Immunity, Politics, and the Rule of Law

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Abstract:

Recent attention to the issue of qualified immunity for police officers has raised the profile of this legal doctrine. Far too often, though, immunity is evaluated in discrete categories- officer immunity, sovereign immunity, legislative immunity, etc. This paper brings together these disparate categories of immunity to highlight an apparent paradox- immunity, a set of circumstances where the law cannot operate, is a necessary element of the function of the rule of law. Judges, for example, would have a difficult time deciding cases if they faced constant lawsuits over their actions. Not all instances of immunity are necessarily compatible with the rule of law, though. A careful review of different conceptions of the rule of law allows for a set of purposes to be identified, including avoiding the arbitrary abuse of power and allowing individuals to predict when they are liable. These purposes can then be compared to the stated purposes of specific immunity doctrines to assess their alignment. The paper concludes with an initial consideration of qualified federal officer immunity.

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"No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."

-Theodore Roosevelt, Third Annual Message to Congress, 1903

"[The rule of law] insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power."

- Stanford Encyclopedia of Philosophy, "Rule of Law"

"[W]ith us, no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

-A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885

That no one is above the law is a culturally embedded precept that has both wide recognition and broad public support. There is no shortage of this concept being deployed in headlines and speeches as part of a clear appeal to a shared normative value (see, for example, Freifeld and Stempel 2022; Polantz, Cohen, and Sneed 2022). This is not to say that it is held by the public to be universally true in practice, but that often serves to reinforce the underlying norm and expectation. Perceived violations of this expectation often receive substantial public backlash. The notion that the wealthy, for example, can buy their way out of compliance with the law is a source of anger for many and envy for some. All of this, again, serves to reinforce the expectation of how law ought to work.[1] It is only through the consistent application of the law to all that the rule of law can function. This is particularly prevalent in what Waldron calls the procedural conception of the rule of law (2008, 7–8).

[1] This is akin to the dynamic of legitimacy reinforcement that Supreme Court confirmation hearings can generate. As Gibson and Caldeira (2009) argue, the constant references to how judges are supposed to behave, even when a particular nominee is described as falling short of that expectation, serves to remind the public of what the Court ought to be.

Yet it is equally clear that the law does not, in fact, apply to all people in all situations. Certainly there is France's (1914) famous quotation about the majesty and equality of law preventing both rich and poor from living under bridges. That approach highlights the ways in which the law itself reflects the beliefs and preferences of those with the power to shape it and there is no shortage of work that explores those dynamics at both the macro and micro levels. This paper is interested in a different dynamic, one made particularly visible during the racial justice protests of 2020. The concept of qualified immunity for police officers from civil suits, including those who have killed unarmed and defenseless individuals, garnered particular attention. In many instances, it is a successful defense. Qualified immunity applies unless the individual knew or should have known that they were violating a protected right. As will be developed later, this can be interpreted broadly or narrowly and debates arise about whether it is appropriate to apply to specific circumstances, but the basic concept of qualified immunity remains. At its core, a qualified immunity defense does not argue that the law was not violated. It implicitly accepts that the law very well may have been violated, but that applying the consequences of that violation to this defendant in these circumstances is unacceptable. This type of immunity, then, can be offered as a defense to avoid the consequences of violating the law.

And qualified immunity is hardly the only example of immunity in the United States. Qualified immunity for police officers is part of a broader category of officer immunity that can be either qualified or absolute. Judges and prosecutors enjoy immunity for their actions. Witnesses can receive legal immunity in exchange for their testimony. States have immunity from lawsuits to which they do not consent. Presidents have absolute immunity for actions within the "outer perimeter" of their official responsibilities. Members of Congress have

immunity for comments made during public debate in the House or Senate. In fact, when we look more closely, immunity weaves its way throughout our legal system in ways both large and small.

Yet it is typically only studied in isolation. One type of immunity or another might be subjected to scrutiny and analysis, but the role of immunity itself within a system committed to the rule of law is rarely, if ever, considered. It is long overdue to think more holistically about how immunity interacts with, and informs, the rule of law. Immunity's role within the rule of law is often ignored or treated as a tiny subset of interactions that are not relevant to the deeper question of the rule of law. I argue that this is a fundamental mistake. How can we have rule of law when there are areas that law explicitly cannot touch? This is especially confounding when we realize that law itself embraces these gaps in its application. That is the paradox at the core of this work. How do we make sense of the tension between the rule of law and immunity? Can we make peace between these concepts? If no person is supposed to be above the law, how can some people be above the law in some situations? This tension cannot be resolved through inattentiveness to the dynamic.

