Short Circuit 316: Unaccountable

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Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises

SPEAKERS

Bob McNamara, Anthony Sanders, Jason Tiezzi

A Anthony Sanders 00:23

Hello, welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, March 6, 2024. And this is a special Short Circuit. Now, on this special episode, we are still talking about the federal courts of appeals. But, instead of one particular case in one particular circuit, we are talking about all the circuits at once and quite a lot of cases in them. And that's because we're talking holistically about an old friend of ours here on Short Circuit ... well, friend in a manner of speaking: qualified immunity, the doctrine that lets government officials go free from accountability when it comes to violations of the Constitution. So, some wizards here at the Institute for Justice and friends of ours came up with a way to study qualified immunity during a long period of time, specifically from 2010 to 2020, looking at thousands of cases involving qualified immunity, trying to come up with some real answers about what qualified immunity is in, how it works, what types of cases it comes up in, what types of claims, how often the plaintiff wins, how often the government official wins, what kind of people these government officials are. We're gonna have answers to so many questions you have about qualified immunity because of this recent report that we issued at the Institute for Justice. It is *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*. And we have two of the authors of this report on today. So first, a very familiar voice to Short Circuit listeners, and that is Bob McNamara, our deputy director of litigation and all-around qualified immunity slayer. Bob, welcome back to Short Circuit.

B Bob McNamara 02:44

It's great to be here. Thanks for having me.

A Anthony Sanders 02:46

Also, joining us for the first time on Short Circuit is a frequent collaborator with us at the Institute for Justice. He is Jason Tiezzi. He is a data scientist. And we'll talk about all things in

numbers for those of you interested in some of the nitty gritty of how this report got together, which is super interesting that we were able to do this, where a lot of other people have failed. And he's going to give us an overview as to how this report was put together as well. So Jason, we're very excited to have you here on Short Circuit.

J

Jason Tiezzi 03:23

Thanks. It's great to be here.

A

Anthony Sanders 03:25

So, let's start with an overview as to what we're talking about here. So, as I said, this report looked at thousands of cases over an 11-year span. Some of the top line numbers we found were that qualified immunity, as those of us in kind of the trenches with qualified immunity know but a lot of people who just casually hear about the doctrine probably will be surprised by, that qualified immunity is not just something that say protects police officers making split-second decisions. It applies to all government officials in all kinds of actions that they make. So, for example, excessive force only came up in 27% of appeals involving qualified immunity. From some of the rhetoric, you would think that's every qualified immunity case. On the other hand, the First Amendment, so freedom of speech, comes up in 18% of the cases that we looked at. So, there's lots of other findings like that that will be surprising to many people. But, before we get into that even, I'd like to start with Bob giving us an overview as to what qualified immunity is, how it works, what it is, and what it isn't for those who maybe don't have as much familiarity with the doctrine as someone who listens to Short Circuit every week. So, Bob, take it away.

B

Bob McNamara 04:59

Sure, so qualified immunity is a doctrine that says if a government official violates the Constitution, that official can only be held liable if he violated what's called a clearly established right. And what that usually means, in practice, is that you have to be able to point to a court decision holding that this specific conduct in these specific circumstances violates the Constitution. And that's frequently really hard to do, right, because the world is complicated and circumstances are often different. And so it's hard to find a previous court decision saying that exactly this thing violates the Constitution in exactly this way. And so the doctrine is controversial. There are debates about whether it makes any sense as a matter of common law, which it does not. There's a question of whether it makes any sense as an interpretation of Section 1983, which is the civil rights statute, and it does not. And so we're familiar with all of those legal arguments. But, one thing that is frustrating about kind of the policy debate about qualified immunity is, as you alluded to, Anthony, it's frequently discussed as if qualified immunity is a doctrine about the police. Qualified immunity is a doctrine about police officers making difficult split-second decisions in dark alleys where their lives are at risk. And the thing is, it's not, right? Qualified immunity is a doctrine about the Constitution. It covers all constitutional claims. And that's an argument we're used to making. I think, you know, regular listeners of the podcast are familiar with lots of qualified immunity cases that have nothing to do with the police. There is a qualified immunity case granting qualified immunity to a government social worker who groped one of his clients because there wasn't a case saying

