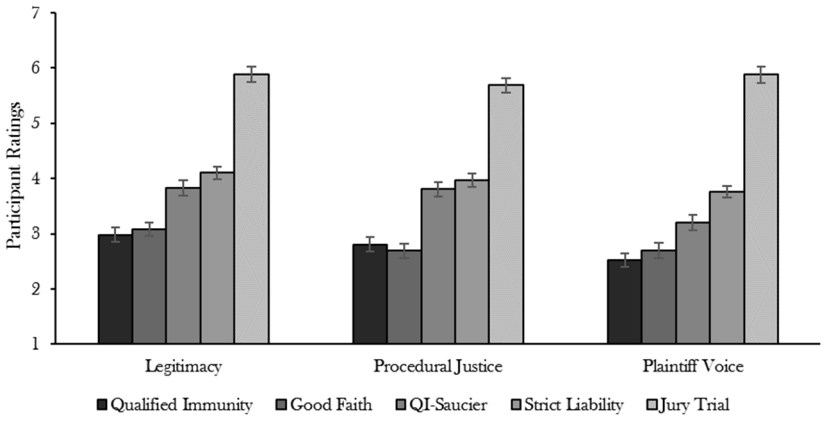
196 $M = 4.10$, $SD = 1.83$ (strict liability); $M = 3.83$, $SD = 1.84$ (*Saucier*); $p = .60$.

197 $M = 3.08$, $SD = 1.87$ (good faith); $M = 2.98$, $SD = 1.74$ (qualified immunity); $p = .99$.

198 $F(3.57, 614.99) = 106.55$, $p < .001$, $\eta^2_p = .38$ (Huynh-Feldt).

199 $F(3.59, 631.87) = 138.24$, $p < .001$, $\eta^2_p = .44$ (Huynh-Feldt).

Figure 7. Perceptions of Legitimacy, Justice, and Voice by Q.I. Procedure



C. Discussion

The results from Study 3 confirmed several findings reported in Studies 1 and 2 while providing additional insights into the perceived legitimacy of tribunals that apply the qualified immunity doctrine. As reflected in participants' procedural rankings, as well as in their individual assessments of each procedure's legitimacy, clear patterns emerged. Most tellingly, the Supreme Court's current qualified immunity framework was the least-preferred procedure for resolving these types of disputes, and it was in the bottom tier with respect to participants' individual assessments of the doctrine's legitimacy.

In contrast, and consistent with the findings from Studies 1 and 2, the procedure in which qualified immunity served as an affirmative defense at trial (rather than as immunity from litigation) was the most preferred procedure by rank, was perceived as providing the most voice to litigants, was judged as the most procedurally fair to the parties, and ultimately was viewed as the most legitimate. Procedures that required the court to rule on the constitutionality of the defendant's conduct composed the second tier of procedures with respect to participants' preferences, perceptions of voice, procedural justice, and legitimacy.

VII. IMPLICATIONS AND CONCLUSIONS

Decades after its inception, the qualified immunity doctrine remains highly controversial. Although legal scholars have written hundreds of articles opining on the evolving contours and general wisdom of this

judicially created rule,[200] there is much more to learn regarding the public's attitude toward it and the public's willingness to view the doctrine as one that is worthy of legitimacy. Empirical psychologists, as well as scholars of institutional design, have much to offer legal policymakers in creating a doctrine that comports with the public's beliefs about what is both substantively and procedurally just.

