Op-Ed

The Academic Attack on Qualified Immunity

By: Lisa Soronen, State and Local Legal Center, Washington D.C.

In 2018 the *Notre Dame Law Review* will publish nine articles on qualified immunity. At the time of this writing only three of these articles are available, but from their titles it appears only one will (mostly) defend qualified immunity.

Academics have long criticized qualified immunity (and many other legal doctrines), so why are these articles noteworthy? First, states and local governments have experienced a winning streak with qualified immunity like no other.[1] Sheer longevity may presage that this winning streak is likely to come to an end very soon, especially with the help of academics. Second, Justices Thomas and Sotomayor,[2] who often reside at polar opposite ends of the ideological spectrum, have recently cited to a 2018 academic article entitled *Is Qualified Immunity Unlawful?* by William Baude. In short, as of late, at least two Supreme Court Justices are interested in what at least one academic has to say about qualified immunity. Third, in March 2018 the CATO Institute held a forum on qualified immunity (featuring Mr. Baude as a speaker) where it announced that it was beginning an "amicus campaign" in lower courts to alert them to the "variety of problems" with the doctrine.[3] Likewise, CATO has recently filed an amicus brief supporting a certiorari petition asking the Supreme Court to overrule qualified immunity.[4]

This article discusses what the three available articles say about qualified immunity and whether the Court is likely to be persuaded by them.

The Case Against Qualified Immunity, Joanna C. Schwartz[5]

Schwartz makes four arguments in this article, which provides a comprehensive attack on qualified immunity. She claims, as Baude has, that qualified immunity has no basis in common law.[6] She also argues that qualified immunity "renders the Constitutional hollow" because Supreme Court decisions have "made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights."[7]

Building on previous writings she argues that qualified immunity does not achieve any of its three intended policy goals. In *Police Indemnification*,[8] Schwartz took on the Court's justification that qualified immunity protects government officials from financial liability. Her findings were that local police departments usually indemnify police officers for money damages owed. In How *Qualified Immunity Fails*,[9] Schwartz notes that one of the reasons the Supreme Court has stated it grants government officials qualified immunity is to save them from the hassle and expense of going through discovery and a trial. But her research reveals that qualified immunity rarely accomplishes this goal because it is more often raised and granted after discovery has begun.

In *The Case Against Qualified Immunity*, Schwartz examines for the first time the third policy goal which the Supreme Court has stated supports qualified immunity. The "overdeterrence" justification posits that damages actions may "deter[] . . . able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Schwartz claims there are three reasons qualified immunity doesn't deter government actors. First, "available evidence" (mostly from the 1990s) doesn't support the concern that the threat of litigation discourages public officials from acting unflinchingly in discharging their duties. Second, even if people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, "available evidence suggests the threat of civil liability is not the cause." Finally, even if the threat of liability deters officers, "it is far from clear that qualified immunity could mitigate those deterrent effects."[13]

Finally, Schwartz examines and rejects other policy justifications for qualified immunity. She asserts that protecting government budgets can't justify qualified immunity,[14] qualified immunity doesn't actually encourage constitutional innovation (where a court announces a new or expanded constitutional right but shields the defendants in the case from damages liability),[15] and it doesn't lead to the quick dismissal of filed cases.[16]

Schwartz's bottom line is the Supreme Court should "do away with or dramatically limit qualified immunity."[17]

A Qualified Defense of Qualified Immunity, Aaron L. Nielson & Christopher J. Walker[18]

This article is divided into two part. The authors critique Baude's argument that qualified immunity is unlawful and Schwartz's argument that it is "ineffective."

According to Baude, the Supreme Court has articulated three legal justifications for qualified immunity, but all are flawed. The most well-known is that qualified immunity "derives from a putative common-law rule that existed when Section 1983 was adopted" in 1871.[19] But Baude claims "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted."[20] After defending qualified immunity on stare decisis grounds, Neilson and Walker opine that the "truth is that the history is murky" ("from the earliest days of the republic, American law has sometimes shied away from holding government officials liable for reasonable mistakes").[21]

Baude rejects a second justification for a broad interpretation of qualified immunity: that Section 1983 also has been read too broadly so qualified immunity properly mitigates that error.[22] In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court interpreted "under color" of any statute, ordinance, regulation, etc. to cover constitutional violations without statutory, ordinance, regulatory, etc. authority. Baude thinks Monroe v. Pape was decided correctly--and that even if it wasn't two wrongs don't make a right.[23] Neilson and Walker suggest that Monroe was in fact decided incorrectly, citing the

work of Sam Glucksberg, a linguistics expert. Glucksberg asked lay citizens to identify what the phrase "under color of law" means. [25] "In his study of a dozen subjects, no one thought the language means what Monroe holds; indeed, eleven thought it means the exact opposite and one was uncertain."[26]