you're not allowed to grope your clients. There was a qualified immunity case about medical regulators snooping through patient files without a warrant because there wasn't a case about that. But, anecdotes only get you so far, unless you can really talk holistically. If you want to talk about qualified immunity as a policy, which in a lot of ways, is what it is. It's not based in law. It's just courts doing policy based on what they think is a good idea. You need to figure out how the doctrine actually applies, like what are the claims that are being barred by qualified immunity? How often is one constitutional provision barred by qualified immunity versus another? How often are we talking about cases that are the police versus cases that aren't the police? And the difficulty in doing that is that qualified immunity cases are everywhere, right? This is a huge part of the federal appellate courts' dockets. There are thousands of cases, and so, I can't sit down and read thousands of cases and tell you I've read every qualified immunity case for the past decade. I can't afford to hire a bunch of contracted attorneys to do that either. And also, I don't know that I would trust the coding of a bunch of bored contract attorneys without double-checking it. And so, kind of the problem we were faced with is we'd love to be able to tell you what qualified immunity actually looks like in the field so that it's not a battle of kind of my anecdotes against your anecdotes, but there are just too many of them to sit down and count. And so, that's the problem we were faced with. And that is when Jason Tiezzi became an enormously valuable friend of mine.

A

Anthony Sanders 08:19

And, Jason, please explain that friendship from the standpoint of data science.

J

Jason Tiezzi 08:28

So yeah, I mean, I think kind of like Bob alluded to, the niche we were trying to fill here was really describing the landscape of qualified immunity appeals in the circuit courts, and there hadn't been a ton of research about that specifically. You know, there has been a lot of research previously that's focused a lot on police and excessive force. There's also been some stuff about kind of the legal rationale like sequencing and then some of the other stuff Bob alluded to, but there hasn't been a whole lot of just general descriptive what's out there, what are the defendants, what types of violations are alleged? And so that's really the niche we were trying to fill here. And, like Bob said, the big challenge is there's a lot of these cases. So, a search on Westlaw for the time period we wanted returned about 7,000 cases. That seemed pretty imposing, given our resources. I think having actually, you know, gone through the process ... So, as part of doing this study, we did hand code about 10% of those to help build and evaluate the algorithms. And I think even that 10% ended up being so much more complicated and time consuming than we could have ever imagined. I mean, I think it took us about a year and a half. We had a lot of challenges in getting people who were qualified to do it. And so I think, even afterwards, it was even more apparent to us like for our organization and our resources, it just wasn't going to be feasible to do this by hand. And so, yeah. What we basically did is we hand coded a bunch of cases. We basically used those cases to try and identify patterns and build algorithms to help read and make predictions on the remaining opinions. And, you know, one thing I would say at the start is like this is not a ChatGPT-like robot that has suddenly learned how to do lawyering or like, you know, analyze qualified immunity in detail or has any idea what it's doing. It's much simpler from a technical standpoint. You know, we're really leveraging the expertise we have at our disposal; people like Bob, people like Patrick, Anya, and Keith (who are some of our other qualified immunity

attorneys); and basically just translating that into code. And so like some of the rules that we used ... We, you know, we built statistical models. There's also some really simple rules that we used that I think would surprise people with how simple they are.

A Anthony Sanders 10:54

So, let's get into how that was built. First, just tell us when ... So, the methodology was first you had a sample. I think it was about something like 700 cases or something like that, and you had attorneys, who are thinking, breathing, living people who actually know about qualified immunity and not just, you know, any old attorney who's been doing something else, they read these cases. And then they figured out kind of certain you might call on-off switches, such as plaintiff wins, plaintiff loses, or certain buckets such as this was about excessive force or this was about the First Amendment. Tell us about some of those criteria that you were looking at for what you wanted to know happened as an aggregate in the, you know, the qualified immunity universe.

