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### What is Scholarly Legal Writing? An Introduction to Different Perspectives (On US Qualified Immunity Doctrine)

Samuel Beswick

*Allard School of Law at the University of British Columbia, beswick@allard.ubc.ca*

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# WHAT IS SCHOLARLY LEGAL WRITING?

An Introduction to Different Perspectives (on US Qualified Immunity Doctrine)

[ASSISTANT PROFESSOR SAMUEL BESWICK](#)



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SCHOOL OF LAW**

THE UNIVERSITY OF BRITISH COLUMBIA

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## OVERVIEW



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*How do you write a law article? It turns out there is no one 'right way'. Legal problems can be analysed from different angles. Law journals are full of diverse perspectives on the law.*

*This document provides an introduction to the different types of legal scholarship that can be found in law journals. It illustrates using scholarship on the American judicial doctrine of qualified immunity, which shields government officials from legal liability for 'constitutional torts'. Qualified immunity can be analysed from the perspective of doctrine, policy, comparative law, history, economics, empirics, sociology, and philosophy. One issue; many perspectives.*

1. What is qualified immunity doctrine?
2. What types of legal scholarly analysis can be applied to help us understand the doctrine?

## Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests

The Supreme Court developed the doctrine that serves as a shield for officers. A half-century later, it is at the center of the debate over policing.



By Hailey Fuchs

Published June 23, 2020 Updated Oct. 18, 2021

WASHINGTON — Long before the death of George Floyd set off a nationwide uproar over police brutality, before protests erupted in 2014 over the death of Michael Brown in Ferguson, Mo., a 50-year-old man named Wayne Jones took a night stroll through the streets of Martinsburg, W.Va.

A police officer saw Mr. Jones walking illegally in the road that night in 2013 and asked whether he was carrying a weapon. Mr. Jones, who had a small knife, and the police got into a tussle, after which one officer accused Mr. Jones of stabbing him. Fifteen minutes later, Mr. Jones lay on the ground facedown between a stone wall and five officers, who had fired 22 bullets at his backside.



## THE DOCTRINE OF QUALIFIED IMMUNITY



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- “Qualified immunity is a judicially created doctrine that shields government officials from being held personally liable for constitutional violations—like the right to be free from excessive police force—for money damages under federal law so long as the officials did not violate ‘clearly established’ law.” — [Lawfare Blog](#)
  - Federal law permits individuals to sue *state* and *federal* government officials for money damages when they violate their constitutional rights (“constitutional torts”).
    - [Civil Rights Act § 1983](#) & [Bivens, 403 U.S. 388 \(1971\)](#).
  - These are civil lawsuits for money, *not* criminal law prosecutions.
  - Qualified immunity doctrine is a defence developed by judges in case law.
  - It applies to suits against individual officers, not government(s) themselves.
  - It is a defence to the entire lawsuit (not just immunity from paying money damages).

## RATIONAL FOR THE DOCTRINE



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- Qualified immunity doctrine attempts to balance competing values:
    - *Protect citizens*: “The importance of a damages remedy to protect the rights of citizens;”
    - *Protect officers*: “The need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority.”
- *Harlow v. Fitzgerald*, [457 U.S. 800 \(1982\)](#)
- Whether a government official is entitled to qualified immunity depends on a two-part test:
    1. First, a court must look at whether the facts indicate that a constitutional right *has been violated*,
    2. If so, a court must then look at whether that right was *clearly established* at the time of the alleged conduct.

— *Saucier v. Katz*, [533 U.S. 194 \(2001\)](#) <sup>5</sup>

## A PROBLEM WITH THE DOCTRINE



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- Supreme Court doctrine doesn't *require* lower courts to consider both parts of the test.
  - Courts can simply consider whether a “right was *clearly established* at the time”;
    - I.e. clearly established by statute or binding case law.
  - If it wasn't “clearly established,” then case dismissed. No need to consider whether “a constitutional right *has been violated*.”

— *Pearson v. Callahan*, [555 U.S. 223 \(2009\)](#)

- ...which means courts aren't ruling on constitutional rights-violations that might serve as precedents for new cases. So rights violations will continue, and officers will keep getting immunity from them so long as they're not already “clearly established”!

## AN EXAMPLE



- *Baxter v. Bracey*, [SCOTUS No.18-1287](#), 2019 (*petition for certiorari*):  
“Whether binding authority holding that a police officer violates the Fourth Amendment when he uses a police dog to apprehend a suspect who has surrendered by lying down on the ground “clearly establish[es]” that it is likewise unconstitutional to use a police dog on a suspect who has surrendered by sitting on the ground with his hands up.”
- *Petition for certiorari denied* on June 15, 2020!
  - Justice Thomas dissented and thought the case should be heard: “*qualified immunity doctrine appears to stray from the statutory text*” and “*the common-law backdrop.*”

## TYPES OF LEGAL SCHOLARSHIP



1. Doctrinal analysis
2. Policy analysis
3. Comparative analysis
4. Historical analysis
5. Economic (welfare) analysis
6. Empirical analysis
7. Critical (race, gender, poverty) analysis
8. Philosophical (right, justice) analysis



Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 *JOURNAL OF LEGAL EDUCATION* 65 (2013);  
Christopher McCrudden, *Legal Research and the Social Sciences*, 122 *LAW QUARTERLY REVIEW* 632 (2006).

