QUALIFIED IMMUNITY:

A shield too big?

Judicial doctrine is rarely the subject of public conversation. So it was once for qualified immunity, which rested for many centuries in a kind of lawyerly tomb — largely the domain of scholars (who debated its parameters) and attorneys practicing in the state domain (who contested its contours in court). But as protests surrounding police violence against Black men and women have grown, so have questions about consequences for offending officers. One answer, as numerous media outlets found themselves explaining this past summer, is that police officers — and various other state actors — are shielded from liability unless a plaintiff can show that the officer violated "clearly established law." Now, as communities across the country wrestle with calls to radically reimagine policing, qualified immunity is increasingly a topic of debate — and a target for reform.

To help explain the nuances and practicalities of qualified immunity, we invited four distinguished thinkers to share their views on the issue: **KYLE HAWKINS**, solicitor general of Texas; **FRED SMITH, JR.**, constitutional law professor at Emory University; and **CLARK NEILY** and **JAY SCHWEIKERT**, both criminal justice analysts at the Cato Institute. Their conversation follows.

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Is qualified immunity justified as a legal doctrine?

NEILY & SCHWEIKERT: No. Qualified immunity is an unlawful doctrine, fundamentally at odds with both the text and history of the statute it is supposed to be interpreting. Qualified immunity is nominally an interpretation of our principal federal civil rights statute, now codified at 42 U.S.C. § 1983 (Section 1983). It provides that any person acting under color of state law who causes "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." This statute thus creates a cause of action against state actors who violate someone's constitutional rights. And as even the Supreme Court acknowledged in *Malley v. Briggs*,[1] "the statute on its face does not provide for any immunities."

The Supreme Court has primarily defended qualified immunity as a reflection of background, common-law immunities for government officials that were well-established when Section 1983 was passed in 1871. But this historical defense is historically inaccurate. The common law, both in the Founding Era and throughout the 19th century, did not include the sort of across-the-board defense for all public officials that characterizes modern qualified immunity.

Founding-Era lawsuits against federal agents who acted unlawfully did not allow "good faith" as a defense.[2] A clear example is the Supreme Court's 1804 decision in *Little v. Barreme*.[3] Captain George Little had captured a Danish ship during the Quasi-War with France. Federal law authorized seizure of ships going to a French port (which this ship was not), but President John Adams had issued broader instructions to also seize ships coming from French ports (which this ship was). The question was whether Captain Little's reliance on these instructions was a defense against liability for the unlawful seizure.

The Court's decision in *Little* makes clear that it seriously considered, but ultimately rejected, the very rationales that would come to support the doctrine of qualified immunity. Chief Justice John Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages"[4] — that is, even though the captain broke the law, maybe he should be immune from damages. Nevertheless, the Court held that the president's instructions could not "change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[5] In other words, the officer's only defense was legality, not good faith.

The historical record in the 19th century is a bit more complicated. There were "good faith" defenses to many common-law torts in this era, but the defense was generally only relevant when the lack of good faith was an element of a particular tort.[6] For example, an officer who made an arrest in good faith was simply not liable for the tort of false arrest at all. A forthcoming article by Scott Keller also argues that executive officers in the mid-19th century had a more general immunity for discretionary acts, unless they acted with malice or bad faith.[7]

But even if Keller is right about this history, there is strong evidence that Section 1983 — which says nothing about any immunities — did not itself incorporate this supposed general immunity. Indeed, in a 1915 decision called *Myers v. Anderson*,[8] the Supreme Court explicitly rejected the application of any good-faith defense to Section 1983 itself.

Myers involved a Section 1983 suit against election officers who had enforced a Maryland "grandfather clause" statute that violated the Fifteenth Amendment. The defendants there made exactly the sort of good-faith, lack-of-malice argument that Keller says was well established in 19th-century common law. The defendants claimed that the plaintiffs "fail[ed] to allege that the action of the defendants in refusing to register the plaintiffs was corrupt or malicious" and that "[m]alice is an essential allegation in a suit of this kind." But the Court rejected those arguments, noting that they were "disposed of by the ruling this day made in the Guinn Case [which held that such statutes were unconstitutional] and by the very terms of [Section 1983]."[9] In other words, the defendants were violating the plaintiffs' constitutional rights, so they were liable — period.