J Jason Tiezzi 11:57

Yeah. So, there's a little over 30 fields that we had our hand coders code and that we wanted to ultimately predict. Some of them were just very basic facts about it like who are the defendants, who are the plaintiffs, what was the date of the appeal? And then we kind of get into, you know, what are the types of constitutional violations? What are the types of defendants? Are they police? Are they prison officials? Are they other types of officials? What are the outcomes of the cases? You know, who wins? Was there a qualified immunity grant? Was there a qualified immunity denial? And we initially started off very ambitiously looking at like, well, can we even get into the rationale of how like, you know, was the court ruling that the right was clearly established? Was the court ruling that there was a constitutional violation alleged? And that piece we ended up having to drop from the study because that was just, I mean, it was almost impossible for our humans. And I think we'll get into that later. That was kind of one of the accidental findings. It's just like holy cow ... Like 25%, I think, of the appeals were coded by our attorneys as unclear. And so like if human coders who are experts are having trouble with it, like the machine had no chance, and we just weren't able to get the performance we wanted out of it. So, we dropped those from the study, and they aren't even included. But, that's basically, you know ... The hand coders hand coded those 30 something appeals, about 10% of all cases. And then, we basically used those to build the algorithms to find patterns and to leverage, again, the expertise of our attorneys to, you know, hopefully predict then the other 90% accurately.

A Anthony Sanders 13:32

Right. So, how you build that algorithm, I think, is a really interesting story that actually kind of relates to the episode we did a couple of weeks ago about AI and legal research. So, we're not talking about, as we predicted on that show, someday soon, you'll be able to, you know, hit Ctrl F and get a legal memo written about a specific area of law. We're not talking about anything like that. But, I think that methodology is going to be cool to dig into in a little bit. But, let's kind of skip a little bit here. So, we looked at those; the coders came up with these various things that looked like the system would be able to identify such as plaintiff wins on appeal, qualified

immunity granted, qualified immunity denied; and then we got these findings, the real meat of the study. So, Bob, as someone who's worked with qualified immunity for a while and has looked under the hood, so to speak, about how the system really works, what are some of the numbers that we came up with, and what are maybe some of the numbersthat were surprising to you, even as someone who has, you know, quite a lot of qualified immunity cases?

B

Bob McNamara 14:54

So, I think probably the biggest takeaway for me was just the extent to which the kind of popular model of qualified immunity is wrong. Like this idea that we're talking about police officers in a dark alley ... I think when most people think of qualified immunity, they think of a police officer who is being sued for excessive force. And that is what qualified immunity is for. That is what qualified immunity does. And it turns out that's about a fifth of qualified immunity cases is where it's just a police officer being sued for excessive force. So, if qualified immunity is about police officers and excessive force, if that's what it's aimed at, it misses most of the time. And on kind of the other end of the spectrum, about a fifth of the data set is cases that don't involve law enforcement or even anything law enforcement adjacent like a prison official. A fifth of the time, you're talking about mayors, social workers, code enforcement, or other kinds of government officials. And it really does underscore the breadth of constitutional claims that are brought and the breadth of constitutional claims that end up sucked up in kind of the qualified immunity maelstrom.

A

Anthony Sanders 16:07

And one thing that I found interesting was this 18% that have to do with the First Amendment. So, some of these are retaliation claims, like some that we're litigating right now at the Institute for Justice. Some of them are, you know, all manner of different First Amendment claims. Can you give us a breakdown as to how those cases work? Do they often overlap with other types of constitutional claims? Like say I give an unlawful seizure and a First Amendment claim in the in the same case.