The Court's oldest justification for qualified immunity is lenity—the idea that government officials should be given fair warning before being found liable for a violation of the law. Baude rejects lenity because it comes come from another Reconstruction-era statute that enforces constitutional rights against state officials.[27] But that statute prohibits criminal conduct while Section 1983 prohibits civil conduct.[28] And the Supreme Court currently rarely applies lenity in criminal cases.[29] Neilson and Walker argue that lenity makes more sense in the civil context where "acts taken with a credible claim of benefiting the public potentially will not trigger the same alarms [as acts in the criminal context with no "obvious offsetting benefit"], even though such acts [in the civil context], in fact, sometimes may also turn out to be unlawful."[30]

Regarding Schwartz's look at the policy justifications for qualified immunity Neilson and Walker point out that policy concerns don't "undermine statutory stare decisis."[31] So even if the Supreme Court has been wrong about the benefits of qualified immunity—this should not matter. Neilson and Walker then discuss the "methodological limitations" of Schwartz's study in *How Qualified Immunity Fails* (regarding whether qualified immunity saves officers from the hassle and expense of going through discovery and a trial).[32] For example, they agree with her that the fact her study only covers two years and five federal district courts indicates it "may not represent the full range of court and litigant behavior nationwide." [33]

Additionally, the authors question how much Schwartz's findings "actually inform [the] inquiry" that qualified immunity is ineffective.[34] "After all, the findings only shed light on qualified immunity's formal role in the disposition of cases actually filed in federal district court. They tell us very little about qualified immunity's functional effect in narrowing potential monetary liability in civil rights actions, in encouraging cases to settle, or in otherwise disposing of civil actions under section 1983."[35] Finally, the authors point out that from their own empirical research "an arguably different picture emerges regarding the effectiveness of qualified immunity."[36]

Nielson and Walker remain unpersuaded that Baude's and Schwartz's arguments "call for the Supreme Court to abandon qualified immunity."[37] Their conclusion "rests heavily on statutory stare decisis, but also on questions about the historical and empirical evidence presented to date."[38]

The Intractability of Qualified Immunity, Alan K. Chen [39]

According to Chen his article offers an "internal critique" of qualified immunity that explains why problems with the doctrine "remain intractable" and "why, unfortunately, there is little hope for resolution of the doctrine's central dilemmas short of either abandoning immunity or making it absolute."[40]

First, Chen discusses what he states can "best be described as qualified immunity's foundational jurisprudential tensions."[41] The first tension is that qualified immunity is a standard and not a bright-line rule.[42] Chen acknowledges that standards have advantages (like deliberation, fairness, and accountability) but claims these advantages may be lost when qualified immunity is applied to contexts like the Fourth Amendment which also rely on standards.[43] Second, Chen asserts that the Supreme Court's "unbending insistence" that qualified immunity is a pure question of law is rarely correct; applying qualified immunity usually involves resolving questions of fact and law.[44] Finally, Chen examines the fact that the "level of generality at which that right is stated will materially alter the qualified immunity determination."[45] Chen criticizes the Supreme Court for doing "little to clarify the appropriate level of generality at which the clearly established right must be articulated."[46]

Chen next looks at qualified immunity's administrability problems describing the doctrine as a "nightmare for litigators and judges who confront its implementation on a routine basis."[47] Chen points out that the Supreme Court has said that trial judges should easily be able to dispose of most cases at summary judgment, but most cases are fact-driven so some discovery is required.[48] Chen criticizes the Court for failing to clarify which party bears the burden of persuasion, which has been identified for decades as one of qualified immunity's unanswered questions.[49] Finally, Chen asserts it is difficult to know if qualified immunity actually reduces costs as the Supreme Court claims it does.[50]

Chen concludes his article by stating that qualified immunity needs "serious reconsideration" but assesses the prospects for reform as "dim."[51] In short, Chen suggests that the Supreme Court is likely to reject, ignore, or misconstrue empirical research that indicates qualified immunity should be reformed.[52] And Congress likely lacks the political will to pass civil rights legislation.[53]

Other Articles

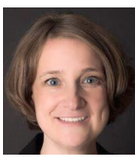
At the time of this writing we don't know what the other Notre Dame Law Review articles will say. But we do know their titles and authors: Alexander A. Reinert, *Qualified Immunity at Trial*; Karen M. Blum, *Qualified Immunity: Time to Change the Message*; Scott Michelman, *The Branch Best Qualified to Abolish Immunity*; John F. Preis, *Qualified Immunity and Fault*; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*; and Fred O. Smith, Jr., *Formalism, Fragmentation, and the Future of Qualified Immunity*.[54]

How will the Court Likely React to These Articles?

It is difficult to say whether and how the Supreme Court Justices will react to these articles, if for no other reason that all of them are not yet published.

On one hand, Supreme Court Justices are more than used to ignoring academics who tell them they got something wrong and should do it another way. And it would be much more concerning if the Court's more centrist Justices (like Chief Justice Roberts and Justice Kennedy) or even the Court's youngest Justices (Gorsuch and Kagan) had cited to Baude's article.

continued on page 39



Lisa Soronen is the Executive Director of the SLLC. Prior to joining the SLLC, Lisa worked for the National School Boards Association, the Wisconsin Association of School Boards, and clerked for the Wisconsin Court of Appeals. She earned her J.D. at the University of Wisconsin Law School and is a graduate of Central Michigan University.