Finally, to the extent 19th-century common law included good-faith defenses for state agents, that history could not possibly justify qualified immunity, because the modern doctrine is not actually a good-faith defense. Under the "clearly established law" standard, a defendant's good or bad faith is irrelevant. All that matters is whether the facts in a plaintiff's case are sufficiently similar to the facts of prior decisions to hold that the law was "clearly established."

HAWKINS: It's true that Section 1983 doesn't say anything about qualified immunity. So it's natural to wonder: What justifies QI?

The answer lies in the Supreme Court's oft-repeated pronouncement that "Congress legislates against

the backdrop of the common law."[10] American law has limited liability for government officials' reasonable mistakes "from the earliest days of the republic,"[11] and "for good or ill, the 1800s Congresses did not always expressly enact defenses even when [they] wanted them."[12]

That's why the Supreme Court has held many times across multiple decades that the 1871 Congress, which enacted Section 1983, believed its language incorporated common-law immunity principles. The Court has recognized many times that, "[a]t common law, government actors were afforded certain protections from liability."[13] Such immunity gave officials "breathing room" to do their jobs well without "fear of personal monetary liability and harassing litigation."[14] So it's consistent with principles of textualism to conclude that even though Section 1983's text does not explicitly mention "qualified immunity," the Congress that enacted Section 1983 believed that its text imposed liability consistent with common-law principles, and the statute continued to provide this breathing room through an immunity that permitted officials to exercise their official discretion.

What exactly were the contours of the immunity legislators believed they were enacting in 1871? Again, when we look to the historical and legal scholarship, we see that although "not every officer received immunity in every case," courts commonly applied good-faith principles to limit liability for official actions.[15] Indeed, 19th-century authorities called it "well settled" that law enforcement officials enjoy a good-faith defense.[16] A 19th-century treatise explained that courts applied a "legal presumption in favor of the validity of [the officer's] official acts," giving an officer "the most lenient consideration

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consistent with the law, when it is manifest that he has acted throughout with perfect good faith, and striven honestly to do his whole duty."[17] Accordingly, 19th-century common-law sources reflect that government officials enjoyed a freestanding immunity from suit based on the performance of their official duties unless a plaintiff could show that an officer acted in bad faith.[18] Clark and Jay cite *Little* v. *Barreme* as contrary evidence, but they're overreading that case. *Little* confirms merely that there was no immunity for "clear absences of jurisdiction."[19]

The current QI doctrine generally comports with that common-law background. In 1982, the Supreme Court explained that qualified immunity turns on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law."[20] More recently, the Court restated that officials are entitled to QI unless "every reasonable official would interpret [precedent] to establish the particular rule the plaintiff seeks to apply," placing "the constitutionality of the officer's conduct 'beyond debate.'"[21]

SMITH: This question could and should be viewed through multiple lenses: doctrinal, sociological, and empirical. First, do commonly accepted legal norms and methods provide sufficient support for qualified immunity? Second, does the doctrine command sufficient respect from the general public? Third, do qualified immunity's underlying empirical and policy premises withstand meaningful scrutiny when tested? Each yields a slightly different answer.

Doctrine. In the context of qualified immunity, neither text nor history explains the current doctrine. Section 1983 says nothing about defenses like prosecutorial immunity or qualified immunity. The text does provide some support for some degree of judicial immunity. But it is difficult to square the words of the statute with immunity for other officials. However, as scholars like William Baude and James Pfander have shown, there is also not a robust historical common-law tradition that matches up with the extant metes and bounds of qualified immunity.[22]

So we are left, then, with precedent. There is significant precedential support for the doctrine of qualified immunity, text and history notwithstanding. The case of *Harlow v. Fitzgerald* — which ▶

initially articulated the current doctrine — remains the law.[23] From a legal standpoint, then, it could be said that the doctrine is "justified" in the sense that lower courts are bound by it, and the United States Supreme Court would have to overturn its prior precedents to meaningfully revisit the doctrine.