B

Bob McNamara 16:45

So, that was actually an area where we were kind of skeptical of our initial findings, right? Like Jason came back, and he said, hey, I looked at this, and like 18% of the time, people are bringing First Amendment claims. This is way more than you expected. And honestly, the instinct was like, yeah, people are bringing First Amendment claims. But, most of those are going to be kind of gussied up excessive force claims where like the police officer punched somebody, and the plaintiff says you only punched me because I mouthed off. And so that's not really quite as exciting of a finding as you think it is. And so we went back, and we took a sample of just the First Amendment cases to see like is this, you know, you punched me in the mouth because I mouthed off? And more than half of the First Amendment claims had nothing to do with sort of that heat of the moment I mouthed off and you roughed me up. More than half the time, what the plaintiff was claiming was this sort of long-term, premeditated retaliation for protected First Amendment activity of the sort that IJ litigates. But, that seems to be honestly much more common than even I would have expected. That you have these

government officials who are far from making a split-second decision who are engaged in sort of a devious, long-term plan to violate the Constitution to the detriment of their political opponents, and they're invoking qualified immunity.

A Anthony Sanders 18:08

Now, one other very pernicious part of qualified immunity from a critic's point of view is that it massively prolongs how long civil cases last. So, if I think I've been damaged by a government official, I sue for money to make myself whole, there is a motion to dismiss where a government official can raise qualified immunity. And even if I, the plaintiff, win that, the official can appeal on a motion to dismiss standard, which basically means just looking at the complaint, no evidence. So, it could be a denial of qualified immunity, could be affirmed, or if it's thrown out, I, the plaintiff, can appeal and then maybe I'll get it reversed. So, you have that appeal, you get over that roadblock, you can, again, have qualified immunity at the summary judgment stage, which is before trial but based on evidence, essentially, for non lawyer listeners' benefit. And then, just in the same way, that could be appealed one way or the other, and then you get the trial. And even if the plaintiff wins at trial, although it sounds like it doesn't work as well as you'd expect, the government defendant can invoke qualified immunity on appeal from the trial and probably appealing on other matters at that point. So, give us a breakdown as to what the numbers show about, you know, how when qualified immunity appeals happen and how it prolongs civil rights litigation.

J Jason Tiezzi 19:44

Um, yeah, so I can take that. I mean, basically, it happens most often at the summary judgment stage of litigation, about 70% of all appeals are there, and almost never after trial. We also ... You know, I think Bob could probably talk on this a little bit more knowledgeably, but we don't have any precise data about how much discovery is happening in these specific cases. But, generally speaking, there is some discovery at the summary judgment stage. So what that basically means is that there's something like 95% of cases, when all is said and done, you know, that are not shielding the defendants from discovery, which is ostensibly one of the purposes of qualified immunity. And so I think that was also one of the things that generally we found in this study is that qualified immunity isn't particularly well-suited towards achieving its own stated goals.

B Bob McNamara 20:37

Yeah, I think that's right. That if qualified immunity is about weeding out cases early, it doesn't seem to be doing that. And our study does show that kind of the ... As litigators, a lot of what frustrates us about qualified immunity is that it just extends the duration of lawsuits, right? Like the government gets triple the number of appeals that anyone else would get. And particularly for someone who's trying to get justice, every extra month you add to the case just makes the case like more expensive and harder to do. And our study bore that out that if you look at how long the case has been going on, when it gets to the court of appeals, a qualified immunity case has been going for about 23% longer on average than the typical case that gets up on appeal. And I think, you know, and Jason will caution me that I can't make causal statements about the data he's found, but I think a good explanation for that is that you have all these

extra appeals. That a defendant who wants to drag out the case, even if they don't have very good arguments, can drag out the case much more easily because of qualified immunity. And so qualified immunity is kind of sold as this way to protect government defendants from expensive discovery and drawn out litigation, and it seems like what's happening in practice is people are taking the same amount of discovery, and the litigation is lasting much, much longer. And so we're getting exactly the opposite consequence of what we would want. And it seems to be a problem that's growing, right? Like one of the things that really struck me in looking at our study, if you sort of divide our dataset in half and look at the first half versus the second half, the total number of appellate opinions actually goes down a little bit. But the total number of opinions about qualified immunity increases by like 20% from the first five years to the second five years. So qualified immunity is becoming a bigger and bigger part of the federal appellate docket. And it's doing so because extra interlocutory appeals are just a way to slow down litigation, a way to impose more settlement pressure on plaintiffs, and a way to just avoid getting the case to final judgment, whether the claims meritorious or not. And it seems like just a wildly expensive thing that we're doing in service of something that's not actually most of the time achieving the goal that I keep being told it's designed to do.

