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## Foreword: The Future of Qualified Immunity

Samuel L. Bray  
*UCLA School of Law*

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## SYMPOSIUM

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### FOREWORD: THE FUTURE OF QUALIFIED IMMUNITY

*Samuel L. Bray\**

Qualified immunity is not an unqualified success. This defense, which protects officers from liability for damages unless they violate clearly established law, has attracted many critics. Some object to its weak historical foundations, while others find its policy effects to be perverse.<sup>1</sup> Yet the doctrine is shown a special solicitude by the Supreme Court.<sup>2</sup> The Court issues many summary reversals in qualified immunity cases, and the effect of these reversals is all in one direction: they protect, entrench, and extend the defense of qualified immunity. There have been calls for a reconsideration of the doctrine, including in a recent opinion by Justice Thomas;<sup>3</sup> and calls for a reconsideration of the summary reversal practice, including in a recent opinion by Justice Sotomayor joined by Justice Ginsburg.<sup>4</sup> Nevertheless, the doctrine continues its forward march, with no sign of retreat by the Court.<sup>5</sup>

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\* Professor, UCLA School of Law. I am grateful for the comments of A.J. Bellia, Katherine Mims Crocker, James Pfander, Joanna Schwartz, and Will Baude.

1 See, e.g., JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* (2016); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014). For a current summation, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*]. For a rejoinder, see Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

2 See Baude, *supra* note 1, at 84–87.

3 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment).

4 *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

5 See, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).

Nor have the critics retreated. There has been a spate of new critiques of qualified immunity.<sup>6</sup> For critics, however, negativity about the status quo is not enough. There must be some idea about what replaces qualified immunity, or how the transition should occur, or which branch of government should be the doctrine's executioner. Doctrinal criticism is always relative. Legal reform is often slow; we look and look again before we leap.

The moment is therefore right for reappraising qualified immunity, and also for careful thinking about what should replace it. This task is the burden of this special issue of the *Notre Dame Law Review*.

The task is not only timely but important. Qualified immunity is a consequential doctrine.<sup>7</sup> When a private plaintiff sues a government officer, what determines the outcome is often not a doctrine of standing or substantive liability, but qualified immunity. And to a striking degree qualified immunity brings together questions of federalism, separation of powers, the relative power of the judge and jury, the relationship of rights and remedies, the relationship of damages to equitable remedies, the strength of precedent, and the grounds and pace of legal change. The Essays in this issue are filled with insights about these questions.<sup>8</sup>

Yet when taken together these Essays also suggest something about why qualified immunity is so hard to remove. Legal scholars often speak of "incompletely theorized agreement," a term coined by Professor Cass Sunstein.<sup>9</sup> And it may seem that among the critics of qualified immunity there is an incompletely theorized agreement, an agreed conclusion even though there are radically different premises. But once the shift is made from pure critique to reconstruction, to what should come after qualified immunity, the agreement is more difficult to sustain.

Consider four different questions about which scholars writing about qualified immunity vigorously disagree. First, what would constitute a suffi-

6 See, e.g., Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. (forthcoming 2019).

7 There is evidence that qualified immunity only rarely leads to the dismissal of cases before discovery and trial, though it may in other ways change the shape of cases and their settlement value. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). Nevertheless, there is a real possibility of selection effects. That is, the case-filtering impact of qualified immunity may not be in reported cases, but in the cases that are never brought because the qualified immunity standard is so high. On the effect of qualified immunity at trial, see Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018).

8 Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018); Nielson & Walker, *supra* note 1; John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969 (2018); Reinert, *supra* note 7; Schwartz, *The Case Against Qualified Immunity*, *supra* note 1; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093 (2018).

9 Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

cient justification for the doctrine of qualified immunity? It might be a strong basis in the common law at the time Congress enacted Section 1983. Or it might be that the doctrine, though lacking a basis in the common law, is required as a compensating adjustment, in light of other changes in tort law, constitutional law, and policing practice. Or it might be that the doctrine has good effects in the present, calibrating the remedies imposed on government officers to avoid overdeterrence. These theoretical grounds of justification—the historical, the hydraulic, and the functional—can of course be combined.<sup>10</sup> Yet there is no agreement about which of these would be sufficient, even assuming it could be shown.