Sociological legitimacy. Legitimacy is a continuum, rather than a binary. At one pole on the continuum lies what Richard Fallon has called "ideal" legitimacy — where the public optimally supports, and complies with, a legal command. At the other pole is illegitimacy, where the public's faith and support in a doctrine, command, or institution slips to a crisis level. As Tom Tyler, Tracey Meares, and Monica Bell have shown, a community's sense of procedural injustice can facilitate such a crisis of faith — that is, a deep belief that the system is rigged.[24] And, as I have argued elsewhere, when a "sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness."[25]

In light of the recent protests against police brutality across the country, there can be little doubt that large segments of the citizenry believe there is insufficient accountability for lawless acts committed by the government. Notably, the eradication of the doctrine of qualified immunity has emerged as one of the potential policy proposals to come out of that protest movement. Multiple legislators from both parties have suggested legislation to revisit the doctrine. And if we care about maintaining the public's trust in the efficacy of our constitutional checks, the doctrine of qualified immunity is surely one that deserves a close

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second look. This is especially true given that the public did not create the doctrine through a democratically accountable body in the first place.

Policy justification. The current doctrine attempts to balance two competing interests. On one hand, it is important to deter unconstitutional conduct. On the other, it is important not to deter constitutional conduct. Qualified immunity, the theory goes, provides a buffer zone, lest governmental officials fear getting too close to the line that demarcates constitutional and unconstitutional conduct.

I suppose at some point we should ask, however, how many unremedied unconstitutional killings we are willing to tolerate in order to maintain a proverbial buffer zone for officers to act without fear of personal liability. We must also ask whether, in light of local governments' indemnification of officers, the doctrine's premise that officials will unduly fear individual liability is well-supported. Different people will have different answers to both of these questions. Tolerance for rights-remedies gaps varies, among

commentators and courts alike. And surely officers care whether they have judgments against them, even if they do not ultimately pay out of pocket. But it does strike me that both of these variables (tolerance for unremedied lawlessness, and views about the risks of individual liability) should be periodically reassessed in light of the available empirical evidence.

What is the role of stare decisis in re-evaluating the doctrine?

NEILY & SCHWEIKERT: The Supreme Court has made clear that while stare decisis is a "vital rule of judicial self-government," it "does not matter for its own sake."[26] Rather, the principle is important precisely "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'"[27] The rule therefore allows the Court "to revisit an earlier decision where experience with its application reveals that it is unworkable."[28] Qualified immunity — especially the "clearly established law" standard — is a textbook example of an unworkable doctrine.

First, the "clearly established law" standard is inherently amorphous and unprincipled. Lower courts remain persistently confused and divided over how to apply it because there is simply no way to define with precision "how similar" the facts of prior cases must be to hold that the law is "clearly established."

Second, the Supreme Court itself has repeatedly rejected the idea that stare decisis should preclude reconsideration of qualified immunity, as the Court has made major revisions to the doctrine over the years. For example, in the 1967 case *Pierson v. Ray*,[29] the Court first allowed for a good-faith defense to suits under Section 1983,

despite having rejected the existence of any such defenses half a century earlier in *Myers v. Anderson*. Then in 1982, *Harlow v. Fitzgerald*[30] created the "clearly established law" standard, which replaced the requirement that a defendant have an actual good-faith belief in the legality of their conduct. And in 2001, *Saucier v. Katz*[31] created a mandatory sequencing standard, requiring courts to first consider the merits and then consider whether a right was clearly established. But it was overruled just eight years later in *Pearson v. Callahan*,[32] which made that sequencing optional. It would be a strange principle of stare decisis that permitted modifications only as a one-way ratchet in favor of greater immunity — which is exactly what the Court has done so far.

HAWKINS: The QI doctrine is consistent with Section 1983's text and common-law background. But even if it weren't, the doctrine of stare decisis precludes a judicial overhaul. QI has been around in its current form for decades. It has been applied by lower courts thousands of times. Disrupting such a long-standing and frequently applied area of law requires special justification — and QI's opponents don't meet that burden. Statutory stare decisis "carries enhanced force" because "unlike in a constitutional case, critics of [the] ruling can take their objections across the street, and Congress can correct any mistake it sees."[33]

That hasn't happened here. QI's critics point to examples of times when they believe it was misapplied. But Congress doesn't seem concerned — or at least, not concerned enough to do something about it. Congress could overhaul or abolish QI tomorrow simply by amending Section 1983. In fact, while QI's critics have attacked the

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doctrine for years, Congress has occasionally updated Section 1983 and related laws without addressing QI. If anything, that suggests Congress is aware of the Court's precedents and approves of QI.