A

Anthony Sanders 23:05

So that's something I found really interesting that just over this 11-year period, qualified immunity appeals went up that much: 20%. And it's not like qualified immunity during this period is a new thing. Maybe there's been additional awful Supreme Court cases that make it a little bit easier in some ways. But overall, it's pretty much the same beast. What sense do you get of that, Bob? Are defense lawyers just getting a little bit smarter and wilier to taking these appeals? Or maybe they wouldn't in the past? I know maybe this is a causal statement, and you can't exactly defer to the data, but what's your hunch there?

B

Bob McNamara 23:48

So, it's hard to say. I mean, one of the limitations we have is that we're looking at the the courts of appeals. We don't have data from the district courts, so we can't really tell you like are more lawsuits being filed? Are more district court decisions coming down? All we can tell you is that if you look at it from sort of the perspective of the workload of the federal appellate courts, qualified immunity is becoming more and more of the work that the federal appellate courts have to do. And I think, in part, it can be attributed to the fact that qualified immunity is a little bit random, right? Like if what we're asking is not did this violate the Constitution, but is this other case sufficiently exactly like this case to make the law clearly established, that's much more of a judgment call, right? Like five lawyers could look at a case and say, well, here's the rule from this case, and we all agree on what the rule for this case is. But they might disagree on like are these facts exactly like this other case? And so you could get a district court that says, yeah, this case is close enough. Those facts are close enough to be exactly like your facts. And another judge might disagree. And so I think you're incentivized to just kind of keep taking shots until you try to cobble together a panel that's like, well, you know, in that case, you were rummaging through files in a file cabinet. Here, you were rummaging through files on a computer. And so that doesn't really clearly establish that you can't look at that private information. And I think that incentive probably leads to a lot more litigation because the defendant only has to win once, right? The defendant only has to at one point cobble together two judges who say, you violated the Constitution, but it's not quite clearly

established. And they end the lawsuit. And I think that is going to lead to a lot more litigation because the litigation isn't about the Constitution. And it's not about the facts of the case even. It's not about whether the conduct was wrongful. It's just about exactly how closely does this jigsaw puzzle fit into this hole we have in the case law? And that's something where there's always going to be enough room for disagreement. And there's going to be enough randomness in the decisions that people are going to keep pressing this defense at every level they can and keep invoking appellate jurisdiction, sort of no matter what they think their odds of winning really are.

A

Anthony Sanders 26:16

So, I want to get to the methodology that I've been teasing the listeners with in a moment with Jason, but one other thing that hardcore fans of the federal circuit courts of appeals are going to be interested in, which of course, all Short Circuit listeners should be, is that the difference in the circuits is another thing that this study uncovered. So, one thing that is in the report is qualified immunity appeals by circuit. So that you can't exactly blame on say the circuit courts themselves, not as much. It seems to be more what's going on below and what the litigation practice in the circuit is. But then another one is the rate at which the circuits do various things in qualified immunity, such as one we have, you can find on page 21 of the report, circuit courts denying qualified immunity, which is basically the plaintiff wins and can go on with his or her case, at different rates. So firstly, just to get your take, Bob, on qualified immunity appeals by circuit, the highest is the 9th Circuit, which you'd expect. It's the most big; it's the biggest circuit by a long shot. But then there's the 6th Circuit, which I don't know if it's the second biggest in population, but if it is, it's not by much. It has a massive amount of qualified immunity appeals. And from your description in the report, it seems like a lot of those are coming from Detroit. So, what can you say about those numbers?