Substantive outcomes matter — and they matter substantially — in terms of the public's impressions of legal doctrines.[201] But as both social identity theorists and experts in institutional design are aware, perceptions of the fairness of the procedural features underlying a judicial doctrine or proceeding often exert equal or greater influence on the public's willingness to legitimize legal doctrines and the institutions that employ them. This is so because the procedural features of a legal doctrine do not exist in a vacuum; the procedures are a result of value judgments and policy choices that send relational signals to the public.[202] To the extent that those signals suggest to individuals that they have a voice in the proceedings, that they have been truly "heard" by the decisionmaker, and that they have been treated with respect, people are more likely to legitimize the legal doctrine or proceeding even if they receive a substantively unfavorable outcome.[203]

This Article reports the first original, four-part empirical study examining the role that non-substantive, procedural features of the qualified immunity doctrine have in predicting the public's willingness to legitimize this controversial rule. The results shed light on aspects of the qualified immunity doctrine that can be improved in a manner that may increase its popular legitimacy. For example, the first study confirmed that outcomes matter to the public's perceptions of a legal doctrine's legitimacy, insofar as participants' perceptions of the qualified immunity doctrine's legitimacy decreased significantly when the government defendants won at a jury trial

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[200] A citation count in the legal search engine Westlaw Precision™ reveals that the term "qualified immunity" has appeared in the title of 399 secondary sources in a variety of law reviews, treatises, and legal newspapers.

[201] *See* Hollander-Blumoff, *supra* note 117, at 132 (citing Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 71 (Joseph Sanders & V. Lee Hamilton eds., 2001)). *See generally* Kyle McLean, *Revisiting the Role of Distributive Justice in Tyler's Legitimacy Theory*, 16 J. EXPERIMENTAL CRIMINOLOGY 335 (2019) (arguing for the importance of understanding distributive justice as a critical antecedent to a legal actor's perceived legitimacy).

[202] *See* Tyler, *Psychology of Procedural Justice*, *supra* note 91, at 836-38.

[203] *Id.*

instead of the plaintiff.[204] But more importantly, the doctrine's popular legitimacy decreased by an additional, equal measure on a procedural matter: when the defendants won on a qualified immunity theory instead of in front of a jury at trial.[205] Moreover, a follow-up study suggested that the public delegitimizes the qualified immunity doctrine beyond a granting of summary judgment to government defendants on the merits, suggesting that the doctrine's legitimacy is damaged not just by depriving a plaintiff of a forum to air her legal grievance, but also by a refusal to engage substantively with her claim.

The serial mediation analysis suggests what social identity theory predicts: a grant of qualified immunity to the defendant was strongly associated with a loss of the plaintiff's voice in the proceedings (and, to a lesser extent, the defendant's voice), which in turn was associated with decreased perceptions of the qualified immunity doctrine's legitimacy.[206]

The second study expanded on these results by examining the application of the qualified immunity doctrine on appeal, where the current form of the doctrine leaves it to the appellate tribunal's discretion whether to adjudicate the alleged constitutional violation. Consistent with the results of Study 1, Study 2 suggests that the decision to reach the merits of the constitutional issue carries with it a relational signal — whether the plaintiff's claim is worthy of receiving meaningful adjudication — even if the court ultimately finds that the qualified immunity doctrine applies.[207] Moreover, Study 2 reports an intriguing complication to this narrative: that individuals appear sensitive to this relational signal when the appellate court reverses a verdict for the plaintiff on appeal, but appear less sensitive to the signal when the appellate court merely affirms a qualified immunity ruling from a lower court.[208] Psychological research on loss aversion[209] and construal level theory[210] suggest that, in these cases, the signal sent by

[204] *See supra* notes 129–37 and accompanying text.

[205] *See supra* notes 129–37 and accompanying text.

[206] *See supra* notes 155–59 and accompanying text.

[207] *See supra* notes 190–94 and accompanying text.

[208] *See supra* notes 182–87 and accompanying text.

[209] Loss aversion is a social psychological phenomenon, first discovered by Daniel Kahneman and Amos Tversky, in which losses weigh more heavily on individuals psychologically than acquiring equivalent gains feels pleasurable. It is an important pillar of Kahneman and Tversky's "Prospect Theory" of risk and loss. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979).

[210] Construal level theory is a social psychological theory that examines the relationship between the psychological distance of an object in one's environment — both physically

the appellate court's willingness to engage with the constitutional merits of the plaintiff's case serves as a relational palliative when the adverse decision is made for the first time on appeal. If so, the results reinforce the importance of constructing a qualified immunity doctrine that is perceived as substantively and procedurally just at the trial court level.