The approach adopted here is to emphasize that immunity should not be seen as an *exception* to the rule of law. Instead, it is an inherent and necessary component of the rule of law. Law cannot function without immunity. By way of example, imagine a system where judges could be sued for every decision that they make. This would quickly become unwieldy and unworkable. A system where every action of government by every level of government official could be challenged in courts for any reason would likewise overwhelm the judiciary and create a situation where enforcement would be impossible. The Speech and Debate Clause is included in the Constitution to protect legislators precisely because the law could be abused by

political opponents to silence meaningful debate amongst elected officials. These are all instrumental arguments and grounded in a practical assessment of political reality, something that rule of law theorizing does not always consider. This way of understanding and thinking about immunity has the benefit of integrating politics more directly into our understanding of the rule of law. The rule of law as a concept cannot be understood without reference to the surrounding politics. Indeed, the rule of law must contain within itself space for politics to operate. Immunity is one such example where politics manifests itself in ways that are, at least on the surface, in tension with the purported principles of rule of law systems.

At the same time, this is not a defense of all instances of immunity. The criticisms of immunity as practiced are deep and compelling. This requires thoughtful engagement. The trick, then, becomes to distinguish when immunity is justifiable in a rule of law system. Not all instances of immunity are compatible with the rule of law. Likewise, a total absence of immunity is also incompatible with the rule of law. I argue here that the way to make these determinations is to engage in a purposive analysis. What is the purpose of a particular area of immunity and how does that align with the purpose of the rule of law? This can be applied at both the categorical level and, perhaps more usefully, at the individual application level. An assessment can be carried out of whether qualified immunity for police officers categorically is consistent with the rule of law. But an assessment can also be carried out of whether granting qualified immunity to a police officer in a particular instance is consistent with the purpose of the rule of law.

In order to adopt this approach, it is necessary to articulate a purpose of the rule of law that can be connected to immunity while still remaining broad enough to incorporate competing visions of the specifics. That is the work that will be taken up in the next section, engaging with

a broad array of rule of law theorists to distill some consistent principles that are relevant to immunity that run across these works with regard to the purpose of the rule of law. This will include classic theories such as Fuller's approach to more recent arguments from Waldron, Tamanaha, and Fallon. From this, a skeletal description of the purpose of the rule of law that can be related to immunity will be developed.[2]

It is also necessary to explore the stated purposes of different categories of immunity. Though the different types of immunity carry with them similar outcomes in legal cases, the justification behind their operation differs. Any theory of immunity has to account for these differences. This paper will offer a proof of concept of sorts by exploring qualified immunity for federal officers specifically. It will conclude with an assessment of this approach as a tool for resolving ongoing conflicts about how the rule of law can incorporate and account for claims of immunity from law.

The Rule of Law

The concept of the rule of law has garnered a massive amount of engagement from scholars across disciplines. In part because it is a complex concept and in part because of the vast array of approaches applied to the idea, defining the rule of law in a consistent way is profoundly difficult. Indeed, the phrase "rule of law" has been used so much that Shklar said "[i]t may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter" (1987, 1). Shklar, nonetheless, does not let this stop

[2] "Skeletal" because it goes well beyond the scope of this work to articulate some new and overriding conception of the rule of law. Rule of law conceptions are inherently contested and in valuable and insightful ways. Pretending to resolve those conflicts entirely is unwise and unnecessary. The goal here is to find common ground that can be used productively to assess immunity claims.

her from proceeding to discuss and analyze the relationship between political theory and the rule of law. It is a topic that is too central to how we think about legitimate government to be left alone. However, as Tamanaha notes, "[t]he rule of law thus stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement on precisely what it means" (2004, 4).