Stare decisis is especially strong here, where individual states can effectively eliminate QI within their borders if desired. For example, Colorado recently enacted a state law that provides a cause of action analogous to Section 1983 in state courts, and it expressly bars a qualified immunity defense to that action. Iowa's Supreme Court has adopted a more plaintiff-friendly standard for lawsuits against police officers. Because both state legislatures and state courts have tools to extend liability to officers within their borders, the United States Supreme Court should be especially hesitant to impose a one-size-fits-all solution like abrogating qualified immunity.

Finally, in order to overrule precedent about statutes, the Supreme Court would have to conclude that the precedent is wrong and unworkable.[34]

QI is neither. For one thing, the doctrine is largely correct as an original matter, for the reasons set out above. The Supreme Court doesn't overturn thousands of cases decided over the course of 40 years unless those cases are fundamentally wrong. What's more, there's little evidence that QI is unworkable. Courts have consistently and fairly applied QI thousands of times. QI's detractors point to isolated examples where the doctrine produces results that seem unpalatable or unjust. But every legal rule produces hits and misses. For example, a world without immunity would result in some cases where plainly innocent officers personally face large money judgments awarded to undeserving plaintiffs. When it comes to QI, the fact that such a massive sample size produces a small handful of questionable outcomes is proof of doctrinal efficacy, not failure. And once again, even if I'm wrong about that, there is a branch of government — Congress — whose job is quite literally to fix public-policy problems caused by federal statutes.

SMITH: Stare decisis is likely the best argument for maintaining the doctrine. But the stare decisis argument is far from impervious to thoughtful review. First, as noted, legislative bodies (Congress and state legislatures) are among the sites where qualified immunity is being revisited. Congress is not bound by the Court's statutory rulings in this context. It is free to amend Section 1983 if it believes the Court's balance is misguided. Indeed, it has done so before; in the mid-1990s, Congress included a limited form of judicial immunity for the first time, as a means of overturning a Supreme Court precedent in that area.

Second, we tend to think of precedent and stare decisis as providing a ▶

stable set of norms that the public can rely upon. However, reversing qualified immunity does not readily evoke concerns about upending foundational or standard practices. State officials presumably do not have an interest in engaging in unconstitutional or unlawful conduct without accountability. As the United States Supreme Court expressed in *Monell v. Dep't of Soc. Servs.*, when it overturned precedents that made it impossible to sue cities under Section 1983, "[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision."[35]

Is the doctrine of qualified immunity judicially administrable?

NEILY & SCHWEIKERT: No. Aside from the obvious moral problem of denying justice to victims whose rights have been violated, qualified immunity has also proven unworkable as a doctrinal matter.

First, the "clearly established law" standard created in *Harlow v. Fitzgerald* has proven hopelessly malleable and indefinite, because there is simply no objective way to define the level of generality at which it should be applied.[36] Since *Harlow* was decided, the Court has issued dozens of substantive qualified immunity decisions that attempt to hammer out a workable understanding of "clearly established law," but with little practical success. On the one hand, the Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality,"[37] and has stated that "clearly established law must be 'particularized' to the facts of the case."[38] But on the other hand, it has said that its case law "does not require a case directly on point for a right to be clearly estab-

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lished,"[39] and that "general statements of the law are not inherently incapable of giving fair and clear warning."[40]

How to navigate between these abstract instructions? The Court's specific guidance has been no more concrete — it has stated simply that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'"[41] The problem, of course, is that this instruction is circular — how to identify clearly established law depends on whether the illegality of the conduct was clearly established.

Second, under *Pearson v. Callahan*,[42] lower courts are allowed to dismiss Section 1983 claims because the law is not "clearly established" without actually deciding whether the plaintiff's rights were violated in the first place. This practice not only denies justice to the victim in that particular case, but it also stagnates the development of the law going forward. After all, if courts refuse to resolve legal claims because the law is not clearly established, then the law will never become clearly established.