## DOCTRINAL ANALYSIS



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- What is qualified immunity doctrine? How did courts develop it?
- What principles underlie the doctrine?
- How are courts applying it? In what sorts of cases? Are they applying it consistently?
- How has the case law developed over time? How might courts develop it in future?
- How well does the doctrine fit constitutional tort statutes and doctrine? How well does the doctrine fit the broader body of relevant law?
- E.g. William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF. L. REV. 45 (2018); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2018); Fred O. Jr. Smith, *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093 (2017).

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## POLICY ANALYSIS



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- Why do we have qualified immunity doctrine?
- What policy goals does the doctrine serve?
  - Vindicate citizens' rights in clear cases while not chilling police action in tough cases.
- How well does it serve those goals?
- Is the doctrine working well nor not? Could it be better? How can it be reformed?
- E.g. Brian Morganelli, *Reform of Qualified Immunity for Police Officers: A Pathway to Legislative Reform* (Institute for American Police Reform, 2021); Evan J. Mandery, *Qualified Immunity Or Absolute Impunity—The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 HARV. J. L. & PUB. POL'Y 479 (1994); Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions under 42 U.S.C. 1983*, 12 U. BRIDGEPORT L. REV. 665 (1991).

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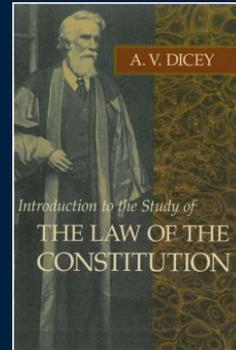
- Can we compare U.S. law to the laws of other countries? Which countries are the most compelling comparators?
  - E.g. United Kingdom, Canada, Australia, New Zealand: democratic, common law jurisdictions with shared roots in English law.
- What principles underlie the laws of comparable countries?

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*THE RULE OF LAW*

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It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals;



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- Can we compare U.S. law to the laws of other countries? Which countries are the most compelling comparators?
  - E.g. United Kingdom, Canada, Australia, New Zealand: democratic, common law jurisdictions with shared roots in English law.
- What principles underlie the laws of comparable countries? (Equality under law ....)
- Do other countries have a comparable doctrine? (No!) What do they do? See:
  - *R. v. Le*, [2019 SCC 34](#) (trespass and false imprisonment).
  - *Binsaris v Northern Territory* [\[2020\] HCA 22](#) (battery).
  - *R v. Brockhill Prison Governor, ex p Evans (No 2)* [\[2001\] 2 AC 19](#) (false imprisonment).
- How apt is the jurisdictional comparison really?

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## HISTORICAL ANALYSIS



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- Where did American (common) law originally come from? (England! Blackstone!)
- What was the state of the law at the time the U.S. Constitution was written? At the time *Civil Rights Act § 1983* was enacted? Do the Founders have anything to say about this?
- Where did qualified immunity doctrine originate? What was the historical context? What were courts doing before they started invoking “qualified immunity”?
- Is the current doctrine consistent with its historical roots? If not, what explains the change?
- E.g. David Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, *CARDOZO LAW REVIEW DE NOVO* \_ (2022); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 *STAN. L. REV.* 1337 (2021); Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 *SEATTLE U. L. REV.* 939 (2013).

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## ECONOMIC (WELFARE) ANALYSIS



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- Does the doctrine achieve the right balance to maximise social welfare?
- What impact does qualified immunity doctrine have on people’s actions?
  - Does it encourage recklessness and disincentivise officers from being careful?
  - Does it mean too few lawsuits are brought against bad officers?
- Can we model the doctrine’s impact?
- Might abolishing or amending the doctrine create a better balance of incentives and enhance social welfare? Or would it overly chill officers from taking action in tough cases?
- E.g. John F. Preis, *Qualified Immunity and Fault*, 93 *NOTRE DAME L. REV.* 1969 (2017); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 *NOTRE DAME L. REV.* 2021 (2017).

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- What can data tell us about the doctrine's impact?
  - What conclusions can we draw from a dataset of police statistics, budgets, judgments, etc?
  - What can we learn from conducting interviews with stakeholders and affected people?
- 
- E.g. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2 (2017); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2017); Colin Rolfs, *Qualified Immunity after Pearson v. Callahan*, 59 UCLA L. REV. 468 (2011).



- Who is primarily/disproportionately harmed by qualified immunity doctrine?
  - How does the doctrine affect minorities and minority communities?
  - Which sectors of society does the doctrine benefit?
- 
- E.g. Brandon Sweeney, *The Increasingly Broad Language of Qualified Immunity, Deference Towards Granting It, and the Ramifications of Racial Injustice*, 22 RUTGERS RACE & L. REV. 405 (2021); Arianna Gibbs, *The Price of Qualified Immunity*, 11 S. J. POL'Y & JUST. 98 (2017); Tabitha Johnson, *Qualified Immunity or Justified Brutality: An Examination of the Qualified Immunity Doctrine in Peterson v. Kopp*, 4 TENN. J. RACE GENDER & SOC. JUST. 261 (2015).



- What are our rights and duties in society?
  - How does jurisprudence and legal theory inform our understanding of the doctrine?
  - How does qualified immunity doctrine advance or undercut the pursuit of justice?
- 
- E.g. Melissa Armstrong, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107 (2004); Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV 261 (1995).



- A scholarly **article** might address one or combine a few of these scholarly approaches (but not all) to present a robust thesis.
  - It would take a (lengthy) **book** to address many of these approaches to qualified immunity doctrine in a single piece of work.
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- E.g. Aziz Z. Huq, *The Collapse of Constitutional Remedies* (Oxford University Press, 2021).



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