Rather than introduce yet another definition of the rule of law, I hope to capture certain core elements that can be used to assess immunity. This will not necessarily include all the elements that make up the rule of law in different theories. Fuller, for example, lays out eight elements of the rule of law: (1) there must be rules; (2) these rules must be available; (3) these rules must not be retroactive; (4) these rules must be understandable; (5) these rules must not be contradictory; (6) it must be possible to comply with the rules; (7) change in these rules must not be too frequent; and (8) the administration of the rules must align with the rules themselves (1969, 33–39). Not all of these different elements would potentially affect questions surrounding immunity. There is limited value in this project to addressing aspects like the frequency of changes to rules, except as that speaks to an ability of government officials to predict their own liability. This is consistent with Fallon's (1997) argument that different theories of the rule of law address different strands or ideal types, calling attention to different values and considerations. Some of these strands will only partially touch on the challenges presented by immunity. Hayek's (1944) well-known emphasis on predictability to allow for planning one's affairs as an element of the rule of law is important, but in ways that are different than his emphasis on individual private actors. Predictability can be important for government actors in ways that could justify immunity. For Marmor, the two critical elements of the rule of law requires that governments guide their subjects' conduct by law and that the law should be such

that it can actually guide human conduct (2004, 2). While important conceptions, they do not lend themselves to application in the context of immunity.

What are some other theories of the rule of law that would assist with establishing a purpose of the rule of law that could be applied when assessing the desirability of specific immunity doctrines? Holmes distills the rule of law down to two elements: predictability, like Hayek, and equality (2003, 19). Equality implies "roughly equal treatment of social groups" (Holmes 2003, 20). As already noted, predictability is valuable, but the idea of equality of application is even more relevant because it is the purpose most likely to be in tension with immunity. This is useful as a starting point but requires some additional development. Tamanaha touches on similar ideas in two of his three themes that emerge out of an extensive review of the history of the concept of the rule of law: (1) government limited by law and (2) formal legality (2004, 114–26).[3] Formal legality, in particular, is defined as "public, prospective laws, with the qualities of generality, equality of application, and certainty" (Tamanaha 2004, 119). Equality of application emerges again but combined with a broader context of generality. Certainty and prospectivity are also present again. It is also worth accounting for the notion that the rule of law involves government being limited by law. This can be highly relevant in the context of immunity since that doctrine often excuses governmental actors from the limits of law.

Bingham offers a concise definition of the rule of law, the core of which is "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered

[3] The third element, rule of law, not man, is not as directly relevant here.

in the courts" (2007, 69). The description that all persons and authorities should be bound by the laws is obviously incompatible with immunity from the law, something that Bingham recognizes. He notes that the statement could not be applied "without exception or qualification…but it seems to me that any derogation calls for close consideration and clear justification" (Bingham 2007, 69). His third sub-rule, as he calls it, fleshes this out more fully. Here, he argues that "the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation" (Bingham 2007, 73). Bingham's qualifications align well with the goal of this paper- how do we apply close consideration to the exceptions that we establish?

Fallon (1997), too, acknowledges that any definition of the rule of law is going to be composed of ideal types from which reality will unavoidably depart. Nonetheless, he offers a similar core definition: "rule (i) in accordance with the originally intended and understood meaning of the directives of legitimate, democratically-accountable authorities, (ii) cast in the form of intelligible rules binding on citizens, governmental officials, and judges alike, (iii) as identified and elucidated in an interpretive process guided by publicly accessible norms and characterized by reason-giving, and (iv) consistent with legitimate public purposes and sound, shared principles of political morality" (Fallon, Jr. 1997, 38). The second element of his definition is the most relevant here, recognizing as other authors do, that binding rules on all are a central component of the rule of law and that those rules must be intelligible. The recognized departure from these ideals, though, creates opportunity for Fallon to explore how we can assess those departures. In particular, he emphasizes consideration of the purposes of the rule of law. These are, he argues, "to protect against anarchy and establish a scheme of public order, to allow people to plan their affairs with advance knowledge of the legal consequences, and to protect

against at least some types of official arbitrariness" (Fallon, Jr. 1997, 43). This consideration of purpose is valuable in constructing something against which immunity doctrine can be evaluated, but it needs additional development.