One of the best examples of this legal "stagnation" is the sluggishness with which federal courts have come to recognize the First Amendment right to record police officers in public. Although the Supreme Court has yet to weigh in on this subject, every cir-

cuit court to address this issue on the merits has found that there is, in fact, such a right. But in the Third and Fourth Circuits, this right has long gone unprotected, precisely because these courts granted qualified immunity to officers who arrested people for exercising this right, without ruling on the merits question.[43] And the Third Circuit even granted qualified immunity to officers in a second right-to-record case, on the grounds that, naturally, the right-to-record had yet to be clearly established in that circuit, so "it was not unreasonable for the officers to regard their conduct as lawful."[44]

HAWKINS: The large sample size of uncontroversial results suggests that QI is working as well as can be expected of any legal doctrine. That's not to say qualified immunity is flawless — it isn't. After trying the critics' way for eight years — requiring lower courts to first see if there is a constitutional violation before determining if an officer is immune — the Supreme Court permitted lower courts to address immunity first in *Pearson*. QI's detractors (like Clark and Jay) argue that because too many courts take the quick fix of QI, important constitutional questions go unresolved. But even if *Pearson* contributes to "stagnation," that's not an argument to abolish QI. That tail-wags-dog argument overlooks the fact that if stagnation is a problem, it is *Pearson* — not QI — that is the culprit. The easy and obvious fix would be to revisit *Pearson* and require lower courts to decide constitutional questions before deciding whether to grant QI. (That was the rule for years under *Saucier v. Katz.*[45])

In any event, if a plaintiff is worried about an ongoing violation of his rights, he can seek prospective injunctive relief. QI bars retrospective

liability; it's no shield against an ongoing or future harm.

SMITH: The doctrine is governed by an articulable standard, but that standard is unevenly applied. As a study by Reuters recently found: "In an analysis of 435 federal district court rulings in excessive force cases from 2014 to 2018 in California and Texas, the two most populous states, judges in Texas granted immunity to police at nearly twice the rate of California judges — 59% of cases, compared to 34%."[46] This disparity is concerning, and it suggests that the qualified immunity standard might be more rudderless than it appears on the surface.

What does empirical data tell us about the efficacy of qualified immunity?

NEILY & SCHWEIKERT: Two of the major policy arguments raised in defense of qualified immunity — especially in the law enforcement context — are (1) that the threat of massive personal liability for good-faith mistakes will deter people from becoming police officers, and (2) that qualified immunity is necessary to combat the threat of "frivolous" lawsuits, because it will allow for marginal cases to be quickly dismissed. Whatever the merits of these arguments in the abstract, however, empirical data demonstrates that qualified immunity fails to satisfy either of these goals.

First, even today, police officers are nearly always indemnified for any judgment or settlement in Section 1983 suits. Professor Joanna Schwartz demonstrated in a 2014 article that governments paid approximately 99.98 percent of all dollars that civil rights plaintiffs recovered in lawsuits against police officers.[47] Therefore, the immediate effect of eliminating qualified immunity would not be to subject individual defendants to massive personal liability, but rather to ensure that victims of unconstitutional misconduct obtain a remedy.

Second, qualified immunity almost never results in the early dismissal of lawsuits, frivolous or otherwise. A 2017 study by Joanna Schwartz examined all Section 1983 claims brought against law enforcement officials in a sample of five federal judicial districts.[48] Out of a total of 979 cases in which qualified immunity could, in principle, be raised, only seven (0.6 percent) were dismissed because of qualified immunity prior to discovery. Courts were much more likely to dismiss cases based on qualified immunity at the summary judgment stage. But even at summary judgment, those courts dismissed only 31 (2.6 percent) total cases. In other words, notwithstanding qualified immunity's purported value in sparing defendants from having to litigate non-meritorious cases, the doctrine almost never achieves this intended goal.

HAWKINS: QI's detractors often claim that QI unjustly shuts down meritorious claims without any benefit. But new research indicates otherwise. One recent analysis found that "qualified immunity bars only a small fraction of cases," as opposed to failure on other grounds.[49] And these criticisms of course ignore the converse point: Immunity protects countless officers from meritless lawsuits arising from the regular course of their duties.