Finally, the third study synthesizes the findings from Studies 1 and 2 by examining how participants perceive several aspects of the qualified immunity doctrine as it has evolved over time. By asking participants to compare the different iterations of qualified immunity against each other, Study 3 provides insights into the features of the doctrine — as it has actually existed — that enjoy heightened or lowered public legitimacy. Strikingly, the current iteration of qualified immunity, which empowers courts to rule on qualified immunity before trial and to avoid adjudicating the underlying constitutional issue, is perceived as the least legitimate of the various versions of the doctrine.[211] Frameworks that, at a minimum, require courts to adjudicate the underlying constitutional issue fared statistically better and reached the midpoint of the legitimacy scale in Study 3, suggesting that doing so provides relational voice to plaintiffs alleging government misconduct.[212] But the procedure that enjoyed the greatest degree of popular legitimacy was the procedure that allowed the defendants to raise qualified immunity as an affirmative defense at trial in front of a jury.[213] This finding is consistent with social identity theory and relational psychology insofar as airing the plaintiff's claim at trial, even if it is ultimately unsuccessful, provides to litigants the greatest degree of perceived dignity, respect, and voice.[214]

A. Policy Implications & Objections

The qualified immunity doctrine, like the scrutiny levels of constitutional review, is a judicially crafted rule. This affords both

and psychologically — and the degree to which people form concrete or abstract representations of the target object. Construal level theory has been hypothesized to explain popular attitudes toward legal doctrines including, for example, the hearsay rule. *See generally* Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879 (2015) (examining the concept of construal level theory empirically).

[211] Indeed, it fared no better statistically than the "good faith" approach, taken by the Court earlier in *Pierson v. Ray*. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

[212] *See supra* notes 172–75 and accompanying text.

[213] *See supra* notes 172–75 and accompanying text.

[214] *See* Tyler & Sevier, *supra* note 95, at 1129-30 (discussing relational perspectives on judicial authority).

legislative policymakers and members of the judiciary the opportunity to review the empirical science underlying the application of the qualified immunity doctrine with an eye toward adjusting procedural aspects of the doctrine to increase its popular legitimacy. In the wake of a national reckoning with respect to citizen-police encounters in the summer of 2020 following the deaths of George Floyd, Breonna Taylor, and others, an increasing public awareness of qualified immunity appeared to coincide with an increased appetite to reform the doctrine at the legislative level.[215] In the early days of the Biden administration, in which a global pandemic raged and vaccine development became a top priority, it remained an open question whether that newfound momentum would translate to legislative reforms at the federal level.[216]

A more promising avenue for reform might exist in the judiciary. Historically, the Supreme Court has been willing to make sweeping changes to the qualified immunity doctrine, including explicitly and materially changing the operative legal standard,[217] as well as more subtle changes — for example, clarifying what constitutes well-established legal precedent in applying the doctrine.[218] The Court's last major doctrinal alteration occurred over a decade ago, when the justices overturned the *Saucier* sequencing rule, allowing courts to decline to resolve the constitutional question at the heart of the plaintiff's case.[219] Since then, the Court has not made major adjustments to the rule, although many commentators believe that the Court has begun to signal that it is willing

[215] *See, e.g.*, Ekins, *supra* note 27 (discussing the doctrine and the need for reform); *Majority of Public*, *supra* note 30 (same); *see also* Fuchs, *supra* note 26 (noting that, at the state level, "[t]he Colorado General Assembly became the first to eliminate qualified immunity this month").

[216] *See, e.g.*, Fuchs, *supra* note 26 (noting criticism of the doctrine by Congressman Jerrold Nadler, expressions of disapproval by Senator Lindsey Graham, and proposed legislation by Senator Mike Braun purporting to reform the legal standard for qualified immunity). *But see* Zak Cheney-Rice, *Police Reform Is Probably Dead Under Biden*, INTELLIGENCER (Nov. 8, 2020), https://nymag.com/intelligencer/2020/11/2020-election-police-reform-is-probably-dead-under-biden.html [https://perma.cc/8TCC-MVKY] (questioning whether the groundswell of support to reform the doctrine was the result of a confluence of "fluky factors" and casting doubt that meaningful legislative reform will be attainable in light of the Biden administration's immediate priorities).