Both Raz (1979) and Waldron (2008) speak to the question of purpose of the rule of law as well, and can help build on Fallon's notions. Raz argues that the rule of law is often rightly contrasted with arbitrary power, especially the dangers of abuse that arise from law itself (1979, 219). Waldron echoes this, arguing that the rule of law is intended to correct dangers of abuse that arise in general when political power is exercised (2008, 11). These align well with the concern regarding arbitrariness raised by Fallon. From these discussions, we can distill some consistent elements that are relevant to any consideration of immunity. The first is an overarching concern with the law being applicable to all, private and public. And when there are departures from that expectation, as there unavoidably will be, they must be defensible in light of the purpose of that norm, which is *to curb the arbitrariness that can emerge from abuse of power*. Finally, there is a concern throughout these theories that being able to know in advance if your actions are unlawful is necessary to create *predictability*. From this foundation, then, it is possible to turn to consider immunity's role within this larger construct.

Understanding Immunity

It is worth being clear about what "immunity" means as well, to the extent that is possible. Immunity, for the purposes of this paper, can be conceived of as a legally recognized defense that can be raised during legal proceedings. Successful raising of such a defense ends all related legal proceedings, regardless of whether the law was violated or not. Though that may sound straightforward, the specifics are anything but and there is significant variation in both the interpretation and application of how immunity operates in cases. Often immunity is described

as resulting in a loss of jurisdiction, either subject matter or personal (Cohen 2016, 762–63). The lack of jurisdiction approach is consistent with Federal Rules of Civil Procedure 12(b) which establishes how to present defenses in civil cases before federal court. 12(b)(1) and 12(b)(2) both address a lack of jurisdiction. However, this is not the only approach that courts have adopted. Sometimes Rule 12(b)(6) is the focus, which allows a defense for failure to state a claim upon which relief can be granted. Other courts have held that immunity is a constraint on enforcement powers that arises through Rule 12(b)(7) that allows a defense for failure to join a party under Rule 19 (Cohen 2016, 763 fn. 7). Though the exact mechanism varies, the end result is the same, which is the termination of litigation.[4]

That any immunity claim must be one that is legally recognized is key. Immunity is not simply an exercise of power to avoid consequences. That would certainly be contrary to the rule of law however conceived and invite arbitrariness. The rules regarding immunity should be clear in advance so as to establish predictability. Yet here, as well, there is variation in what constitutes legal recognition of a defense. Much of immunity doctrine in its many forms emerged through common law development rather than explicit statutory grants, although there are some of those as well. In most cases, the institution that has recognized specific types of immunity as legitimate is the judiciary and as with many areas of law this is done in steps both small and large over a long period of time. This is, at times, supplemented or recognized by statute, sometimes obliquely. Thus, both the procedure and recognition of immunity is less than clear when examined more closely. This highlights the value of establishing a consistent means of evaluating the validity of various claims of immunity in light of the rule of law.

[4] There are a number of critics of the costs imposed by this lack of clarity. See Cohen (2016), Noll (2008), and Sisk (2005) for some of these critiques.

The variety of different types of immunities can be overwhelming, but it is possible to cluster them together into three broad categories. The first, and most expansive category, is immunity of government officials from liability. This includes many different sub-categories, such as judicial immunity, prosecutorial immunity, and police officer immunity. The second category is institutional immunity, which encompasses both federal and state sovereign immunity and executive immunity. The third category is immunity of private individuals and organizations. This category includes witness immunity, amnesty, and reporter's privilege. There is a fourth category of immunity not examined here surrounding diplomatic and foreign state immunity. I purposely set that aside because it is grounded less in domestic legal doctrines that can cohere into rule of law and more in international relations. The three primary categories of immunity, including specific related doctrines are presented in Table 1.

Table 1: Types of Immunity

Immunity of Government Officials from Liability	**Institutional Immunity**	**Immunity of Private Individuals and Organizations**
Qualified officer immunity Absolute officer immunity	Federal sovereign immunity State sovereign immunity Tribal immunity Executive immunity Speech and Debate Clause immunity	Witness immunity Spousal immunity Amnesty immunity Reporter's privilege

These are not hard and fast categories and there is discretion about how to place different types of immunity in each category, but it does help to clarify the various concerns that may be offered to justify specific immunities. The first category, immunity of government officials from liability in their personal capacity, includes the protections offered to government officials in the carrying out of their responsibilities. Whether that immunity is qualified, meaning that it only

exists where the officer could not have reasonably known they were acting unlawfully, or absolute, where no such constraints exist, depends on the actor and the circumstances. There are, it is worth noting, a significant array of different types of immunity that fall under this first category ranging from qualified immunity for federal officers to claims under state law to absolute immunity for administrative officials acting as adjudicators in hearings. In all these instances, though, the immunity applies to the individual and is intended to allow them to carry out their responsibilities without undue concern about litigation.

