The Trouble with Qualified Immunity

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William Baude, *Is Qualified Immunity Unlawful?*, 106 **Cal. L. Rev.** (forthcoming 2018), available at SSRN .

Is Qualified Immunity Unlawful? This is the ambitious question that Will Baude tackles in a forthcoming article in the *California Law Review*. When plaintiffs file damages suits under § 1983 against government officials who violate federal rights acting "under color" of state law, they must overcome the defense of qualified immunity. That doctrine protects government officials from damages claims unless they violate clearly established law that a reasonable person would have known. The Court has emphasized that this is a high standard, protecting all but the "plainly incompetent and those who knowingly violate the law."

While qualified immunity appears nowhere in § 1983's text, its lawfulness tends to go unchallenged both in scholarship and in cases. Until now. Baude's article interrogates the legal justifications for qualified immunity and finds them wanting. Neither text nor history is sufficient to sustain this highly consequential doctrine. He begins with the text, stressing the statute's language, which purports to hold "[e]very person" liable who violates federal rights while acting under color of state law.

Baude's article does not end with the seemingly unambiguous language of the statute, however, which would leave it a short article indeed. Instead, he catalogues and rebuts other proffered legal justifications. For example, on the rare occasions that the Court has explained the foundations of the doctrine, it has sometimes either asserted or implied that qualified immunity is a common law doctrine that was implicitly or presumptively incorporated into § 1983 when it was enacted in 1871.

Baude accepts that a common law backdrop can sometimes help us understand the proper scope of a statute. The problem is that the common law backdrop does not support qualified immunity, especially as the doctrine currently operates. In *Little v. Barreme*, the Supreme Court rejected a broad immunity for civilian government officials who violated the law. And in the decades after § 1983's passage, courts rejected the notion that state and local officials who violate the Constitution should be immunized from liability. In *Myers v. Anderson*, the Court held that any claim of such immunity was "fully disposed of … by the very terms of" § 1983.

To be sure, Baude acknowledges that some common law doctrines protected government officials from suit under limited circumstances. Acting in "good faith" sometimes served as a shield to liability. But to the extent that a defendant's good faith could doom a plaintiff's suit, this was because bad faith was an element of a specific tort, such as false arrest. "Good faith" was not a broad protection that applied regardless of the underlying alleged violation. What is more, qualified immunity today is an objective standard that applies even when a defendant acts in subjective bad faith. In that way, the qualified immunity defense as it is currently understood outpaces the common law good faith doctrine.

Justice Scalia proposed an additional argument in a dissenting opinion in *Crawford-El v. Britton*. He contended that § 1983 had been interpreted too broadly, to reach officials who violated state law, because it seemed implausible that a person could violate state law while acting under the color of state law. Qualified immunity provided a remedial correction for this fundamental defect in the Court's § 1983 jurisprudence. Baude dispatches this argument persuasively, relying in part on the work of scholars

such as Steven Winter. “Under color of” is a legal term of art that long has encompassed not only individuals acting with authority, but also those acting with the pretense of authority. Section 1983’s breadth is a matter of congressional choice, so the statute does not need some deep, broad extratextual remedial correction like qualified immunity.

Finally, Baude makes plain that qualified immunity cannot be justified by the rule of lenity, because qualified immunity is much more extensive. Dueling cases from various circuits can help demonstrate that the law is sufficiently unclear to shield a government official from civil liability, while the same division of authority does not provide a basis for lenity in criminal law.

Baude’s piece is, almost self-evidently, a bold and important contribution that emerges at a timely moment. The Court in recent decades has often taken a formalist tone with respect to legal doctrines that outpace statutory and constitutional text. And yet, during the same era, the Court has routinely invoked qualified immunity to protect police officers and other government officials, often reversing lower courts that find the doctrine inapplicable. So what do we make of a doctrine that is not justified by traditional modes of interpretation and that routinely blocks accountability? At least one Justice has acknowledged the need for the Court to confront this question. In a concurring opinion this past term in *Ziglar v. Abbasi*, Justice Thomas cited to Baude’s manuscript and suggested the Court should reconsider its qualified-immunity jurisprudence in an “appropriate case.” In the absence of new justifications for the doctrine that have not yet emerged, it is time to revisit qualified immunity’s scope, its existence, or both.

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