[217] *See supra* notes 33–49 and accompanying text.

[218] *See supra* notes 51–53 and accompanying text.

[219] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009); *see also supra* note 50 and accompanying text.

to revisit its qualified immunity jurisprudence in the context of an appropriate factual setting.[220]

More generally, commentators have noted that there has arisen an uneasy political alliance among conservatives, libertarians, and liberals with respect to their opposition to the qualified immunity doctrine, albeit for different philosophical reasons.[221] This political alliance, of course, may bear fruit in the legislative realm. But the alliance has had spillover effects in litigation, insofar as think tanks and policy centers on different sides of the political spectrum have filed amicus curiae briefs with appellate courts encouraging them to eliminate or modify the doctrine.[222] At the same time, justices on opposite sides of the ideological spectrum have criticized the doctrine in recent concurring and dissenting opinions, warning that the doctrine "tells the public that [unconstitutional actions] will go unpunished"[223] and that the doctrine "substitute[s] our own policy

[220] *See, e.g.*, Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do with Police Reform?*, LAWFARE (June 6, 2020, 12:16 PM), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform [https://perma.cc/U8EV-NNAH] (discussing qualms about the doctrine expressed by Justices of the Supreme Court).

[221] *See, e.g.*, Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html [https://perma.cc/RXF2-EKVH] (discussing the benefits and drawbacks of eliminating the qualified immunity doctrine); *see also* Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html [https://perma.cc/2DMK-KTUS]. Specifically, commentators have noted that there appears to be an uneasy alliance among political libertarians, wary of the federal government's power, political liberals, concerned with a doctrine that undercompensates civil plaintiffs, and political conservatives, troubled by a doctrine that does not comport with an originalist understanding of the Constitution, with respect to their opposition to the qualified immunity doctrine. *See, e.g.*, Donovan-Smith, *supra* note 22 (noting that "[a]n ideologically diverse alliance of groups including the libertarian Reason Foundation, the left-wing ACLU and the right-wing Americans for Prosperity came together to oppose qualified immunity" in eight cases in which a petition for certiorari was pending during the Court's October 2019 term).

[222] *See, e.g.*, Brief of the DKT Liberty Project, The Due Process Institute, The Rutherford Institute, and Reason Foundation as Amici Curiae in Support of Petitioner, West v. Winfield, No. 18-35300 (U.S. Feb. 20, 2020), https://reason.org/wp-content/uploads/amicus-brief-west-v-winfield.pdf (last visited Feb. 4, 2022) [https://perma.cc/7T25-8LPK] (joint brief from the DKT Liberty Project, the Due Process Institute, the Rutherford Institute, and the Reason Foundation arguing for abolishing the doctrine).

[223] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). The case involved a police officer who shot a knife-wielding suspect through a chain-link fence.

preferences for the mandates of Congress" such that the doctrine itself should be "reconsider[ed]."[224]

To the extent that the Court has signaled a willingness to revisit the qualified immunity doctrine, what might appropriate reforms look like? Legal scholars have proffered several ideas, mostly but not entirely without empirical evidence of the efficacy of those reform proposals. Some proposals have focused on the identity of the reformer, arguing that Congress — not the courts — is responsible for enacting changes to the qualified immunity doctrine, on account of Congress's superior ability to gather empirical data and its direct political accountability to the public.[225] Setting aside the question of the manner through which to reform the doctrine, the question becomes which of myriad reforms proposed in the literature is appropriate. At the extremes, commentators have urged policymakers not to reform the doctrine at all; they argue that — notwithstanding the weaknesses articulated in the scholarly literature — the current doctrine strikes a fair balance between hard-to-reconcile philosophical differences with respect to the liability of governmental actors.[226] Other scholars take the opposite view. They argue the qualified