The second category, institutional immunity, primarily addresses immunity that can be claimed by institutions such as states and the federal government. This immunity is grounded in arguments about sovereignty and the proper relationship of the government to the governed and other levels of government. However, it also includes some forms of immunity that could plausibly be placed in the first category, particularly executive immunity and the immunity derived from the Speech and Debate Clause for members of Congress. Those fit more comfortably in the second category because, while they do attach to individuals, the underlying interest and justification is much more institutional. The reasoning behind the scope of immunity granted to the president, for example, rests on the centrality of that individual to the functioning of the entire executive branch of government. Courts have distinguished executive immunity from other forms of immunity and it seems appropriate to fit it into this category. The Speech and Debate Clause immunity has a similar purpose, although it is distinctive for being the only form of immunity explicitly covered in the U.S. Constitution. This tracks roughly the

distinction between personal capacity and official capacity lawsuits against government officials.[5]

The third category includes individuals and organizations outside of government, although the provision of this type of immunity is usually at the discretion of governmental actors. It can serve different purposes. Witness immunity is connected to maintaining an effective judicial system while spousal immunity has origins in common law protections surrounding marriage. Amnesty immunity results from a policy decision outside the judiciary to immunize a group of individuals from liability or prosecution. Each category, then, reflects a different set of purposes that can be assessed and balanced against the purpose of the rule of law. This can be done at the broad categorical level, at the sub-categorical level, or perhaps most fruitfully, at the individual case level.

As noted in the introduction, immunity and the rule of law appear to be at odds with one another at first glance. Yet legally recognized defenses can be consistent with both the need for predictability and the exceptions to the ideal rule of law acknowledged by theorists, including exceptions to the principle of equal application. The core question that needs to be explored, then, is the justification for those exceptions. In thinking about immunity in this way, it connects the specific circumstances of an immunity claim to a larger systemic question of legitimacy. To demonstrate how this might work in practice, I focus on one specific sub-category of immunity, qualified immunity for federal officers.

[5] See *Hafer v. Melo*, 502 U.S. 21 (1991), for a more complete discussion of the distinction between personal and official capacity.

An Assessment of Qualified Federal Officer Immunity

To establish what this kind of analysis might look like in practice, it is necessary to begin with a narrower category of immunity. I begin with qualified immunity for federal officers because it has a substantial amount of legal and scholarly development surrounding it while still constraining the issues to a more limited scope. In doing so, I will review the source, origin, and implementation of this type of immunity with an eye to identifying a purpose behind it. That purpose will then be connected to the purpose of the rule of law to assess whether this category of immunity is consistent with the rule of law.

The Doctrine of Qualified Federal Officer Immunity

The origins of federal officer immunity can be seen as far back as *Osborn v. Bank of the United States* (1824) where the Court found that federal officers are protected from state laws allowing suit for actions taken in the line of duty, a protection that arises out of judicial rather than legislative action. This implies, and was later made explicit, that immunity for federal officers arises out of common law, something that can be changed by legislative action.[6] This immunity was extended to the Postmaster General for making a mistake in the scope of discretion allowed under his normal duties (*Kendall v. Stokes* 1845) and a military officer for an error of judgement that was neither malicious nor willful (*Wilkes v. Dinsman* 1849). The Court clarified that where "a public officer, acting to the best of his judgment and from a sense of duty, in a matter of account with an individual [is not] liable in an action for an error of judgment" (*Kendall v. Stokes* 1845, 97-98). The scope of this protection was developed further in *Spalding v. Vilas* (1896) when the Court held that a head of department could not be liable for actions

[6] See Waxman and Morrison (2003, 2209–11) for a more detailed argument about how common law rather than statutes is the origin of federal officer immunity.

taken pursuant to an act of Congress no matter how improper the motive might have been.[7] This immunity does carry with it limits, though. For federal officers, the Court established a specific right of action against government defendants in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* in 1971. This mirrored in many respects the liability of state and local officials under 42 U.S.C. §1983 for violations of constitutional rights. Under that line of cases, state and local officials are granted immunity under certain conditions, called qualified immunity. This form of immunity was characterized as coming out of common law and consisting of two elements- good faith and probable cause. When officers acted in good faith and with probable cause, they were immune from suit under §1983 (*Pierson v. Ray* 1967, 555-557). However, where the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [sic] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury," there was no immunity (*Wood v. Strickland* 1975, 322). As the Court established in *Butz v. Economou* (1978), officer immunity does not extend to circumstances where an official both "committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution" (495).