QI's detractors also claim that QI doesn't actually reduce litigation burdens for public officials. As an initial matter, "it is difficult to identify the number and potential costs associated with cases that are never filed because of a potential qualified immunity defense."[50] But in any event, there's little doubt that QI serves its intended role of shielding public officials from litigation regarding their good-faith actions. One scholar notes that cases are "declining" "because the cost of litigating qualified immunity outweighed the likely financial rewards, and because the factual allegations had not previously been ruled unconstitutional."[51]

Finally, the evidence of the kind of stagnation that the QI detractors complain about is "equivocal."[52] "Even after *Pearson*, courts reach the merits in the overwhelming majority of qualified immunity cases (81.1 percent, 80.5 percent, and 74.3 percent of cases in the three studies)."[53]

SMITH: Joanna Schwartz is the nation's leading empiricist when it comes to qualified immunity, and interestingly both of my fellow debaters cite her work. I agree with Clark and Jay that among her most important finds are that when officers are found liable, the resulting judgments are almost always paid by the city by means of indemnification. Much of qualified immunity doctrine is rooted in assumptions that officers will be deterred from doing their job, for fear of having to pay money damages out of pocket. But in reality, officers do not pay, even when they are found individually liable.

Second, Schwartz has also shown that qualified immunity is not raised in most situations in which officers are permitted to raise it as a defense. This empirical reality could be invoked to sustain a range of policy outcomes — some for, and some against, qualified immunity. But it does tend to suggest that eradicating qualified immunity would not represent the kind of seismic shock to the legal system that is sometimes assumed. ▸

The qualified immunity discussion usually focuses on the police context. How does it apply to other kinds of officials, and what do those cases illustrate about the doctrine?

NEILY & SCHWEIKERT: Civil rights suits against prison officials, much like suits against police officers, are often highly fact dependent, and thus it is trivially easy to hold that a right was not "clearly established" simply because a particular case has minor factual distinctions from previous decisions. For example, in a case called *Allah v. Milling*,[54] the Second Circuit granted immunity to prison officials who kept a pretrial detainee in brutal solitary confinement conditions, all because of one supposed instance of "misconduct," where Mr. Allah asked to speak to a lieutenant about why he was being denied access to the commissary. The court unanimously agreed that the prison guards violated Allah's rights. Nevertheless, the panel majority held that the guards were entitled to immunity, noting only that "Defendants were following an established DOC practice," and no prior case had "assessed the constitutionality of that particular practice."[55]

Qualified immunity also protects public school officials who violate the constitutional rights of their students, especially their First Amendment rights. For example, in the recent case *Turning Point USA v. Rhodes*,[56] the Eighth Circuit held that it was unconstitutional for Arkansas State University to impose "free expression policies" that required students to request and obtain advanced permission before speaking anywhere on campus. But the court still granted qualified immunity to the defendants, notwithstanding the seemingly obvious unconstitutionality of these prior restraints on speech.

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HAWKINS: Section 1983 governs the liability of "[e]very person" acting "under color" of state law. That's generally been read to sweep in all kinds of state officials. Most of the media attention goes to police officers, but many other state and local officials benefit from qualified immunity as well.

Some of the most high-profile QI cases outside the police context involve teachers. In *Morgan v. Swanson*,[57] for example, the en banc Fifth Circuit granted qualified immunity to public school principals who restricted elementary students from distributing written religious materials while at school. One student proposed distributing "candy cane ink pens" to his fellow students; the pens were attached to a bookmark explaining the Christian origin of the candy cane and pronouncing that "Jesus is the Christ!"

The local principal shot down that plan, saying school districts have the right to restrict the distribution of religious messages in the classroom. The Fifth Circuit disagreed on the merits — but granted the principal qualified immunity. *Morgan* shows that QI does not stifle all development of law: The Fifth Circuit has now squarely held that school principals cannot act the way the principal in *Morgan* did — but

it let that particular principal off the hook because the law had previously been unclear. It also protected public school officials from a potentially large lawsuit. QI critics who think that repealing immunity will affect only the police often forget about these other public employees whose jobs will become more difficult without QI.