B

Bob McNamara 28:02

They're super striking is what I can say about them. And it is one of those things, right? Fundamentally, our goal with this report is basically it's a quantitative report, right? It's about counting so that everyone in the country who talks about qualified immunity can talk about it in the same way and understand, you know, how many of different things there are. And that is kind of what we limited ourselves to was the counting. And those numbers kind of jumped out at us as well. And you sort of ask like what the heck is going on in the federal district courts of Michigan? And I don't know the answer. It may be it's just a fluke of this 10-year period. And maybe there's something very strange going on that perhaps some other researchers want to look into. But it is true that there is this wide, wide disparity in not just how many of these cases there are among the different circuits, but in how often the circuits publish opinions, which itself has downstream effects, because remember, what you're trying to do as a constitutional plaintiff is say that a constitutional violation was clearly established. And the only way you can clearly establish the law is by pointing to a published circuit court opinion, which is, you know, itself kind of absurd, because obviously, government officials are not just, you know, religiously reading every circuit court opinion, right?

A

Anthony Sanders 29:21

That's what they do on the weekends is read their latest circuit court opinions.

B

Bob McNamara 29:24

It's the only thing that they read. They don't read their training manuals; they don't talk to their supervisor. They only read published circuit court opinions. But like beyond it being sort of a silly way of deciding what the law is, it also kind of reveals how arbitrary it is that the less often your circuit publishes opinions about the Constitution, the less clearly established law there is and the fewer constitutional rights you enjoy. And so, on the one hand, it's just kind of interesting as a fan of the federal courts to see that there are these huge, you know, as far as I can tell, unexplained differences among the circuits in volume. But there are downstream consequences to those differences in volume that actually interfere with the level of protection individual rights get in each jurisdiction in this country.

J

Jason Tiezzi 30:13

Yeah. And just a follow up too on the publication data in particular, those differences are just so striking to me, because I think that the 1st Circuit has the highest publication rate at 86%. And the 11th Circuit is 17%. I mean, that's just like night and day different.

A

Anthony Sanders 30:31

Are those in line with, you know, publishing all kinds of other cases, or are they materially different for qualified immunity cases in those circuits?

J

Jason Tiezzi 30:41

There's definitely not as much variation I think in general among the circuit courts, like for their overall publication rates, as there is in qualified immunity cases specifically. And overall, I think qualified immunity cases are actually published, you know, not at a surprisingly low rate. But again, the variation is just humongous.

A

Anthony Sanders 31:05

Yeah, the thing that really struck me as being someone who used to live and practice in Chicago, and of course, the Chicago Police Department has all kinds of problems and is always involved in civil rights litigation, is its circuit, the 7th Circuit, which I don't think, in population, is that much smaller than the 6th Circuit. It had 273 appeals that involve qualified immunity, whereas the 6th Circuit, which has Detroit and, you know, Cleveland and few others, has like three times that, 819, which I don't think it's because Chicago's general counsel, you know, forgets to appeal qualified immunity issues. But it must just show it's something there. I mean, I don't know what to put my finger on, but that is a wildly different number.

J

Jason Tiezzi 32:02

And really the Eastern District of Michigan, as you alluded to earlier, like that district, is so disproportionately large. Like it's hard to even put into context. I think one in every 20 appeals in our dataset comes, originates from that district court. It's the only district with over 300 appeals. The next closest is like 170, and it's the Central District of California. And that district has like three times as many people. So it's like the Eastern District of Michigan, like Bob said, we don't know what's going on there. But there's clearly something there. And I'd love to see some future researchers dig into that a little bit more. And one other thing I'll add too is if anyone's interested in like the circuit by circuit data specifically, you can actually go into one of the appendices, and we dump a lot of the data there that we didn't have time to go over. So I think like the 10th Circuit, interestingly enough, it doesn't jump out at you as much because I think it's a smaller circuit by population. But I think on a per capita basis, it actually has the highest rate of qualified immunity appeals, with the 6th Circuit also being up there.