The scope of immunity granted to federal officials was modified in *Harlow v. Fitzgerald* (1982). In *Harlow*, the Court eliminated the good faith element of the immunity consideration. Henceforth, it would not matter whether the action was taken for malicious purposes. Even if an officer acted in bad faith, the immunity was only eliminated if their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known"

[7] See generally the discussion in *Butz v. Economou*, 438 U.S. 478 (1978), 489-496 on the legal development of officer immunity.

(*Harlow v. Fitzgerald* 1982, 818). This was done because the Court argued that the good faith element of qualified immunity allowed too many cases to go forward to trial that are based on insubstantial claims. The subjective question of whether officials acted in good faith was a question that had to be resolved by a jury, requiring extensive discovery, distraction of officials from their government duty, and deterrence of able people from public service (*Harlow v. Fitzgerald* 1982, 816). This became a mandatory two-step sequential analysis in *Saucier v. Katz* (2001). This requires courts, when considering a motion to dismiss, to first assess whether defendants showed that plaintiffs failed to allege facts that establish that the officer's conduct violated a constitutional right. If defendants could do so, that was enough to dismiss. If they could not, courts should move to the second step, which requires showing that the defendant did not violate clearly established law or that the defendant reasonably believed that their conduct did not violate clearly established law. This two-step process was softened in *Pearson v. Callahan* (2009), allowing courts to answer the second question first without determining whether a constitutional violation actually happened at all.

This approach to qualified immunity places a heavy emphasis on whether a "clearly established law" has been violated. The Court has given limited guidance on what this means, although they do require that "prior case law must define the established right with sufficient particularity, and that definition must correspond to the facts of the case at hand" (Finn 2019, 447). Lower courts have subsequently adopted a definition of "clearly established law" that focuses only on precedent from the Supreme Court, the court of appeals in that circuit, or the state high court (Catlett 2005). As for what right is established by those decisions, the Court has cautioned against using rights at too high a level of generality (*Ashcroft v. Al-Kidd* 2011, 732; *White v. Pauly* 2017, 551-552). For example, it is not enough to say that the Fourth Amendment

is a clearly established right and the action violated the Fourth Amendment. The right at issue in a particular case must be more specific and must be more specifically established through precedent. The Court has backed this up by finding officers violated clearly established law in just two of the thirty qualified immunity cases decided between 1982 and 2017 (Baude 2018, 82–83).

There are some other aspects of qualified immunity that are important to clarify as well before turning to the purpose of the doctrine and an assessment. Who is covered by this immunity defense? First, it is limited to individuals, not organizations or municipalities, although it does include both those who allegedly violated rights and those acting in a supervisory capacity. Second, it can only be used in cases where defendants are being sued in their individual capacity for damages, not claims seeking injunctive relief. Finally, there is limited applicability of the defense to private individuals, an assessment that is made on a case-by-case basis (Reinert 2011, 482–83). It is a defense that can be raised at any point during the proceedings from the motion to dismiss stage all the way through to trial and it can be raised as many times as the defendant wishes (Reinert 2011, 487).

Though most scholarly discussions of qualified immunity do not distinguish between federal *Bivens* liability and §1983 liability for state and local officials, *Bivens* liability is narrower in scope than what applies to state and local officials. While the developments in these two areas have often mirrored one another, *Bivens* is an entirely judicially created doctrine, unlike §1983 liability. This means that the Court can, and has, declined to apply the liability to additional constitutional questions in a way it has not in §1983 cases. The Court is considering in the 2021-22 term whether *Bivens* liability applies to First Amendment and border search

claims after already deciding that it does not apply to a cross-border shooting (*Hernandez v. Mesa* 2020; see also *Wilkie v. Robbins* 2007).