Op-Ed Cont'd from page 21

On the other hand, when all of the Notre Dame Law Review articles are complete it seems likely the academics will have done a thorough and competent job of criticizing every angle of qualified immunity. And more simply, perhaps every winning streak must come to an end.

That said, completely changing course on any major legal doctrine, especially one like qualified immunity, which the liberal and conservative Justices mostly agree on, with some notable exceptions,[55] is unlikely without a number of changes in personnel. Changes to the doctrine at the margins are more likely. For example, in the next few terms maybe the Supreme Court will rule that a lower court improperly granted a state or local government official qualified immunity.[56] Regardless, it seems safe to say that the doctrine as currently configured is destined to meet continuing scrutiny and challenge.

Notes

1. In only two cases since 1982 has the Supreme Court held that police officers have violated clearly established law. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018).
2. In *Ziglar v. Abbasi*, 582 U.S. ___ (2017), Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. Justice Thomas cited to Baude's article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871. *Ziglar*, 582 U.S. at *5 (Thomas, J., concurring). In *Kisela v. Hughes*, 584 U.S. ___, *6 (2018) (per curiam), a majority of the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer in an excessive force case. Justices Sotomayor and Ginsburg criticized the majority opinion, citing to Baude's article for the proposition that the Supreme Court "routinely display[ing] an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" *Kisela*, 582 U.S. at *14 (Sotomayor, J., dissenting).
3. Transcript of Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability, CATO Institute, Mar. 1, 2018. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Williams v. Cline (2018) (No. 17-2603).
4. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Allah v. Milling (2018) (No. 17-8654).
5. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 101 (2018) (working draft
6. *See id.* at 104-7.
7. *Id.* at 119, *citing* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
8. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).
9. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127:2 Yale L. J. 1 (2017), *available at* https://www.yalelawjournal.org/pdf/Schwartz_1ki1sac4.pdf.
10. Schwartz, *supra* note 5, at 115.
11. *See id.* at 116-17.
12. *Id.* at 117-18. According to Schwartz "departments' difficulty recruiting law enforcement has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."
13. *Id.* at 118-19.
14. *See id.* at 126-31.
15. *See id.* at 131-37.
16. *See id.* at 137-39.
17. *Id.* at 139.
18. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
19. Baude, *supra*, note 1, at 51.
20. *Id.* at 55.
21. Neilson & Walker, *supra* note 18, at 13.
22. *See* Baude, *supra*, note 1, at 62-69.
23. *See id.* at 62-69.
24. *See* Neilson & Walker, *supra* note 18, at 19.
25. *See id.*
26. *Id.*
27. *See* Baude, *supra*, note 1, at 69.
28. *See id.* at 70.
29. *See id.* at 71-72.
30. Neilson & Walker, *supra* note 18, at 24.
31. *See id.* at 26.
32. *See id.* at 27-31.
33. *See id.* at 27.
34. *Id.* at 31.
35. *Id.*
36. *Id.* at 33.
37. *Id.* at 34.
38. *Id.* at 34. Neilson and Walker think the Supreme Court should focus its attention on the "unintended effects of the Court's 2009 decision *Pearson v. Callahan*." In that case the Court rejected a rigid requirement that courts must first address whether a constitutional right was violated and, if so, only then address whether that right was clearly established.
Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
40. *Id.* at 1.
41. *Id.* at 1-2.
42. *See id.* at 7-10.
43. *See id.* at 9-10.
44. *See id.* 10-12.
45. *Id.* at 12.
46. *Id.* at 13.
47. *Id.* at 15.
48. *See id.* at 16.
49. *See id.* at 18-22.
50. *See id.* at 23. "While there is no single, systematic statistical account of the amount of qualified immunity litigation, attempts to measure its frequency suggest that it consumes an enormous amount of resources from parties, courts, and society. It is certainly possible that, on balance, more defendants still prevail on summary judgment, thus saving substantial trial costs, but it is equally likely that the administration of the immunity defense itself imposes substantial costs on the parties, the courts, and society."
51. *See id.* at 24.
52. *See id.* at 29-30.
53. *See id.* at 32.
54. Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1, 2 n.9 (2018) (working draft.
55. *See, e.g.,* Justice Sotomayor's solo dissent in *Mullenix v. Luna*, 577 U.S. ___ (2015).
56. At the time of this writing the Supreme Court has repeatedly relisted a *certiorari* petition in *Sause v. Bauer*, 859. F.3d 1270 (10th Cir. 2017), *petition for cert. filed* (U.S. Nov. 17. 2017) (No. 17-__) where the Tenth Circuit granted qualified immunity to police officers who stopped the petitioner from praying silently in her home because there was no prior case law involving similar facts. Summary reversal against the officers seems likely in this case. ML