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Qualified Immunity -- A Rootless Doctrine The Court Should Jettison

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In my previous article, I discussed the Supreme Court's near abandonment of an actual, necessary part of the Constitution, namely the Contract Clause. Contrariwise, a case that the Court should hear involves a harmful legal doctrine that it simply made up, namely "qualified immunity."

Here's the background. After the Civil War, most members of Congress were concerned that if the states had a free hand, they and their officials would often violate the civil rights of freed slaves and other unpopular groups. So Congress passed and President Grant signed the Civil Rights Act of 1871, which included this provision language (now known as 42 U.S. Code Section 1983): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any 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, or equity, or other proper proceeding for redress."

Thus, individuals whose rights were violated by police or other officials could sue them in federal court. It was supposed to deter bad actors who violate the rights of people in the course of their duties. The law says nothing whatsoever about those officials having any defenses against those suits.

Nevertheless, the Supreme Court invented a defense known as "qualified immunity."

Jay Schweikert, a Policy Analyst with Cato Institute's Project on Criminal Justice, explains here, "This doctrine, invented by the Court out of whole cloth, immunizes public officials even when they commit legal misconduct unless they violated 'clearly established law.' That standard is incredibly difficult for civil rights plaintiffs to overcome because the courts have required not just a clear legal *rule,* but a prior case on the books with functionally identical *facts."*

One legal scholar who has made an exhaustive study of qualified immunity is Professor William Baude of the University of Chicago Law School.

In his paper “Is Qualified Immunity Unlawful?”Professor William Baude explains that the Court has over time advanced three justifications for qualified immunity: “One is that it derives from a common law ‘good faith’ defense; another is that it compensates for an earlier putative mistake in broadening the statute; the third is that it provides ‘fair warning’ to government officials, akin to the rule of lenity.”

But all three justifications fail, Baude shows. “There was no such defense, there was no such mistake, and lenity ought not to apply.” And in the early Sec. 1983 cases, the Court rejected the argument that there was or should be a “good faith” defense for officials, instead applying the statute exactly as written. In the 1960s, however, the Court began to read “qualified immunity” into the law. That crack in the dike has led to the situation today where, Baude says, we have virtually *unqualified* immunity, meaning that suits against government officials almost never succeed.

The Supreme Court could, however, change the law of qualified immunity if it were to accept a Tenth Circuit case, *Pauly v. White*, which raises the issue.

On a rainy night in 2011, three New Mexico police officers received a tip about a road rage incident that had occurred on Interstate 25. That information took them to a rural house. The officers stormed into the home with guns drawn, shouting that they had it surrounded. They lacked probable cause and did not identify themselves a police.

Not knowing what dangers they faced, Samuel and his brother Daniel armed themselves with guns kept in the house. Daniel fired two shots intended to scare off the unidentified intruders. At that point, Samuel was shot dead through a window by officer Ray White.

Pauly’s father filed a Sec. 1983 suit against the police officers for the death of his son, arguing that the officers violated his rights against excessive force under the Fourth Amendment. Why shouldn’t they be liable when they failed to follow proper police procedures and thereby caused what should have been a routine matter to escalate into deadly violence?

The Tenth Circuit agreed that the officers had violated Samuel Pauly’s rights, but still shielded them with qualified immunity because there was no prior case with sufficiently similar facts and therefore their conduct did not did not violate “clearly established” law.

Notice how extraordinarily strange this is: When ordinary citizens violate a law (usually that they had no reason to think even existed, given the vast reach of the law today), they can’t escape responsibility by saying, “But we did not know that was illegal.” But when it comes to the police and other government officials, they can and do escape responsibility because the courts say, “How were they to know their conduct was illegal?”

Pauly has asked the Supreme Court to review the case. Cato Institute’s amicus brief makes a strong argument that it should take it and use the opportunity to review the mess it has created with qualified immunity. “While qualified immunity itself is not a constitutional rule,” write

Cato attorneys Clark Neily and Jay Schweikert, "it vitiates the very statute that was intended to protect all persons in the United States in their rights, and to furnish the means of that vindication."

One federal judge who agrees is Jon Newman of the Second Circuit. In this *Washington Post op-ed* published shortly after the acquittal of the officer charged with the death of Freddie Gray while he was under arrest in Baltimore, he wrote, "Suing the officer for money damages in a federal civil rights suit is the only realistic way to establish police misconduct and secure at least some vindication for victims and their families."

The Court should go back to its original understanding of Section 1983 – that it imposes strict liability on government officials for violations of citizens' constitutional rights. Then if Congress wants to rewrite Sec. 1983 to include a rule of lenity or any other way to weaken officials' liability when they violate the rights of individuals, let it do so. Congress is supposed to amend the laws it writes, not the Supreme Court.