This state of affairs has led to considerable criticism of the Court's jurisprudence on this point, ranging from arguments about a lack of accountability (Smith, Jr. 2018), a lack of clarity (Catlett 2005; Finn 2019), a lack of legal justification (Baude 2018), encouragement of police violence (Fisher 2020), and failure to achieve its goal (Schwartz 2017). These critiques certainly suggest powerful concerns about the application of qualified immunity for officers, but most do not engage in a broader consideration of how this doctrine fits into the rule of law more broadly.[8] I now turn to that task.

Comparing Purposes

Given this background on qualified immunity for federal officers, what purpose behind the doctrine can be gleaned? The Court has pointed to several justifications for the doctrine, although there has been some change over time. In *Pierson v. Ray* (1967), the rationale for qualified immunity was to protect defendants from financial liability. *Harlow v. Fitzgerald* added to this justification by emphasizing the importance of avoiding "the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and the danger that fear of being sued will 'dampen the ardor of all but the most resolute or the most irresponsible, in the unflinching discharge of their duties'" (814). This distraction arises in the context of "disruptive discovery" and trial and the demands that could place on public officials (*Ashcroft v. Iqbal* 2009, 685). In *Pearson v. Callahan*, the Court summed up

[8] Feldman (2017) is an exception to this and will be addressed in greater detail.

these different justifications, saying the doctrine reflects "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably" (2009, 231).

Baude (2018) highlights additional justifications. The first is a practical tort defense of good faith drawing on a common law tradition to protect police from being liable for false arrest when they have probable cause at the time of arrest. As noted above, though, this good faith justification was abandoned by the Court in *Harlow*, so cannot be part of the current justification for qualified immunity.[9] The second justification for qualified immunity comes out of a concern that officials have "fair warning" that their conduct is unlawful. This draws on the rule of lenity favoring narrow construction of criminal statutes, the rule that expanded constructions of criminal law cannot be applied retroactively, and the principle that vague criminal statutes are unconstitutional. Whatever the practical departures from perfectly applying this principle (Baude 2018, 72–77), it seems to be a worthwhile justification to include in an assessment of the legitimacy of this form of immunity.[10]

If these are the proffered justifications, then they should be compared with the purposes behind the rule of law identified earlier- the importance of law being applicable to all in order to curb the arbitrariness that can emerge from abuse of power and the benefits of predictability. The first justification for qualified immunity of federal officers clearly falls short of addressing the first purpose of the rule of law. Avoiding fiscal liability for public officials is unrelated to avoiding arbitrariness in their exercise of power. Being aware of fiscal liability could conceivably be seen as an element of predictability. However, as critics such as Schwartz (2017)

[9] Baude also highlights significant theoretical and historical shortcomings of this justification even if it were still being emphasized (2018, 54–61).

[10] Baude offers a third justification, but since it is only drawn from a dissenting opinion in a single case over two decades ago, it does not seem worth engaging as an accepted justification (2018, 62–69).

have demonstrated, this rationale is disconnected from any concern that public officials actually experience given that almost all of them are indemnified by their employer and thus face no personal financial risk. This first justification for qualified officer immunity, then, appears to be incompatible with the rule of law.

Distraction from responsibilities initially seems disconnected from the first purpose as well, but it may not be as far removed as expected. It is possible to see litigants using the power of the judiciary in unsubstantiated cases as an arbitrary abuse of power to take public officials away from their obligations. Conceived of in this way, there can be a connection between qualified immunity and avoiding abuse of power, although it suggests that immunity should only be granted in circumstances where the plaintiff can plausibly be perceived as abusing the authority of courts to target public officials. It is more difficult to see a connection between the predictability purpose of the rule of law and distraction from responsibilities. Though valuable from an efficacy perspective of government, that is not sufficient to establish alignment with the rule of law.

A similar connection to avoiding abuse of power can be made to the rationale of avoiding harassment of public officials, although it is worth noting that in order to make that connection, the justification offered by the Court would have to be modified. As described in *Harlow*, this concern about harassment appears to be limited to getting "able citizens" to accept public office. Granting immunity to public officials for that reason would not be consistent with the purpose of the rule of law. As with the distraction justification, this would only be appropriate when an abuse of power by the plaintiff can credibly be claimed. And as with the distraction justification, the predictability purpose does not appear to be supportive.