[224] Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring). Justice Thomas's concurrence clarified that he does not believe that the qualified immunity doctrine is consistent with an originalist interpretation of the constitution. In light of Justice Thomas's and Justice Sotomayor's comments, commentators noted that several qualified immunity cases in which a petition for certiorari had been filed — including Shaniz West's case — had been consistently carried over from each month's conference during the Court's 2020 term without a disposition, suggesting that the Court might decide to grant certiorari to at least one of those cases and schedule it for oral argument during the October 2020 term. Surprisingly, however, the Court denied certiorari in all eight cases at the end of the Court's October 2019 term. *See* Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (declining to reconsider the doctrine over Justice Thomas's dissent); *see also* Simmons, *supra* note 6.

[225] *See, e.g.*, Nielson & Walker, *Qualified Immunity and Federalism*, *supra* note 25, at 236 n.37 (advocating for legislative rather than judicial reform of qualified immunity and suggesting that Congress could limit immunity for some types of officers, allow consideration of officers' subjective intent, or define what "clearly established" law means); *see also* Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S.U. L. REV. 283, 283 (2019) (arguing that Congress rather than the courts should change or abolish qualified immunity); Christopher J. Walker, *Legislating away Qualified Immunity in Section 1983*, YALE J. REG.: NOTICE & COMMENT BLOG (June 24, 2020), https://www.yalejreg.com/nc/legislating-away-qualified-immunity-in-section-1983/ [https://perma.cc/EFK7-6JNU] (discussing three legislative proposals).

[226] *See, e.g.*, Rosenthal, *supra* note 25, at 551 (arguing that the qualified immunity defense discourages "plaintiffs' lawyers from bringing a wide variety of novel damages claims of questionable merit, and it also minimizes the costs that would be incurred by

immunity doctrine should be eliminated in its entirety because (1) the minor reforms proposed in the scholarly literature would do little to provide relief to undercompensated plaintiffs who allege meritorious claims of constitutional violations, and (2) the articulated harms to state-actor defendants if they are held liable for those violations are based on empirically false assumptions.[227] Between these extremes lies a set of reform proposals focused primarily on either classifying the types of cases in which qualified immunity would be an appropriate defense[228] or materially altering the legal standard underlying the doctrine in various ways.[229]

These reforms may increase the public's view of the fairness of the outcomes in at least some trials in which qualified immunity plays a role, but they would not meaningfully improve the public's skepticism regarding the quality of the procedures by which these cases are adjudicated. They therefore do not address an equally important aspect of

innocent third parties if public officials faced unlimited liability"); *see also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1885 (2018) (arguing against "substantively reconsider[ing] the doctrine").

[227] *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 32, at 1804 (finding that "qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments against them" and that qualified immunity is "ill-suited [in shielding] government officials from burdens of discovery and trial [because] it is very rarely the reason that suits against law enforcement officers are dismissed"); *see also* Schwartz, *Police Indemnification*, *supra* note 62, at 890 (finding that police officers contributed financially to settlements and adverse judgments in fewer than 1% of the cases sampled in the study). *But see* Rosenthal, *supra* note 25, at 551 (discussing several counterarguments to abolishing qualified immunity).

[228] Wells, *supra* note 43, at 379 (arguing that a "better approach [to qualified immunity] is to retain the basic doctrine but to identify categories of cases in which immunity should be denied, and others in which it should be strengthened").

[229] *See, e.g.*, Pat Fackrell, *A Call to Clarify the "Scope of Authority" Question of Qualified Immunity*, 68 CLEV. ST. L. REV. 1, 32 (2019) (proposing that courts impose an additional requirement on state officials to demonstrate they acted within the "clearly established scope of his authority" to obtain qualified immunity); John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 91 (2017) (advocating for an approach to qualified immunity that would require police officers to "choose the least dangerous alternative"); Silverstein, *supra* note 40, at 499 (proposing an analysis that would begin with the judge's assumption of a "constitutional violation and then weigh an objective-reasonableness factor, a subjective-standard factor, and, finally, a constitutional-development factor, which will encourage judges to determine the potential benefits to constitutional development if the case goes to trial").