Second, even if there were agreement about what would theoretically suffice to justify the doctrine, there is no agreement about whether that form of justification actually exists. There is dispute about the common-law basis of qualified immunity. There is dispute about the hydraulic necessity of the doctrine. There is dispute about its policy effects.

Third, there is disagreement about how to think about the passage of time. The Supreme Court has spent several decades developing the doctrine of qualified immunity. One might think that is a strong reason to retain the status quo, and it certainly is for those who emphasize the weight of precedent.<sup>11</sup> On the other hand, a vigorous critic of the doctrine might draw the opposite lesson from the passage of time. There have been decades to get this right; the experiment has failed; it is time to give up.<sup>12</sup> Should we think of legal doctrines as experiments, as drug trials that can be canceled if the promised benefits are illusory and deadly side effects emerge? Or should we think of the law as a river, one that changes even as we change?<sup>13</sup> Is there any going back?

Finally, even if we could agree (a) that qualified immunity is a doctrine without sufficient justification, and (b) that it can and should be excised, what next? This question is deeply institutional.<sup>14</sup> Should the courts be the ones to remove the doctrine and fashion its replacement, because they made it in the first place?<sup>15</sup> That conclusion can draw support from how technical

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10 Indeed, it may be that considering one theoretical justification will drive us toward another. See Preis, *supra* note 8.

11 See Nielson & Walker, *supra* note 1.

12 See Michelman, *supra* note 8.

13 PLATO, *Cratylus*, in *CRATYLUS, PARMENIDES, GREATER HIPPIAS, LESSER HIPPIAS* 1, 66–67, § 402 (Jeffrey Henderson ed., Harold N. Fowler trans., Harv. Univ. Press, rev. ed. 1939) (“Heracleitus says, you know, that all things move and nothing remains still, and he likens the universe to the current of a river, saying that you cannot step twice into the same stream.”).

14 For explicit discussion of the question, and a conclusion in favor of courts, see Michelman, *supra* note 8. On the difficulty of reforming qualified immunity through the courts or Congress, see Chen, *supra* note 8.

15 See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 465 (2009) (calling the “Supreme Court’s invention of qualified immunity for police officers . . . as great a departure from the remedial scheme known to the Framers of the Fourth Amendment as the Court’s invention of the exclusionary rule”). For court-

the doctrines are that intersect with qualified immunity, and from the relatively greater concern that judges have with the systematicity of the law.<sup>16</sup> On the other hand, judges decide cases, which are disputes between parties. They render judgments and offer remedies, not for the nation at large but for those parties. How can one case not only excise the doctrine of qualified immunity but also address—in a judicially legitimate way—the many other moving parts that connect to qualified immunity?<sup>17</sup>

These problems of disagreement about theoretical justification, actual justification, the weight of precedent, and the mode of legal change are not unique to qualified immunity. But here the tensions seem particularly acute.

How can these disagreements be resolved? The writ system of the common law was designed to narrow each dispute to its crux, which could then be decided by the jury. But is there any way to begin to narrow the scholarly and judicial disagreements over qualified immunity? The best we can do is the Essays in this issue. These Essays show lively disagreement, candid critique, and careful refinement. The common law developed its substantive rules “in the interstices of procedure.”<sup>18</sup> Perhaps it is too much to hope that the law of qualified immunity—or whatever replaces it—will be developed in the interstices of scholarly commentary. But more illumination and understanding are not too much to hope for, and the reader of these pages will find them in ample measure.

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centric proposals, see Blum, *supra* note 8; Schwartz, *The Case Against Qualified Immunity*, *supra* note 1; Shapiro & Hogle, *supra* note 8; Smith, *supra* note 8. Most court-centric proposals assume that qualified immunity should be replaced by some other judicially developed doctrine, but there could instead be a return to greater discretion for the jury.

16 See generally Jeremy Waldron, “*Transcendental Nonsense*” and *System in the Law*, 100 COLUM. L. REV. 16 (2000).

17 Note, though, that qualified immunity in its modern form can be traced to a single case. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); see also Alschuler, *supra* note 15, at 506 (“The Warren Court approved qualified immunity, not because § 1983 incorporated a well understood historical practice, but because qualified immunity seemed like a good idea at the time.”). For contemporaneous views, critical and sanguine respectively, see Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 613 (1970); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1148 (1969).

18 HENRY S. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883).