A

Anthony Sanders 33:02

Interesting. Well, let's go to those appendices. Alright, so let's get really into the data.

B

Bob McNamara 33:09

This is just the worst intro. You've just lost half your audience right here.

A

Anthony Sanders 33:11

There are people tuning in right now just to hear this part. So we've talked earlier about how we had humans read about, like smart humans, read about 700ish opinions, figured out how this works. And then you had a computer program go through that and kind of learn from it. And then you set it loose on the bigger database, which is the 7,000 opinions for this time period. So Jason, explain a little bit about how that worked, what the challenges were, and why you're pretty confident in, you know, what this algorithm was then able to come up with.

J

Jason Tiezzi 33:55

Yeah. So, I mean, I think in general the thing I would probably emphasize the most, kind of cutting right to the chase and the last piece of your question there, is one of the things we really wanted to make sure we were able to do in this study is be confident about what we were saying. We didn't want to be speculating on stuff that wasn't good. And so, at the end of the day, we needed to have a way to evaluate that the algorithms were doing a sufficiently good job. And so what we basically did is we had 200 appeals that we held out, they weren't part of the algorithm development process, but we had our hand coders code them at the end of the process. So the algorithms are built, they're ready to go. We have our hand coders code these 200 appeals, and then we run those same appeals on the algorithm. The algorithm makes predictions on those appeals. And then we compare how well did the algorithm do to how well did the human coders do, and what were the discrepancies? And then, ultimately, what was the accuracy of the algorithm? And so that information is all published in one of the appendices, and I think the very short story, without boring, you know, listeners to death with all of the F1 scores and ridiculous statistics stuff like that, is I think, generally speaking, pretty good, you

know, but not everything was great. There were certainly some fields that came in below expectations. But I think what I would say is, we really tried to focus on the stuff that did good and that we could talk about with confidence. So like the First Amendment is a great example of that. So the First Amendment field, thank goodness, was one of our most reliable fields in the study, you know, over 99% accurate. F1 score was really, really good, which that's really the best way, statistically, to evaluate it. And so we could talk about, you know, First Amendment appeals with confidence, whereas we had a field for like whether there was an illegal search alleged, and that one didn't do quite as good. And so you'll notice we don't really talk about that much in this study. And we were fortunate, again, that I think a lot of the things we really wanted to talk about; publication rates, interlocutory appeals, First Amendment, excessive force claims, what types of defendants; like all of those things really performed well, where, again, without going into the nitty gritty details, like a very back of the envelope for a non technical reader, like 95% accuracy, I guess, is, you know, kind of a takeaway of what you could get. So, for most of this stuff, maybe not quite as good as a human could do, but pretty close I think. For some of the more basic fields, I think it's certainly the equivalent of what we would have gotten out of human coding.

B

Bob McNamara 36:23

The thing I appreciate is that it's quantified. Usually when you read a study that has a data set, the data set was coded by law students, and the law students have an error rate too, right? We've all met law students, they have an error rate; but the study can't tell you what it is. But Jason can actually tell me like, well, when I tell you this about this field, I'm right 95% of the time. When I say something about that field, I'm right 98% of the time. Like we're not saying it's 100% accurate, but we know the places that make mistakes. And with hand coding, you just, I guess, assume that nobody made many mistakes, or that it all comes out in the wash?

J

Jason Tiezzi 37:00

Yeah, and we definitely found out, as you reference, like the hand coding isn't perfect either. No matter. It's just really hard. It's like these opinions are complicated. And so there is an error rate always going to be associated with that, too.

A

Anthony Sanders 37:13

Was your intuition that maybe claims that are going to be more nebulous in how the court even determines whether it happened or not, you know, based on the evidence versus one that's more kind of an on-off switch, do better? Or is it not that clean a relationship in how your algorithm works?