SMITH: Qualified immunity applies any time a government official is sued for money damages in her individual capacity for violating a federal right. It applies to police and all other officials acting under the color of federal or state law. For example, in *Safford Unified School District v. Redding*, the United States Supreme Court ruled that school officials who strip-searched an eighth-grade girl — based on a suspicion that the girl had ibuprofen — were entitled to qualified immunity. I believe the doctrine receives more attention in the policing context because of the life-or-death consequences. Qualified immunity has become a part of a larger conversation about reducing the number of unnecessary killings at the hands of the government.

If we should change the qualified immunity doctrine, how should we do so?

NEILY & SCHWEIKERT: Qualified immunity should be abolished entirely, and both the Supreme Court and Congress have the ability and the authority to achieve this result. Qualified immunity was a judicial invention and a gross legal error, and the traditional principles of stare decisis should not preclude the Supreme Court from reconsidering its mistake. However, because qualified immunity is not a constitutional doctrine, Congress also has the ability to

eliminate qualified immunity by passing an amendment to Section 1983 clarifying that, in essence, the statute means what it says — that a state actor who violates someone's constitutional rights "shall be liable to the party injured."

While complete abolition (either by the Court or Congress) is probably the optimal solution, there are alternatives that would preserve a modified version of the defense for relatively more sympathetic defendants. Specifically, Congress might clarify that defendants are not liable when either (1) their conduct was specifically authorized by a state or federal statute, and no court in their jurisdiction had found the statute unlawful, or (2) a court in their jurisdiction had specifically found the conduct at issue to be lawful when it was committed (even if that decision was subsequently reversed). This approach would preserve immunity in those relatively rare — but more sympathetic — cases in which defendants are specifically acting in accordance with clearly established law, while still preserving liability in the mine-run of cases, which are typically very fact and context-specific and would not fall within one of these "safe harbor" provisions.

HAWKINS: In a word: Congress. QI's critics believe the doctrine is irredeemably flawed. They should persuade Congress, not the courts.

After all, only legislators, not courts, can assess the true public-policy problems QI poses and decide how best to address them. For example, QI's detractors say that QI lets rogue police officers act with impunity. But it's not obvious that QI is what's really to blame for bad cops. What about labor unions that prevent cities from firing incompetent police officers?[58] What about the doctrine of *Monell* liabil-

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ity — i.e., the principle that cities can't be held liable for their rogue officers? If *Monell* were overruled, would cities work harder to prevent the abuses that QI's detractors complain about? And in any event, QI enables police officers to react to split-second decisions without hesitating because of fear of a lawsuit. What is the acceptable trade-off between vindicating constitutional rights through money damages and decreased crime through more vigorous police protection?

Courts don't have the answers to those questions. Unelected judges are not equipped to choose which levers to pull to address a multidimensional public-policy issue spanning multiple legal doctrines and extralegal considerations.

SMITH: In my view, there are at least three approaches that, independently or together, could improve the doctrine significantly. The first is burden-shifting. Today, for a plaintiff to demonstrate that an officer violated clearly established law that a reasonable official would have known, the plaintiff must often identify a prior case, with materially similar facts, in which the relevant appellate court previously found a constitutional violation. But given that qualified immunity is a defense, one can imagine instead that the burden could be placed on the defendant to point to prior cases that reasonably supported the officer's belief that such conduct was constitutional. This approach would take seriously the important fairness concern inherent in holding someone liable for something they reasonably believed was legal, without placing Americans on impossible fishing expeditions to get justice for illegalities committed against them.

Second, we could expand the circumstances in which municipal liability is permitted. Many, for example, have advanced respondeat superior liability when officers violate the law. But short of that, we could, as John Jeffries has proposed, hold cities liable for the negligent acts and omissions of high-level officials (i.e., negligent hiring and training). We could also, as I have proposed, hold cities liable under a theory

of respondeat superior liability when there is no other remedy available at law in light of various individual immunities (like qualified immunity).

Another approach is to rely on common law defenses for various types of violations, at least until Congress dictates otherwise. This approach is perhaps most attractive to people whose biggest concern with qualified immunity is the degree to which it is untethered from basic legal norms.

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4   *Id.* at 179.
5   *Id.*
6   *See* Baude, *supra* note 2, at 58–60.
7   *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. __ (forthcoming 2021).
8   238 U.S. 368 (1915).
9   *Id.* at 379.
10 *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020).
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14 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017).
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