the public's willingness to legitimize qualified immunity. Two procedural reforms proposed in the literature, however, do address procedural justice concerns: a requirement that (1) qualified immunity claims be adjudicated by a jury, and (2) courts explicitly rule on the underlying constitutional allegation at the heart of the plaintiff's complaint.[230]

In the first study reported in this Article, participants viewed the trial as less legitimate when the plaintiff lost in front of the jury compared to when she won, but average ratings of the trial's legitimacy remained above the midpoint of the scale, suggesting that participants were at least neutral, under those conditions, with respect to the trial's legitimacy.[231] But when the plaintiff lost — on the same facts — at the summary judgment phase on a qualified immunity theory, average legitimacy ratings fell below the midpoint of the scale, suggesting that the proceeding, under those conditions, was viewed as illegitimate.[232] Proponents of the current qualified immunity regime argue that resolving these types of claims at the summary judgment phase — before the facts of the case are fully aired in front of a jury — prevents the distraction and expense of nuisance suits against government officials as they perform their discretionary functions. These are, of course, important concerns. But the results from the experiments reported in this Article suggest that disposing of these cases before trial comes at a cost: the public's willingness to legitimize legal decisions that are resolved in this manner procedurally. Policymakers should therefore reconsider the costs and benefits — given this concern — of returning to earlier versions of the doctrine in which the reasonableness of a government official's conduct is evaluated by a jury in light of the additional costs associated with adjudicating disputes in this manner. Reasonable policymakers could decide the increased sense of dignity, respect, and voice afforded to litigants — and the concomitant increase in the perceived righteousness of the court's decision even if the decision is unfavorable to the plaintiff — is worth the additional expense of a trial, particularly in light of research suggesting that (1) concerns about the cost to defendant officials of such suits are overstated,[233] and (2) jurors do not

[230] *See, e.g.*, Schwartz, *After Qualified Immunity*, *supra* note 25, at 362 (discussing the benefits of subjecting government misconduct claims to trial by jury and requiring constitutional rulings from courts, among other reforms).

[231] *See supra* Figure 1 and accompanying text.

[232] *See supra* Figure 2 and accompanying text.

[233] *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 32, at 1804 (finding that "qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments against them").

appear to favor plaintiffs in these cases substantially more than do judges.[234]

Similarly, in light of these findings — situated in the context of social identity theory, procedural and interactional justice, and relational psychology — policymakers should consider returning to a *Saucier v. Katz* approach, in which courts are required to evaluate the constitutionality of the government official's conduct.[235] In overturning *Saucier*, the Supreme Court expressed a preference for the doctrine of constitutional avoidance, as well as concerns about (1) inconsistent precedent amongst the different federal circuits and (2) the prematurity of deciding constitutional issues before full discovery of the operative facts.[236] Scholars have criticized the constitutional avoidance doctrine as one that proverbially "kick[s] the can down the road" in terms of placing government actors on notice of constitutionally violative behavior,[237] and they have criticized as "overblown" the perceived risk of routine, unresolved circuit splits emerging in qualified immunity cases under a *Saucier* standard.[238] If however, policymakers wish to allow courts the ability to defer the resolution of at least some constitutional questions to a future case, a middle ground approach — first suggested by Professors Aaron Nielson and Christopher Walker — may preserve the courts' ability to do so without sacrificing perceptions of the doctrine's legitimacy.[239] Specifically, a body of psychology research has shown that providing a meaningful *rationale* for a decisionmaker's act, particularly when the

[234] *See generally* Reinert, *Qualified Immunity at Trial*, *supra* note 75 (reporting empirical findings suggesting that requiring trial by jury in qualified immunity cases does not necessitate a tradeoff with substantive outcomes — specifically, increased governmental liability).

[235] Saucier v. Katz, 533 U.S. 194, 201 (2001) (explaining the "sequential," two-part test).