The final justification has to do with giving fair warning to public officials that their actions are unlawful. This can be connected to both purposes of the rule of law as long as it is carefully couched in a need to prevent the abuse of power through the judiciary against unwitting officials. It could be an arbitrary use of power to make individuals liable for actions that they could not reasonably have known would make them liable. It also violates expectations of predictability to impose liability absent some fair warning. This is likely the most expansive justification for qualified officer immunity and the one with the deepest roots in the rule of law. With some adjustment, then, qualified immunity for federal officials can be consistent with the rule of law. However, the emphasis on avoiding the abuse of power by applying law arbitrarily and unpredictably allows only instances of qualified immunity that actually reflect those concerns. Some applications of qualified immunity of federal officials likely fall outside this scope of justification.

Feldman (2017) articulates this concern effectively. After acknowledging that the fair warning justification could be consistent with the rule of law, he argues that this is only true if courts clarify the law going forward from that specific case, making future litigation possible. "Instead, the Court has combined (1) legal indeterminacy (the balancing test and factors), (2) a disabling procedural time frame and (3) the selective appropriation of the values of clarity and prospectivity to create a legal grey hole" (Feldman 2017, 346).[11] The decision in *Pearson v. Callahan* (2009) allowing courts to avoid consideration of whether the action at issue was a constitutional violation exacerbates this because immunity can be awarded without clarifying the rules for future violations. A failure to link the justifications and guidelines for qualified officer

[11] Legal grey holes, as defined by Dyzenhaus (2006, 42), are legal spaces where some constraints exist, but they are so insubstantial that they do not meaningfully limit governmental action. These legal grey holes offer a pale imitation of the rule of law.

immunity to an underlying concern with the rule of law generates outcomes that are indefensible from a rule of law perspective.

For example, the widespread adoption by circuit courts of appeals, at the Supreme Court's urging, to provide immunity except with regard to very specific rights that have been clearly established in precedent results in outcomes that seem absurd on their face. In *Baxter v. Bracey* (6th Cir. 2018), two police officers found a suspect sitting on the ground with his hands up in the air to surrender. One of the officers, after waiting 5 to 10 seconds, released a police dog to attack the suspect, biting him in the armpit and requiring emergency care in the hospital. A previous Sixth Circuit decision had already held that it is a clear violation of the Fourth Amendment to use a police dog without warning against an unarmed suspect who was lying on the ground with his hands at his sides. In *Baxter*, however, the court held that prior case law had not clearly established that it was a violation of the Fourth Amendment to use a police dog when the suspect has his hands up. It is unclear how upholding qualified immunity in these circumstances, and many other similar ones, because of the need to ensure a fair warning to officials is aligned with ensuring equal application of the law to all in order to prevent arbitrary abuse of power. Predictability is important, but this approach of reading the fair warning requirement so narrowly emphasizes concerns about avoiding retroactivity at the expense of another equally important strand of the rule of law. To make matters worse, by deciding that the law is not clearly established and dismissing on qualified immunity grounds, the courts can avoid clearly establishing that similar violations are unconstitutional in the future. By requiring that constitutional violations are only clearly established if there is specific precedent within that particular circuit, courts are allowing arbitrary abuses of power with no equal application of the law unless extraordinarily narrow requirements are met. At the same time, these decisions deny

the clarity of establishing guidelines that would redress predictability concerns. Just because qualified immunity can be consistent with the rule of law does not mean that the way it has been applied in practice necessarily is. Paying attention to the ways in which qualified immunity interacts with the rule of law offers guidance in how courts may best approach these questions.

Conclusion

This paper represents a starting point for a more cohesive and comprehensive assessment of immunity and the rule of law. Rather than regarding these concepts as inherently at odds with one another, it is more productive to search for ways in which they can be compatible. By engaging in a purposive analysis of immunity claims, rule of law concerns can remain central to decision-making in this area. While it would be valuable for courts to adopt this approach, even if they don't, it is useful for scholars to frame their assessments of various immunity doctrines with a clearer eye to the implications for a rule of law system.

To move this effort forward requires applying this analysis to more categories and sub-categories of immunity as well as more in-depth engagement with rationales offered in specific cases and circumstances. The analysis is flexible enough that it can apply at general and specific levels. Doing so can strengthen and deepen the understanding of the purposes of the rule of law as well as identify boundaries for immunity doctrines aligned with those purposes.

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