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It Is Time to Revisit Qualified Immunity

With recent incidents of police misconduct and a renewed debate on the role of policing and police tactics, the doctrine of qualified immunity for police officers has come under scrutiny.

By David Coyle

With recent incidents of police misconduct rocking the nation and a renewed debate on the role of policing and police tactics, the doctrine of qualified immunity for police officers has come under scrutiny. Under section 1 of the Civil Rights Act of 1871, individuals can sue police officers and other government officials for monetary damages when their federally protected civil rights are violated. Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983). The doctrine of qualified immunity shields officers and other government officials from these suits when their conduct does not violate "clearly established" rights. The issue, though, often becomes this: At what level of specificity should "clearly established" law be defined?

On June 15, 2020, over a dissent from Justice Clarence Thomas, the U.S. Supreme Court decided not to grant certiorari on several cases asking them to revisit the qualified immunity doctrine. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari). The ball has now been passed to Congress, where some members are eager to take up a debate on changes to the doctrine. If Congress does not act, the Supreme Court should revisit qualified immunity, as it has diverged significantly from Congress's intent in enacting the Civil Rights Act of 1871.

The Problem with Qualified Immunity

A recent case before the U.S. Court of Appeals for the Fourth Circuit highlights part of the problem. As the nation reeled from the death of George Floyd at the hands of the police, the Fourth Circuit was confronted with the question of whether five officers should be entitled to qualified immunity for "shoot[ing] a man 22 times as he lay motionless on the

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ground." *Estate of Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020). The district court had granted summary judgment for the officers on qualified immunity grounds, reasoning that the officers' conduct did not violate "clearly established law." *Id.* at 667. If you think the district court's conclusion cannot possibly be correct, you are not alone. The Fourth Circuit reversed the district court's ruling, finding that viewing the evidence in the light most favorable to the plaintiff, the officers were not entitled to qualified immunity. *Id.* at 668. The Fourth Circuit explained its reasoning, noting that at the time of the incident, "it was clearly established that law enforcement may not constitutionally use force against a secured, incapacitated person—let alone use deadly force against that person." *Id.* at 671.

The point of drawing attention to this case is not to say that the lower court's decision should be criticized as completely unfaithful to precedent on qualified immunity. In fact, it is not inconceivable to think that the Fourth Circuit's ruling could be reversed by the U.S. Supreme Court, and the district court's ruling reinstated. This is because Supreme Court precedent has increasingly required clearly established law to be found at a very high level of specificity. *See, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Justice Sotomayor dissenting and criticizing the majority for in essence requiring "a factually identical case to satisfy the 'clearly established' standard"); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1246–48 (2015) (highlighting the Court's move to require clearly established law to be defined at a high level of specificity). In other words, unless there is a prior case with very similar facts in which officers were found to have committed misconduct, it is quite likely that officers will be entitled to qualified immunity for actions that violate someone's constitutional rights.

The problems with the doctrine of qualified immunity in its current form are manifest. Officers that violate individuals' civil rights go unpunished and undetected. Civilians that have had their rights violated go uncompensated and unheard. Community and police relations break down even further. As the late Ninth Circuit judge Stephen Reinhardt starkly put it five years ago, the Court's current qualified immunity precedents "risk[] turning federal judges from protectors of the Constitution into unreasoning deniers of worthy claims of constitutional rights." Reinhardt, *supra*, at 1254. The result, Judge Reinhardt warned, "is an unnecessary and unjust process that values other concerns of far less importance over the constitutional rights of individuals—rights that lie at the heart of

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our judicial system." *Id.* Or as District Judge Carlton W. Reeves observed before granting qualified immunity to an officer that had unconstitutionally searched the plaintiff's car after lying to the plaintiff about receiving a report that the car contained 10 kilos of cocaine, "the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine." *Jamison v. McClendon*, 2020 WL 4497723, at *3 (S.D. Miss. Aug. 4, 2020).

If the Court's current qualified immunity jurisprudence really is what Congress intended when it enacted the Civil Rights Act of 1871, then the problem with qualified immunity would be one of policy and not of law. But, in fact, there is good reason to believe that the Court's current qualified immunity jurisprudence has strayed far from what Congress intended.

How We Got Here

In understanding the Court's qualified immunity jurisprudence, it makes sense to begin with the text of section 1983. After all, qualified immunity is a defense to actions under that statute. In pertinent part, section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

While there is nothing in the text of section 1983 that speaks of "clearly established" law or "qualified immunity" or defenses, the Court has read section 1983 "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Thus, immunity is "available under the statute if it was 'historically accorded the relevant official' in an analogous situation 'at common law,' . . . unless the statute provides some reason to think that Congress did not

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APPELLATE PRACTICE
SECTION OF LITIGATION

Summer 2020, Vol. 39 No. 4

preserve the defense. . . .” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

Therefore, in *Pierson v. Ray*, the Court held “that the defense of good faith and probable cause” was available to officers for an unconstitutional arrest because that defense was “available to the officers in the common-law action for false arrest and imprisonment.” 386 U.S. 547, 557 (1967). As pointed out by Professor William Baude, “One might . . . have expected this reasoning to support a subjective defense of good faith, but the Court has since transformed it into an objective analysis of ‘the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.’” William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 53 (2018).

Furthermore, in *Harlow v. Fitzgerald*, the Supreme Court held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” 457 U.S. 800, 818 (1982).