[236] Pearson v. Callahan, 555 U.S. 223, 239-41 (2009) (overturning *Saucier v. Katz*).

[237] *See, e.g.*, Nielson & Walker, *New Qualified Immunity*, *supra* note 50, at 23-25, 64-65 (describing the argument and acknowledging that "courts appear to be finding constitutional violations at a lower rate after *Pearson*, which lends some credence to stagnation concerns").

[238] *See, e.g.*, Schwartz, *After Qualified Immunity*, *supra* note 25, at 325 (noting that a world where courts are required to evaluate alleged constitutional violations by government officials could, more quickly, create greater uniformity among the circuit courts with respect to recognizing rights: for example, that recording police activity is protected under the First Amendment).

[239] Nielson & Walker, *New Qualified Immunity*, *supra* note 50, at 2, 52-64 (recommending "that qualified immunity's procedural standard evolve . . . to require courts to give *reasons* for their exercise of *Pearson* discretion" and commending appellate opinions in which the court has done so (emphasis added)).

reasoning behind the act is not immediately obvious to others, increases the perceived satisfaction reported by those who interact with the decisionmaker and the perceived procedural justice that the decisionmaker has afforded them.[240]

Regardless of the method that policymakers choose — either requiring courts to evaluate the underlying constitutional claims in qualified immunity cases or requiring them to unambiguously explain their reasoning for declining to do so — converting the qualified immunity doctrine into an affirmative defense at a trial by jury should (1) alleviate the concern that constitutional decisions will be made prematurely, and (2) increase the doctrine's popular legitimacy by giving voice to, and respect toward, plaintiffs' constitutional claims against government officials.

It is, of course, important to note that the studies reported in this Article are the first to evaluate the effects of procedural features of the qualified immunity doctrine on its perceived legitimacy with the public. The findings from these studies should spur other empirical scholars to investigate other procedural or substantive features of the doctrine that play a meaningful role in its perceived legitimacy with the public. For example, scholars might consider evaluating the efficacy of specific reforms that have been posited in the qualified immunity literature — such as the effects of altering the operative legal standard[241] — with an eye toward examining which reforms are the most effective. A more complete body of research may persuade policymakers to adopt these reforms more readily when evaluating the benefits of reforming the doctrine against the costs of implementation.

B. Conclusion

Shaniz West could not have anticipated the destruction that resulted from the raid on her home in the late summer of 2014. But she may have anticipated the lasting effects that her case could have on the doctrine that barred her from recovering her losses. In describing her harrowing ordeal

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[240] *See, e.g.*, Ellen Langer, Arthur Blank & Benzion Chanowitz, *The Mindlessness of Ostensibly Thoughtful Action: The Role of 'Placebic' Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCH. 635 (1978) (reporting results from a classic study demonstrating the palliative and persuasive effects of providing reasons for decisions, acts, or other behaviors); *cf.* ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 3-4 (First Collins Business Essential ed., 2009) (discussing this research and noting that a "well-known principle of human behavior says that when we ask someone to do us a favor we will be more successful if we provide a reason[;] [p]eople simply like to have reasons for what they do").

[241] *See supra* note 216 and accompanying text.

with the City of Caldwell police department to her local newspaper, an emotional West clarified that her federal civil rights lawsuit is "not me having something against the police or bashing the police. This case has nothing to do with that. It's much, much more."[242]

By depriving West of a resolution on the merits of her federal constitutional claim, and preventing her from airing that claim in front of a jury of her peers — no matter the ultimate verdict — federal courts risk further delegitimizing a doctrine that has already experienced a steep decline in public support. But there are empirically supported ways in which policymakers can stem the bleeding. By appreciating the relational signals the doctrine sends to litigants and the public through the procedures via which the doctrine operates, and by seeking to maximize the extent to which those procedures signal a respect for litigants, an interest in hearing their voice, and an acknowledgment of the dignity of those who bring constitutional claims against government officials, policymakers can create a more legitimate qualified immunity doctrine.

[242] Simmons, *supra* note 6.