J

Jason Tiezzi 37:38

It's complicated and depends on a lot of things. But yes, generally, if the court's not clear, the algorithm is going to have a pretty hard time, and I think, you know, one of the reasons we didn't go with a ChatGPT-like purchase is we just don't have very much data. And a lot of times, various fields like all hinge on one sentence. So like, sometimes, there's just a footnote, and

there's a sentence in it that determines whether the appeal is even relevant for our study. And so it's just like you really have to use a finely tailored rule approach that looks for very specific things. And so there's a lot of factors that go into it. But I think that's one of the reasons we didn't ultimately include like whether right was clearly established, kind of the court's rationale. Those fields were just too hard. The courts get too ambiguous. There's not enough clear language for the algorithms to latch on to. And so they just didn't work well enough. And, you know, I'm happy with what we were able to accomplish. But, you know, that's just kind of the way it shook out.

A

Anthony Sanders 38:40

And for anyone skeptical of any of these decisions, it's all there in the appendix on how this was coded and how this algorithm was built. And there's plenty of other fun little bits of data in the appendices as well. Bob, any other points you want to address about the study that people should take away from, especially those who are interested in qualified immunity reform or have litigated in the area and maybe they'd like to know a little bit more advice about how courts actually deal with qualified immunity?

B

Bob McNamara 39:22

So, I think the big takeaway for me from this study is that, in a way, it's shocking that nobody has done this before, right? Like the Supreme Court talks about qualified immunity as if it's engaged in policymaking, right? As if it says, well, we want to protect these people. We want to make sure that government officials have enough space to do their jobs without fearing burdensome discovery. Like they have policy goals, and yet, nobody's using sort of the basic tools of policy analysis to see whether those policy goals are being achieved. And I think this study is a huge step towards that of saying, okay, like you've stated your policy goals; this is what you're trying to achieve. Let's just count, let's just see how many times this is being invoked and whether it's achieving the policy. Which just, because courts aren't generally supposed to be policymaking organizations in this sense, courts aren't set up to do. And so I think we're bringing a lot of light to an issue that has had, perhaps at least in a lot of the public debates, has had more heat than light. And hopefully that sparks a more sober conversation about what we're actually trying to do with qualified immunity, whether those goals are being achieved, and exactly how much we're losing along the way that qualified immunity wasn't supposed to be targeted at in the first place.

A

Anthony Sanders 40:50

Jason, any other closing thoughts, top lines about the study, especially you as a non lawyer? Thank goodness we have a non lawyer involved to give us some perspective.

J

Jason Tiezzi 41:01

Yeah, I mean, I think it's really interesting like comparing Bob's takeaways to mine, because obviously, Bob's an expert in this. He came in with a large background and so, I think a lot of the things weren't that surprising to him. But, you know, I had a general knowledge of qualified

immunity but certainly would not classify myself as an expert like coming into this. And so I was really surprised like, wow, there's a lot of First Amendment stuff. Wow. You know, I think the arbitrariness of qualified immunity too really jumped out at me. You know, we talk about this with the different circuit populations and the different publication rates. But even just, you know, I had to read a lot of qualified immunity appeals as part of designing the algorithms and seeing how inconsistently the courts apply the clearly established standard, which was really surprising. And there's not really a metric for how to quantify that, so we didn't like put that in the study. But that really jumped out at me too, just the arbitrariness and just how it doesn't seem particularly well suited to what it's trying to accomplish overall. So, I was really surprised honestly by a lot. And again, I had lots of room to be surprised. That's the great thing about kind of ignorance going in. But I found it really kind of fascinating.

A Anthony Sanders 42:15

Well, once again, we learned that the clearly established test is not clearly established for what is clearly established law. Well, thank you both for coming on and discussing this wonderful new report. Again, it is *Unaccountable*. You can find it on our webpage at ij.org but we will put a link in the show notes so you can take a look at that. But I'd like to thank both of my guests for coming on. This has been a great conversation. And for everyone else, I hope that using this report or otherwise, all of you get engaged.