In contrast, in *Hope v. Pelzer*, it looked as if the Court would allow clearly established law to be defined at a modest level of generality. There, the Court stated that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” 536 U.S. 730, 741 (2002). The Court also noted that it was rejecting a requirement that previous cases be “fundamentally” or “materially” similar. *Id.*

However, any optimism that *Hope* would allow clearly established law to be defined at a more general level of specificity was quickly dashed. As alluded to earlier, the Court has now drifted toward requiring greater and greater specificity in defining clearly established law. *See* Reinhardt, *supra*, at 1247 (noting that “*Hope* was short-lived”).

Time for Court Reexamination of Qualified Immunity

Many jurists and legal commentators have criticized the high level of specificity required by the Court in defining clearly established law. However, more recently, there have been calls to reexamine the doctrine more fundamentally.

In particular, Justice Thomas has called attention to the fact that the Court’s current approach to qualified immunity has strayed greatly from the intent of Congress in enacting the Civil Rights Act of 1871. As Justice Thomas explained in his 2017 concurring opinion

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in *Ziglar v. Abbasi*, because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act." 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment). In other words, even if one accepts that section 1983 should be read to include the common-law immunities that existed when the act was enacted, the current inquiry focusing on clearly established law is in no way grounded in that common-law backdrop. Thus, the Court's "qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that [the Court has] previously disclaimed the power to make." *Id.* In fact, as Justice Thomas observed, the Court in past decisions has even explicitly acknowledged that the "clearly established" qualified immunity standard is designed in an attempt to balance competing values. *Id.* at 1872 (noting that the Court has acknowledged "that the 'clearly established' standard is designed to 'protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties'"). But this kind of balancing, as Justice Thomas recognized, is the realm of "Congress, not the Courts." *Id.*

Among other legal voices, Professor Baude has joined Justice Thomas in calling attention to the fact that the Court's qualified immunity jurisprudence is not rooted in Congress's intent. Baude, *supra*, at 88. In a *California Law Review* article entitled *Is Qualified Immunity Unlawful?*, Professor Baude answers that question with a resounding yes, with an analysis along lines similar to those advanced by Justice Thomas.

However, given that the Court's "clearly established" law standard has been with us for several decades now, the more salient question may be, "Given that qualified immunity is unlawful, should the court revisit it?" There are compelling reasons to think that it should.

First, as alluded to by Justice Thomas and Professor Baude, the Court's "clearly established" law standard for qualified immunity is not rooted in Congress's intent in enacting the Civil Rights Act of 1871. The critique is not simply that the Court got it wrong in interpreting the intent of Congress but rather that it did not even try. The Court's current qualified immunity jurisprudence represents a judge-made defense that was never contemplated by Congress. This error will continue to produce bad decisions if the Court does not fix it. As Justice Gorsuch announced earlier this year in rejecting a stare decisis argument and overturning a nearly 50-year-old precedent: "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020).

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Summer 2020, Vol. 39 No. 4

Second, the usual concerns cautioning against abandoning stare decisis on statutory decisions are not as strong here as they are in the typical statutory construction case. This is so for two reasons:

- First, the traditional view cautions against overruling statutory interpretation precedent in part because if the Court misconstrued Congress's intent, Congress can always rewrite the statute to correct the Court's error. However, here, the Congress that enacted the Civil Rights of Act of 1871 and section 1983 are long, long gone. *See* Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 Tex. Rev. L. & Pol. 277, 279–80 (2003–2004) (pushing back against the presumption of heightened caution in overruling statutory interpretation precedent in part because "the legislature that passed the initial legislation might be long gone and the new legislature might be no better a guardian of the meaning of the original law than the new court is"). There is little reason to think that our current Congress better understands the intent of the Congress that enacted the Civil Rights Act of 1871. Moreover, there is reason to think that Congress's inaction on the issue is the result of various political factors rather than acceptance of the precedent. *Cf. id.* at 280 (noting that "legislatures do all sorts of things for all sorts of reasons" and that a "court does not have to read legislative silence as acquiescence and as a reason not to overturn" statutory precedent).
- The second reason for relaxing the presumption against overruling statutory precedent here is that the Court's jurisprudence in this area is not the typical statutory interpretation jurisprudence. In developing the "clearly established" law standard, the Court was not simply trying to interpret a statutory term. Rather, it was doing something more akin to common-law or even constitutional analysis, where the presumption against overruling precedent is not as strong. *See* Baude, *supra*, at 80–81 (highlighting that the qualified immunity doctrine is "unorthodox" statutory precedent); *Monroe v. Pape*, 365 U.S. 167, 221–22 (1961) (Frankfurter, J., dissenting) (noting that "the construction of the Civil Rights Acts raises issues fundamental to our institutions" and that "[t]his imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion," and later noting that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable").

Finally, to the extent that the Court's decisions on qualified immunity rest on policy considerations balancing "the vindication of constitutional rights" on the one hand and "government officials' effective performance of their duties" on the other hand, the facts on the ground have now changed. The ubiquitous public outcry over the death of George Floyd, resulting mass protests across the nation, and calls to defund or abolish the police entirely have made clear the urgency in a rebalancing that leads to greater accountability in policing.

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Summer 2020, Vol. 39 No. 4

If Congress doesn't have the willpower or humility to act, the Court must. As the Fourth Circuit lamented in the recent decision discussed at the beginning of this article:

> Wayne Jones was killed just over one year before the Ferguson, Missouri shooting of Michael Brown would once again draw national scrutiny to police shootings of black people in the United States. Seven years later, we are asked to decide whether it was clearly established that five officers could not shoot a man 22 times as he lay motionless on the ground. Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. *This has to stop.*

Estate of Jones, 961 F.3d at 673 (emphasis added).

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